

thought there might be some jealousy against the bond, but the qualifications adduced did not amount to a full proof, and therefore repelled the articles, and sustained the bond.

No 573.

*Fol. Dic. v. 2. p. 267. Fountainball, v. 2. p. 329.*

1707. November 14. SANDERS against SCOT and DONALDSON.

AN objection against a witness was reported by my Lord Register.— It was an improbation of a disposition made of some lands made by one Cruikshanks and Syme to John Donaldson writer in Banff, subscribed by two notaries for the parties, and four witnesses; which instrumentary witnesses being, by the direct manner of improving, adduced, (one of them being dead,) and two of them being examined, it was *objected* against the fourth, That *esto* he was *testis instrumentarius*, and so necessary, yet *res hic devenit in alium casum*, for he being apparent heir to the granter of the disposition, viz. his grandchild, and the granter being since dead, he is become his heir, and debtor by the clause of warrandice, and so he was plainly in the case of one who could tine or win in the cause; and his deposition could make the right fall, and so he gets back the land if the disposition were taken out of the field. *Answered*, There was nothing more ordinary than for parties to adhibit their sons and nearest relations witnesses to their subscribing of writs, and no law made them inhabile or incompetent; and a supervenient accident of his succeeding as heir to the granter, can never incapacitate him *ex post facto*, especially being an instrumentary witnesses, and the LORDS receiving all manner of trial in the expiscation of falsehood. Some were for receiving him *cum nota*; but it being evident, that he lay under some temptation to deny the deed, they superceded to examine him till the probation already adduced came to be advised; that if, from the circumstances, it appeared false or true, they might take measures accordingly of admitting or rejecting him. All the hazard is, if he die in the mean time, law reputes him for a proving witness.

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In an improbation of a writ, one who had succeeded in right of blood to the granter was examined as a witness only in presence of the Court, and *cum nota*.

1708. July 14.—THE Lord Banff being debtor by an heritable bond to William Cruikshanks in L. 800 Scots, William Syme his grandchild, by his daughter Jean Cruikshanks, serving heir to his goodsire, and claiming the bond, compearance is made for John Donaldson, notary in Banff, who produces a disposition to said bond by the said William Cruikshanks, in 1695, subscribed for him by two notaries and four witnesses; whereof the said William Syme, his grandson, being surprised thereat, raises improbation; and adducing the witnesses on life, one of them deponed, that he was never called to be a witness to that writ, but acknowledges it is very like his subscription. Another says, he cannot be positive but that it may be his hand-writing, but his memory cannot serve him now, after twelve years time, but he is sure he would never have subscribed witness, had he not seen the notaries sign, and heard them get war-

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rant from the parties. The third witness on life, was the said William Syme against whom Donaldson objected. He can never be a habile witness now, whatever he was at the time of his subscribing; for now the very right of the debt in controversy is by his falling heir to Cruikshanks his goodsire, and serving heir to him, established in his person; and the improbation to sweep it away is pursued by Scott, as his trustee, alienarily for his behoof, so in effect his deponing were *in re propria*; and the writ must stand or fall by his oath; and no law can ever allow him to declare a writ false, the benefit whereof will rebound immediately to himself; and what if an instrumentary witness were bribed to deny his subscription, will not the proving his corruption, cast him from being a witness; *ergo a pari* his becoming a party should much more reject him; and why should any man be led into so palpable a snare and temptation to stretch his conscience, where his own oath gains him the cause. Answered, The law presumes every man honest till the contrary be proved, and if this supervenient interest should cast him from being a witness, then persons might insert in their bonds their sons, brothers, and nearest heirs, who coming to succeed, shall be found inhabile witnesses, and so make the deed fall; whereas there is nothing more ordinary than to insert these near relations as witnesses in bonds and other writs, and being reputed elected by the common consent of both parties, they can never afterwards be objected against. It is true, bribery is a personal exception founded on their own crime and delinquency; but what contingency has that with the case in hand, where one innocently succeeds by his right of blood to the granter of the disposition, where he was adhibited a witness, which can never import an incapacity. See Sir George Mackenzie's Observations on the 80th act Parliament 1597. THE LORDS, in this extraordinary case, proceeded with all the wariness and circumspection imaginable, and allowed him to be received *cum nota*, but declared they would examine him in their own presence. And, by the testimonies already taken, one of the witnesses denies his subscription, the other *non meminit*, so the writ may be found null and improbativ, though it will not amount to falsehood.

*Fol. Dic. v. 2. p. 265. Fountainball, v. 2. p. 392. & 453.*

1767. January 26. Sir JOHN ANSTRUTHER against ALEXANDERS, &c.

No 575.

Proof and effect of bribery in the Michaelmas election of a burgh.

UPON the death of Sir Harry Erskine, member of Parliament for the five burghs of Pittenweem, Wester and Easter Anstruther, Kilrenny and Crail, two candidates appeared, Sir John Anstruther, a gentleman of great estate in the neighbourhood, and Mr Robert Alexander, an Edinburgh merchant, who had no natural connection with any of these burghs. By the force of money, however, he prevailed in three of them, viz. Pittenweem, Anstruther Wester, and Kilrenny, and got his adherents into the Council and Magistracy, so as to secure their