

No 45. by witnesses. Our law admits of such proof in similar cases: In reductions of writs on the head of death-bed, where the defence is, that the writ is for onerous causes, Lord Stair says expressly, 'That witnesses are sustained to prove the onerous causes in the writ;' L. 3. Tit. 4. § 30. Parole evidence will be allowed to prove the date and delivery of holograph deeds. In reductions upon the act 1621, the onerous causes of deeds may be proved by the like evidence. See Lord Stair, L. 1. Tit. 9. p. 84.

"THE LORDS found the proof by witnesses was competent, and sustained the claim."

Act. *Scrymgeour.*

Alt. *Alex. Home & And. Pringle.*

Clerk, *Murray.*

B.

Fac. Col. No 103. p. 152.

1763. June 22.

GEORGE NORVEL of Boghall *against* JOHN RAMSAY of Kinnalty.

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Witnesses allowed to be adduced in support of a *legatum liberationis.*

IN the years 1753 and 1754, John Ramsay of Kinnalty granted two bonds to Katharine Lady Dowager of Halkerton, for the sum of 10,000 merks each.

The said Lady Halkerton appointed George Norvel of Boghall her sole executor; and having died in February, 1762, William Bell, Minister of the Gospel at Edinburgh, brought a process of multiplepinding against the said George Norvel and John Ramsay of Kinnalty, in which he set forth the following circumstances: That, in the year 1761, Lady Halkerton put into his hands a packet, sealed up, which she desired he should keep till she called for it: That on the back of this packet were written the following words: 'For Mr David Nevay, merchant in Edinburgh, to be delivered to my Lady Dowager of Halkerton, or to John Ramsay of Kinnalty, late factor for the Lord Halkerton, and to no other person; and, in the event of my Lady's death, to the said John Ramsay.' That, on the seal-side of the packet, were written these words: 'Notwithstanding this is directed for Mr David Nevay, it is designed to be given to Mr Bell.—K. Halkerton.'—That he, the pursuer, kept this packet in his custody during the Lady's life; and that, having opened it after her death, he found therein inclosed the two bonds above mentioned, granted by John Ramsay, and a letter of her Ladyship's hand-writing, dated Miln of Pert, 9th July 1759, in these words: 'Sir, There are herewith inclosed two bonds, 10,000 merks each, to be used by you as your own property after my death. Your humble servant, K. Halkerton.'

Mr Ramsay *insisted*; That the two bonds should be delivered up to him; and, in order to corroborate the evidence of the *legatum liberationis*, arising from the writings themselves, he offered to prove the following particulars, by the oaths of John Ogilvy of Inshuan, and the said Mr William Bell; *imo*, That Mr Ogilvy was witness to, and assisted Lady Halkerton in inclosing the bonds in the before mentioned cover; *2do*, That he saw her affix her seal thereto, or

that she gave the seal to him for that purpose ; and that the seal, which is still entire upon the cover, is the seal which was then affixed ; *3^{to}*, That the seal was her Ladyship's usual proper seal ; *4^{to}*, That, by her direction, he wrote the addresses on the said cover ; *5^{to}*, How she expressed herself upon that occasion, and, particularly, as to her being to deposite the packet first in Mr Nevay's, and then in Mr Bell's hands, for his, Mr Ramsay's, behoof ; *6^{to}*, That Mr Bell received the packet as a deposit from the Lady Halkerton ; and, when it was so deposed, *7^{mo}*, Whether, after the first deposition, she did not call for the packet, and thereafter return it him ? *8^{vo}*, That it was sealed when put into his hands, and remained so sealed in his custody till after her death ; *9^{no}*, That the before mentioned addresses upon the cover were adhibited before he received it ; *10^{mo}*, That the contents of the packet were as set forth in the summons of multiplepointing ; and, *lastly*, What the particular terms of the deposition were, and how her Ladyship expressed herself upon that, or any after occasion.

Objected by Mr Norval ; The writing upon the back of the cover is neither holograph of Lady Halkerton, nor signed by her ; and the writing upon the fore part of it, though signed, is not authenticated by witnesses. It is true, indeed, that the note, in the form of a letter, is both holograph and signed ; but then it is addressed to nobody. This being the case, there is here no writing which can constitute a legacy, or discharge two bonds to the value of 20,000 merks ; and it is indisputable, that so great a sum can neither be given in legacy, nor discharged, without some deed in writing properly authenticated. Mr Ramsay wants to supply the defects by parole evidence, and to prove, *1^{mo}*, That the two writings upon the cover were both written at Lady Halkerton's desire, and expressed her will and intention ; and, *2^{do}*, That the note, though addressed to nobody, was by her intended for him. But, if proofs of this sort were to be allowed, it would overturn that part of our law which makes writing absolutely necessary in deeds of this nature. Mr Bell may indeed be examined, whether the packet was given to him by Lady Halkerton ; and whether it was sealed up with the bonds inclosed in it ? But neither he nor Mr Ogilvy can be examined as to what she said concerning the person for whom she intended these bonds ; because that would be constituting a legacy or donation by parole evidence. In short, Mr Ramsay's plea is neither more nor less than this, that, by the oath of the depository, he will make a deed in his own favour, instead of proving that a deed already made was delivered to the depository for his behoof, which is all that is competent to be proved by a depository's oath.

Answered ; A legacy may be left not only in a testament or codicil, but also by a missive letter ; and it is plain, that the letter inclosed under the cover, alongst with the two bonds, could be intended for no other person than Mr Ramsay, who is mentioned in the writing upon the back of the letter, which, though not signed by Lady Halkerton, is clearly authenticated by the writing upon the fore part of it, signed by her. This being the case, the writings

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themselves would be sufficient *ad victoriam causæ* ; but, as Mr Ramsay proposes, *ex superabundanti*, to examine Mr Bell and Mr Ogilvy before answer, the Lady's executor can have no reasonable objection to it. For it is a joke to pretend that Mr Ramsay wants to constitute a legacy by parole evidence. That is by no means the case. There is the strongest proof here possible of Lady Halkerton's having made a bequest of these two bonds to some particular person ; and, if there remain any doubt who the person is, it is highly just and expedient to take such proof as the nature of the case will admit, in order to ascertain the fact.

“ THE LORDS allowed the witnesses to be examined.”

For John Ramsay, *Lockhart*.

For George Norval, *Burast*.

Clerk, *Justice*.

Legatum liberationis sustained, in respect of certain circumstances proved by parole evidence, although not legally authenticated by writing.

1764. *January 17*.—IN 1753 and 1754, John Ramsay of Kinnalty granted two bonds to Katharine Lady Dowager of Halkerton, for 10,000 merks each.

Lady Halkerton, by her latter will and testament, appointed George Norval of Boghall her sole executor ; and, having died in February 1762, Mr William Bell, Minister of the Gospel at Edinburgh, brought a process of multiplepinding against the said George Norval and John Ramsay, in which he set forth, That, in the year 1761, Lady Halkerton put into his hands a sealed packet, which she desired him not to open till after her death : That, on the back of this packet, were written the following words : ‘ To Mr David Nevay, merchant ‘ in Edinburgh, to be delivered to my Lady Dowager of Halkerton, or to John ‘ Ramsay of Kinnalty, late factor for the Lord Halkerton, and to no other person ; and, in the event of my Lady's death, to the said John Ramsay :’ That, on the seal side of the packet, were written these words : ‘ Notwithstanding this ‘ is directed to Mr David Nevay, it is designed to be given to Mr Bell.—K. ‘ Halkerton.’—That he, the pursuer, kept this packet in his custody during the Lady's life ; and that, having opened it after her death, he found inclosed the two bonds above mentioned, granted by John Ramsay, and a letter of her Ladyship's hand-writing, dated Mill of Pert, 9th July 1759, in these words : ‘ Sir, There are herewith inclosed two bonds, 10,000 merks each, to be used by ‘ you as your own property after my death. Your humble servant, K. Halkerton.’

Mr Ramsay *insisted* ; That these two bonds should be delivered up to him ; and, in order to corroborate the evidence of the *legatum liberationis*, arising from the writings themselves, he offered to prove a number of particulars, by the oaths of John Ogilvy of Inshuan, and Mr Bell, the raiser of the multiplepinding.

Mr Norval *objected* ; That a proof by witnesses was altogether incompetent ; but the Court allowed them to be examined.

Mr Ogilvy and Mr Bell were accordingly examined.

Mr Ogilvy deposed, " That Mr Ramsay was factor for the Lady Dowager of Halkerton : That, in the 1754, he, the deponent, had occasion to witness Mr Ramsay's clearances with her Ladyship of the rents ; and that he also witnessed clearances betwixt my Lady and the said John Ramsay, with relation to the interest due upon two bonds for 10,000 merks each, which the said Mr Ramsay was due her : That, about the year 1758, he, the deponent, wrote a discharge by the Lady of the bygone annualrents on the said bonds, which was signed by her, and delivered to Mr Ramsay : That, at that time, the Lady took the two bonds out of a sealed packet ; and that, after the discharge was delivered to Mr Ramsay, she desired him to put up the two bonds in a cover or wrapper of paper, and to seal the same ; and, for that purpose, gave him one of the seals at her watch, which, she said, she had caused to be cut as a seal proper for her, as Lady Dowager of Halkerton : That her Ladyship likewise took a note out of the said sealed packet, which he, the deponent, believed to be holograph of her Ladyship, and signed by her, and a calculation in writing of the interest due upon the bond : That she desired the deponent to put up this note and calculation : That he accordingly wrapped up the whole in a piece of paper, which he sealed with the foresaid seal ; and that, at the Lady's particular desire, he wrote upon the back of the wrapper the direction, beginning, ' To Mr David Nevay,' &c. : That, while the deponent was writing the direction, the Lady went out of the room, and, upon her return, took up the sealed packet, and, reading the address, said it was wrong, for that it should have been directed for Mr Bell : That the deponent thereupon mentioned, that it was easy to open the seal, put the papers under another cover, and direct it a-new : That to this she answered, It was an unnecessary trouble ; and desired the deponent to write on the sealed side of the cover an address to Mr Bell, which he did, beginning with these words, ' Notwithstanding,' &c. : That the deponent saw her subscribe this address ; and that she kept the packet, and said she was to deliver it to Mr Bell."

The same witness likewise deposed, " That the two principal bonds, together with the note of calculation of interest, which had been produced by Mr Bell, were, to the best of his knowledge, the identical writings which he inclosed in the sealed cover : That the cover shown to him was the identical cover in which the papers were put ; and that he verily believed the seal upon the said cover to be the seal or impression he put upon it as before mentioned."

Mr Bell deposed, " That the packet in process was put into his hands, sealed, by Lady Halkerton, some time in the year 1761 : That he at the same time received from her another sealed packet, with a note upon the back of it, bearing these words, ' Lady Halkerton's sealed testament : ' That at this time she mentioned nothing particularly with regard to the first of these packets, but said, in general, That he might keep it for her till she called for it : That the other packet had a direction upon it, desiring it might be dispatched by

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express to John Ogilvy of Inshuan at her death ; and, by conversations the deponent had with her, she gave him ground to think, that she did not choose they should be lying by her at the time of her death : That she never mentioned any thing further about them to the deponent, or what was contained in them, though he had occasion to be frequently with her ; and that upon his hearing, two days or so before her death, that she was making settlements of her affairs, he took occasion to mention to her the packets with which she had intrusted him, and asked what he should do with them ; to which she answered, That, no doubt, the sealed testament must be changed ; and added, that the rest, or the other, was to be sent : That, upon receiving notice of her Ladyship's death, he broke open the seal of the first packet, expecting more particular directions under the cover, and found therein the two principal bonds, with the signed declaration and jotting, and nothing more ; and that the said packet, with the writings so found therein, continued in his, the deponent's, custody until they were given by him to his agent, and produced in the multiplepoinding."

Mr Bell further deposed, " That, some years prior to the year 1761, Lady Halkerton delivered to him some sealed packets, which, upon being called for, he afterwards gave back to her Ladyship ; and that, to the best of his knowledge and belief, the packet in process was one of those which had been given to him prior to the year 1761, and had been called for by her Ladyship, and afterwards delivered back again to him in that year."

These oaths being reported to the Court, it was *pleaded* for Mr Norval, the executor, *1mo*, That, setting aside the parole evidence, there was nothing to constitute the legacy, except the holograph note and the cover : That the holograph note, wanting so material a part as the name of the person to whom it was addressed, could not constitute a legacy in favour of Mr Ramsay, more than on any other person : That the cover, with the two different addresses upon it, was equally unavailable, as it might have inclosed any other paper as well as the bonds and holograph note ; and that, setting aside the parole evidence, the cause came to be precisely the same as if the bonds, the note, and the cover, had been all found in the Lady's repositories at her death, loose and detached from each other.

2do, That Mr Bell's evidence could not be sustained to establish a connection betwixt the note and the cover : That two writings, which in themselves express no connection with, or reference to each other, cannot be connected together by parole evidence, the testimony of witnesses being incapable to add to the meaning or import of writings, or to give them force which they otherwise would not have ; as was decided in the case of Gordon *contra* Shearer and Kelman. See APPENDIX.

3tio, That though Mr Bell, by his oath, could make a packet of the writings, and prove that the cover related to the papers produced by him, and to none other, yet still there would not be enough to constitute a legacy. For, al-

though a legacy may be constituted by a missive letter, holograph and addressed by the same hand, or containing in itself evident marks of the person for whom it was intended, yet a missive letter of that kind, found either in the repositories of a person after his death, or in the hands of a custodier, without any address or inclusive evidence of the person to whom it was intended, could have no effect, even though it were to be proved by a hundred witnesses that it was really intended for a particular person. The case, however, was the same here; because, though there is an address upon the cover, yet it is not holograph of the testator: Nay, further, there is no direction or address at all upon the note or letter itself, but only upon a paper a-part, confessedly the handwriting of Mr Ogilvy of Inshuan. Nor will it aid Mr Ramsay, that the writing upon the fore part of the cover, which appears to refer to that upon the back of it, is said to be signed by Lady Halkerton. For, *imo*, That writing is not holograph, so neither is the subscription attested; and, *2do*, There is nothing in it that has the least relation to a legacy, nor is the name of Mr Ramsay so much as mentioned in it. It only refers to the first part of the writing on the back of the cover, concerning the custodier. It substitutes Mr Bell instead of Mr Nevay, but says not a word of the person for whose behoof the packet was to be kept.

4to, Supposing a legacy to have been constituted, yet it was virtually revoked by the posterior testament, in which no mention was made of it.

Pleaded for John Ramsay, *imo*, It is a maxim of law, founded upon the soundest reason, Quod instrumentum apud debitorem repertum præsuntur solutum. If therefore Lady Halkerton had delivered the two bonds to Ramsay, the debtor, her doing so would have operated a discharge of these bonds, unless her executor had offered to prove, by Mr Ramsay's writ or oath, that they were delivered to him for another purpose. It is another maxim of law, equally well founded, That, when writings of any kind are deposited in the hands of a third party, the oath of the depositar makes full evidence, with respect to the terms and purpose of the deposition, unless in so far as these terms are expressed in writing. If therefore the bonds in question had been deposited in the hands of Mr Bell, without any writing whatsoever, it would have been competent to prove, by his oath, that they were lodged with him for the special purpose of delivering them up to Mr Ramsay, in the event of my Lady's death, to be used as his property. And as this fact has been ascertained, both by the oath of Mr Bell and by the writings produced, Mr Ramsay must have an undoubted title to demand the delivery.

2do, The writings produced are of themselves sufficient to constitute a legacy, and must be effectual in law for that purpose, independent of the parole evidence, by which these writings are supported. The note, which was enclosed in the same packet with the bonds, establishes a legacy to Mr Ramsay in the most express terms. The words, 'To be used by you as your own property,' can apply to no other person than the debtor in the bonds; for it is

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evident that this writing could never be understood by Lady Halkerton as an assignment of the bonds, sufficient to transfer them to a third party. Nor can the want of an address upon this writing be laid hold of. The address on the out side of the packet was fully sufficient, being authenticated by two capital circumstances, *imo*, That the cover of the packet was sealed with Lady Halkerton's seal; and, *2do*, That her name was subscribed on the back of that cover. Neither was it necessary that the address should be holograph, the delivery of a packet to a third party would have sufficiently authenticated the address of itself.

It is equally vain to pretend, that the writings are, in this case, to be considered as separate and detached from each other. Had Mr Bell produced the packet unopened, there could not have been the least hesitation upon this head; and Mr Ramsay cannot be forfeited of his right upon account of Mr Bell's curiosity. Mr Bell's oath, though it were no otherwise supported, must certainly be probative, in a question with those claiming under Lady Halkerton, of the situation of this packet at the time it was opened by him, because he was the person intrusted by her. The matter, however, does not rest here, for his oath is strongly supported by the writings themselves.

3tio, It evidently appears, from the holograph writing found in the custody of Mr Bell, and clearly referring to them, under the description of two bonds for 10,000 merks each, that a legacy of these bonds was intended in favour of some person or other: That being the case, it must undoubtedly be competent to remove, by parole evidence, any ambiguity which may be supposed to occur, with regard to the person intended to be favoured; and such proof cannot be considered as any infringement of the general rule, that writings cannot be taken away by witnesses, or a legacy established by the oaths of witnesses alone.

4to, Although a posterior testament is considered as a revocation of all prior general settlements, yet, where a person has given a special legacy or donation *mortis causa*, not in any former general settlement, such legacy or donation is never presumed to be recalled by a posterior general settlement, without express words. And upon this point there are a number of uniform judgments of the Court; 8th March 1626, Traquair, No 4. p 11337. observed by Durie; 7th February 1699, Handyside, No 14. p. 11347.; 24th November 1710, Johnston, No 17. p. 11351. both observed by Fountainhall; 29th January 1679, Aikman, No 10. p. 11347. collected by Stair; and 7th July 1732, Strachan, No 21. p. 11356. It also in this case appears, from Mr Bell's oath, that, although he mentioned to Lady Halkerton the packet with which he had been intrusted, only a few days before her death, yet, in place of recalling the packet in question, she expressly told him it was to be sent, though she at the same time said, that the sealed testament must be changed; and, in aid of this argument, it may

likewise be observed, that, although every other bond is particularly specified in her testament, yet no mention is therein made of the two bonds in question.

“THE LORDS, in respect of the particular circumstances of the case, found, That the two bonds in question, for 10,000 merks each, must be delivered up to the pursuer, John Ramsay, to be used as his property.”

For John Ramsay, *Lockhart & Johnston*. For George Norval, *Burnett & Rae*: Clerk, *Ross*.
A. W. Fol. Dic. v. 4. p. 135. Fac. Col. No 114. p. 266. & No 125. p. 295.

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SECT. III.

What Proof relevant to take away Writ.

1533. February 11. & March 6.

JASPER CRANSTOUN of Corsbie *against* GEORGE HOME.

GIF ony persoun beand callit for spuilzie of teindis, or ony uther gudis and geir, alledgis that ony man, in his name, transactit with the persewar, that he sould intromet with the samin teindis or geir; this samin alledgeance is sufficient, and saifis him fra spuilzie, bot he aucht and sould preive the samin be writ, and not be witnessis.

Fol. Dic. v. 2. p. 221. Balfour, (OF PROBATION BY WRIT.) No 13. p. 365.

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1534. December 5. A. *against* B.

ANE decreite of removing beand gevin aganis ony persoun, and thairefter he be sufferit, be licence and tolerance of the obtenar thairof, to sit still, and labour the ground, to ane certane term or time, and it happin thairefter ony questioun or contraversie to arise tuichand the said pactioun of licence or tolerance, the samin sould not be provin be witnessis, bot be writ.

Fol. Dic. v. 4. p. 220. Balfour, (OF PROBATION.) No 32. p. 357.

No 48.

1540. January 21. Lord SOMERVELL *against* N.

TRANSACTION and compositioun may not be provin be witnessis, bot be writ.
Fol. Dic. v. 2. p. 220. Balfour, (OF PROBATION BY WRIT.) No 17. p. 365.

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