

1st, That the heir cannot be prejudged by a gratuitous deed on death-bed : 2d, That the heir cannot be disappointed by a testamentary deed. The trust-disposition did not prejudge the heir ; for, if no subsequent testament had been executed, the heir would have taken the estate : it therefore follows that the interlocutor allows the heir to be prejudged by a testament. I admit that all this is a subtlety in our law, without sufficient reason : it is not only a subtlety, but a snare. I wish to see it removed ; but I cannot remove it.

BARJARG. The only objection here is as to form, which, I think, is removed by the trust-deed which denuded Ouchterlony.

GARDENSTON. In construction of law, a testament is a death-bed deed, though executed *in liege poustie* : yet there is a distinction made in the practice of the Court. If any word in a deed *in liege poustie* can infer a disposition, it will be good ; and where is the difference here ? If the testament had been first, and the trust-deed came afterwards referring to the testament, would it not have been effectual ? And where is the difference here ?

PITFOUR. I agree with the esteem expressed for the law of death-bed as to its substance. As to its form respecting also testamentary deeds, that also is established in law. Here Ouchterlony disposes his estate to trustees for uses to be hereafter declared : against this there is nothing but strict form. It is the same thing as if he had referred to a writing under his own hand : and here is a writing.

On the 20th February 1770, “ The Lords sustained the defence against payment of the L.4517 ; and found that it was carried by the trust-right ;” adhering to interlocutor of 12th December 1769.

Act. A. Wight. *Alt.* H. Dundas.

Reporter, Justice-Clerk.

Diss. Coalston, Hailes, Monboddo.

Remitted on appeal.

1770. February 21. HOUSTON STEWART NICOLSON, Esq. *against* MRS MARGARET PORTERFIELD.

PROCESS—ADULTERY.

The pursuer of a divorce for adultery must condescend specially upon the person with whom the crime is supposed to have been committed.

[*Faculty Collection, V. 62 ; Dictionary, 12,639.*]

HAILES. The judgment of the Commissaries is consonant to practice and to reason. The same judgment was given by this Court in the cases of *Dormont* and *Cuninghame*. The judgment in the case of *Michie* was not different : for there the husband was abroad, and could know nothing of his wife's gal-

lants. The Court would not require impossibilities, nor oblige a man to condescend upon what he could not know—but it required his doer to declare that he could not condescend more specially than he had already done.

BARJARG. There is no reason for concealing the man's name when known, and when the pursuer restricts his libel to the proof of guilt with that particular man.

JUSTICE-CLERK. The excellent statute of James VI., 1606, would be eluded, were parties allowed to go on in prosecutions without mentioning names.

COALSTON. This action comes as near a criminal action as can be. The lady is entitled to the privileges of a criminal. When no person objects, an action of divorce may go on without the mention of names: not so, when a more particular condescendence may be given, and is required.

GARDENSTON. My difficulty lies here:—if the man is pointed out, how can he be made a witness and obliged *jurare in suam turpitudinem*.

PRESIDENT. By the old practice of the Commissary Court, a pursuer was not obliged to condescend. But the contrary was solemnly determined in the case of *Cunninghame*. This case is still stronger: the person described as the gallant is said to be a person of low rank. If the pursuer means to avoid condescending, merely with the view of bringing this nameless low person as evidence, this would be dangerous indeed, and make way for too easy conviction, in so atrocious an accusation as that of adultery. There is no danger from the action of damages, which the pursuer says may be brought by the supposed gallant, if the proof should prove insufficient. For, if a husband shows that he had a probable cause of suspicion, no damages will ever be awarded; and, if he has no probable cause, there is no reason why he should not be exposed to damages.

On the 21st February 1770, “The Lords refused the bill of advocacy.”

Act. A. Lockhart. Alt. Ilay Campbell. Rep. Monboddo.

1770. March 2. DAVID ROSS *against* ELIZABETH ROSS.

CLAUSE—GENERAL ASSIGNATION.

A general clause for “Goods, gear, debts, &c., and all other effects of what nature or kind soever,” in a disposition, held insufficient to convey heritable bonds and adjudications.

[*Fac. Col. V. 71; Dictionary, 5,019.*]

GARDENSTON. It is a rule of law, that deeds disinheriting a son, especially an eldest son, are to be strictly interpreted. This is a hard-hearted deed. I do not doubt of intention; but that is not enough. It is probable that the testator did not advert that he had such subjects. The late case of *Bower* was still narrower than this, and yet the Court found for the heir-at-law.