

No. 44.

1696. November 11.

PHILIP against ———

In the case of one Philip, the Lords refused to sustain a compensation founded in this manner: The discharge produced bears all counts and reckonings and debts betwixt them to be discharged, except a bond containing the sum of 50 merks, which is declared not to be comprehended under the generality fore-said; whereupon allowance was craved of that 50 merks. The Lords found, seeing it related to a bond which was not produced, this exception could neither constitute nor instruct the debt. But if such a clause related to a debt, without mentioning bond or ticket by which it was constituted, it might be more dubious; for in that case the rule, *non creditur referenti nisi constet de relato*, could not take place; and if there be nothing to instruct the debt but an exception in a discharge, the abstracting it frustrates the other of his mean of probation, which being an evident in another's hands, and liable to many inconveniencies, no man will rely upon it, without having some document and instruction of the debt in his own hands.

Fountainball, v. 1. p. 733.

No 45.

Certification in an improbation is not delayed by a depending proving the tenor.

1699. February 9.

BROWN against CRAW

The Lords entered to advise the proving of the tenor of a disposition of the lands of Blaikburn, pursued by Captain Brown, to stop a certification craved by Robert Craw, the lineal heir, in a reduction and improbation he had raised of that disposition. The *casus amissions* was libelled to be the English rifling his house in 1651; the adminicles were a sasine following on the said disposition, and the Notary's protocal book to fortify it; a disposition of moveables by James Brown, narrating, he had made a disposition of his lands, and all this backed with near 40 years possession. Answered, in the making up a writ, three things must be instructed, *1mo*, The existence, that there once was such a paper *in rerum natura*, whether true or false; *2do*, The verity of it; and, *3tio*, Its solemnity and formality, for who knows what nullities it might labour with, as the want of writers name and witnesses; it might be burdened with a reversion, or many other clauses and reservations; so there is nothing more dangerous in the preparative, than rashly to sustain such tenors; for Haddington, in his decisions, gives an instance of one who forged a testament, and shewed it to severals, causing them read it, and afterwards destroyed it, and then raised a tenor to be made up by their oaths whom he had employed to read it*. And as to the adminicles here produced, by the act of prescription 1617, a sasine with 100 years possession signifies nothing where it wants a warrant; likeas it does not bear the witnesses' names when he repeats the precept; and the disposition of moveables is yet more suspect, for it has a marginal note adjected with another hand and different ink, relating to the mails and duties of the lands, which has been added only to serve a turn, and so

* See APPENDIX.

This is to prove *obscurum per obscurius, infirmum per infirmius*; and though the possession gives a presumption, yet that has not been sustained *per se* as appears from many decisions; 12th December 1672, Brodie, No. 22. p. 15795.; 21st June 1672, Mitchel, No. 399. p. 12520.; 15th July 1675, Fumarton, No. 37. p. 1755.; where the adminicles were stronger, and yet the tenors were rejected. The Lords demurred in this case, in respect of the hazard of taking away a man's just right, though lost by fatality, on the one hand; or of making up writs with clauses which never had a being, on the other; therefore there were some named to endeavour a settlement, and to give Robert Craw something.

Fountainhall, v. 2. p. 42.

No. 45.

1701. November 18.

JAMES DOUGLAS *against* WILLIAM SOMERVELL of KENNOX.

William Douglas, son to Samuel Douglas of Hissleside, gave in a bill to the Lords, representing, that Mr William Somervell, *in anno* 1670, granted a disposition of the lands of Kennox to Stuart of Hissleside in liferent, and to James his son in fee, whereupon infestment followed; and that he was apparent heir to James, the fiar, being his mother's brother; and the disposition being lost, but the sasine found in the register, he had raised an action for proving the tenor of the said disposition; and finding that one John Guthrie was not only notary to the said sasine, but also writer of the disposition, and being informed that the said John had removed his family and residence to Holland, but was at present on some business in Edinburgh, and was quickly to depart, and being a necessary witness in making up the tenor, and who cannot be examined on commission, but only by the Lords themselves; therefore craved a warrant to cite him to compare and depone, that his oath may lie *in retentis*, least his mean of probation perish before the cause come in to be debated by the ordinary course of the roll. It was answered for William Somervell of Kennox, son to the said William, *1mo*, That depositions to lie *in retentis*, before litiscontestation or an act in the cause, was a *remedium extraordinarium*, not to be recurred to but in extremities; but this case was not so favourable as to go out of the common road of law for it. *2do*, That disposition ought not to be made up; for it is *res his transacta*, in so far as James Stuart of Hissleside, the father, did discharge the said disposition, and obligations thereof, and reponed Mr. William Somervell to his own place against it; and the son being an infant, and the fee purchased by his father's means, the father might validly discharge it. *3tio*, Samuel Douglas having married Hissleside's only daughter and apparent heir, she served herself general heir to her brother James, the fiar, and upon that title renounced and discharged of new, with consent of her husband, for the sum of 3000 merks then paid them; and therefore a disposition so solemnly transacted and taken away ought not to be made up. Replied, That instances can be given, where witnesses have been

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What adminicles relevant to admit the libel to further probation?