

1673. July 26. Earl of ANNANDALE *against* CREDITORS of SINCLAIR.

No 285.

IN a competition betwixt an appriser and a donatar of liferent-escheat, it was sustained to be proved by the members and clerks of Exchequer, That the appriser presented a signature before the liferent-escheat took place by lapse of year and day.

Fol. Dic. v. 2. p. 235. Stair. Dirleten.

*** This case is No 67. p. 3666. *voce* ESCHEAT.

1680. June 24. CLELAND *against* The Laird of LAMINGTON.

No 286.

WILLIAM CLELAND, as assignee by Littlegill, having pursued Lamington for payment of a bond of his deceased father; the LORDS found, That Littlegill having been tutor or curator to Lamington, neither he nor his assignee could have access against him *ante redditas rationes*, and therefore appointed a count and reckoning; in which Lamington charged several bonds due to his grandfather which were neglected by his curators and the parties become insolvent, and for which his curators were liable *in solidum*. It was *answered, Non relevat*, unless it were instructed that his curators knew of these bonds. It was *replied*, That it is presumed the bonds were in the charter-chest, which the curators were obliged to search, and their ignorance cannot excuse them unless they had searched the same.

What proof that a curator upon search could not find a bond in question?

Which the LORDS sustained, but found the search probable by witnesses, and that they did search, but did not find the bonds in question, or inventories relating where they were, unless it were proved they knew of these bonds particularly.

Fol. Dic. v. 2. p. 235. Stair, v. 2. p. 777.

*** Fountainhall reports this case:

IN the action James Cleland *against* Lamington, which resolved into a curator account, Newton having reported two points debated there, they found, contrary to Newton's own opinion, " That the minor is not obliged to prove that the writs were in the charter-chest the time of the curatory, but that the same is to be presumed, unless the curator offered to prove that the charter-chest was searched, and these bonds and other instructions not found therein; and allow that to be proved by witnesses who made inventory of the writs, or searched the charter-chest, or were present at the searching of it; and allow James Cleland by a diligence to cite the rest of the curators. And as to the other point about the executry, the LORDS, before answer, ordain Lamington to condescend, if during the time of the curatory he was distressed for any

No 286. debts whereof he might have had relief of the executry, if his curators had confirmed him."

Fountainball, v. 1. p. 104.

1742. June 17. PROVAN *against* CALDER and ANDERSON.

No 287.

A PERSON, supposed in liquor, having made a promise of marriage to a woman, to give her assurance of his being in earnest, granted her a bill for L.100 Sterling. The woman gave the bill in custody to a mutual friend who was present, and promised either to return it to her when called for, or pay the sum. The acceptor of the bill got it from the custodiary, and resiled from his promise. The woman brought an action against both, for exhibition of the bill or payment. The defenders *urged*, That the whole transaction was in joke; and besides, that the granting a bill, and its delivery, were not probable by witnesses. THE LORDS at first assoilzied; but upon a reclaiming petition, found the defenders, conjunctly and severally, liable for the L. 100 Sterling.

Fol. Dic. v. 4. p. 163. C. Home.

. This case is No 60. p. 9511, *voce* PACTUM ILLICITUM.

1755. January 24. WILLIAM CRAWFURD *against* THOMAS MACFIE.

No 288.

A person became bound to convey all debts, and the grounds thereof, due to him by a third party, and one of the grounds of debt being lost, he was allowed to prove *pro ut de jure* that it was known at the time of the agreement to be lost.

WILLIAM CRAWFURD, in consideration of 7000 merks to be paid by Thomas Macfie, became bound to convey to him the hail principal sums, annualrents, and penalties due to Crawford by Wallace and Morton, with his hail grounds of debt and diligence, personal and real, affecting their heritable and moveable subjects.

Among the debts thus agreed to be conveyed was a bond of 700 merks due by Wallace and Morton, to which Crawford had right, on which adjudication had followed. Crawford produced the adjudication, but he did not produce the bond.

Macfie claimed deduction, to the amount of this bond, from the 7000 merks he had obliged himself to pay to Crawford.

Crawford charged for his whole sum, and offered to prove *prout de jure*. That at the time of the transaction Macfie was in the knowledge the bond in question was lost, and therefore could not expect to have it delivered to him.

Macfie suspended; and *answered*, The allegiance was only probable *scripto aut juramento*; for the import of it was, to take away the effect of a writing, to wit, Crawford's obligation to convey the whole debts with the diligences on them; and that could not be done by a proof *prout de jure*.

"THE LORDS allowed a proof of the allegiance *prout de jure*."

Act. Arch. Hamilton & Millar.

Alt. J. Dalrymple.

J. D.

Fol. Dic. v. 4. p. 163. Fac. Col. No 131. p. 195.