

No 655. it, refused to admit either the granter of the bond, or any extrinsic witnesses, to depone in prejudice thereof; but found the allegiance that it was Donald's money only probable by John's oath, but ordained him to be examined in presence of the granter of the bond, or any other persons that Donald should desire him to be confronted with.

*Fol. Dic. v. 2. p. 272. Fountainhall, MS.*

No 656. 1681. December 1. WHITELAW against MALLOCH.

ONE Gray, a trustee for Trench, having served inhibition against some tenements, which tenements Trench acquired upon some other debt, and disposed to Mr Isaac Whitelaw; and Trench thereafter got Gray to assign the bonds and inhibition to William Mitchel, Trench's brother-in-law; who, after Trench's decease, transferred them to Malloch, who married Trench's relict and William's sister; and (Malloch) having raised reduction of the rights of the tenements *ex capite inhibitionis*, Whitelaw *alleged*, That the said bonds and inhibition, were in Gray's name in trust for Trench before the disposition, and were so conveyed without any onerous cause, *ut supra*.

THE LORDS, *ex officio*, ordained Gray and Mitchel, and others, to be examined as to the trust and conveyance, and if the bonds were lying by Trench the time of his decease.

*Harcarse, (PROBATION.) No 781. p. 221.*

\*.\* Fountainhall reports this case :

1681. February 23.—MR ISAAC WHITELAW's reduction against Robert Malloch being reported, " the LORDS found no necessity of Mr Isaac's calling the authors, because the adjudication craved to be reduced is led by Malloch himself, and not by his authors."

1681. November 30.—MR ISAAC WHITELAW's reduction and declarator against Robert Malloch being reported, the LORDS found the persons condescended upon ought to be examined upon the trust and conveyance, though it redounded to the prejudice of Malloch a singular successor, who might be innocent and *noways particeps fraudis*, else the fraud could never be got discovered.—This was so decided *multum refragante Domino Haddo pæside et aliis quibusdam*.

1682. January 5.—IN Whitelaw's case against Malloch (30th November 1681,) the LORDS declared that they would supersede to take Alexander Gray's oath till the conclusion of the cause, and at the advising they would consider on the necessity thereof, but ordained the rest of the persons condescended on to be examined.

1683. *January 27*,—MR ISAAC WHITELAW against Malloch, mentioned 5th January 1682. " THE LORDS reduced Malloch's adjudication, and find by the probation that the bond which was the ground of it was retired by David French, Whitelaw's author, reserving always to Malloch relief against Alexander Gray the assignee.

No 656.

*Fountainhall, v. 1. p. 132, 165, 168, & 213.*

\* \* Sir P. Home reports this case.

1681. *December.*

JAMES WILKIE and John Hamilton having granted a bond to Alexander Gray, writer in Edinburgh, for the sum of 500 merks, whereupon following there was an inhibition served, which being assigned to Adam Mitchel, he transfers the same to Robert Malloch, merchant in Edinburgh, who leads an adjudication of certain lands belonging to the said James Wilkie, which lands had been formerly disposed to Mr Isaac Whitelaw, but after the inhibition; upon which Mr Isaac raised a reduction and declarator against Robert Malloch for reducing of the bond and diligence done thereupon, upon this ground, that the land being disposed by James Wilkie to David French, who disposed the same to Mr Isaac Whitelaw, which albeit after the inhibition served at Alexander Gray's instance, yet the debt being properly due to David French, the pursuer's author, who is liable in warrandice of the disposition, and Alexander Gray's name being only borrowed to his behoof, he could not make use of that debt to affect the lands in prejudice of that person to whom he had disposed the lands, and to whom he was liable in warrandice; for he being both debtor by the warrandice, and creditor in the sum, *confusione tollitur*, and so soon as the right of the sum came in French's person, it became so far extinct, as that albeit it were thereafter transferred to Adam Mitchel, who was French's brother-in-law, it could not affect the lands in prejudice of the clause of warrandice in the disposition; and it appears that the assignation has been taken blank by French *ab initio*, and been lying by him the time of his decease; and Malloch having thereafter named French's relict, they filled up Adam Mitchel their brother's name in the assignation, who thereafter transferred the same to Robert Malloch the defender, which was a manifest fraud and conveyance, and therefore craved, that Alexander Gray, Adam Mitchel, and the writer and witnesses of the assignation, may be examined *ex officio* upon the trust and other grounds above-mentioned, for clearing of the fraud and contrivance; as the Lords are ordinarily in use to do in such cases. *Answered*, That it is a principal in law, that writ cannot be taken away but by writ, or oath of party; for the defender having right to the sum for onerous causes, it cannot be taken away unless it could be made appear *scripto* of French that Alexander Gray's name was only inserted in the bond to his behoof, or by the defender's oath, that it consisted with his knowledge that the bond was granted to Alexander Gray in trust; for albeit the Lords, in some

No 656.

cases, *ex nobilio officio*, before answer, do examine witnesses, in order to the taking away of writ, where there are evident presumptions of fraud, or when writs have been deposited, or have been lying by the party the time of his decease; which cannot be pretended in this case, where it is evident by the bond, that it is all written with John Hamilton's own hand, who is one of the parties bound in the bond with Wilkie; and David French is witness to the bond, and it cannot be supposed that if the bond had been taken blank in the creditors' name to his behoof, that he would have been a witness in the bond; and Alexander Gray was altogether a stranger to David French, and it cannot be supposed that if the bond had been taken blank in the creditors' name to his behoof, that he would have intrusted a stranger's name in the bond, without a back-bond; and the assignation to Adam Mitchel is three years after the bond, so that it was not lying blank by him the time of his decease; as also, it is a principle in law, that a cedent's oath cannot be taken in prejudice of the assignee, especially the assignation being for an onerous cause; and if it were otherwise sustained, it would lay a foundation to subvert a great point of the securities in Scotland. THE LORDS, before answer, ordained Alexander Gray, Adam Mitchel, and the writer and witnesses in the bond, to be examined upon the foresaid grounds of declarator, but in respect he was informer, and might tyne or win in the cause, and that there were several other objections against him that might debar him from being a witness, the LORDS discharged him to be a witness.

*Sir P. Home, MS. v. 1. No 25. p. 35.*

1685. December. LAUCHLAND LESLIE against INNERNYTIE.

No 657.

Trust declared upon circumstances, and the pursuer's oath in supplement.

LAUCHLAND LESLIE having, upon a payment of a debt to my Lord Northesk, gotten a blank assignation *in anno* 1669, and being debtor to John Stuart, son to Sir William Stuart of Innernytie, the assignation was filled in Sir William's name, though then dead, because it did not quadrate with John, who, at the date thereof, was but a child *in familia*: Leslie immediately took up his assignation, till the settlement with John was adjusted; and John dying *medio tempore*, he commenced a declarator against the present Innernytie, for declaring that Sir William's name was inserted in trust.

*Alleged* for the defender; That an assignation in the name of his father, whom he represents, could only be taken away *scripto vel juramento*; and it was improbable the pursuer could fill up a dead man's name, when he could not get a back-bond, unless he had been first secured by the representatives.

*Answered*; The pursuer offers to prove that he paid the money to Northesk, and got the assignation delivered to him, which he now produces; *2do*, Sir