

1700. *January 23.* SMITH *against* HAMILTON.

Smith, in Elgin, having pursued a declarator of trust of a bond against one Hamilton, the Lords had allowed a probation, before answer, of the qualifications of the trust, for expiscation ; and sundry witnesses having deponed, and their testimonies coming to be advised, they seemed clearly enough to make out the trust, so as he ought to be countable for the money in the bond, or else for diligence, or, *3dly*, to retrocess and reponne the party. Yet, in regard they deponed on words wherein witnesses might easily mistake, and that the defender produced a discharge of the pursuer's, after counting, though it did not extend to this trust ; therefore the Lords assoilyied from the declarator of trust, unless the pursuer would prove it by his oath, and that he was yet resting the money.

This is now cleared by the late Act of Parliament, that trusts can only hereafter be proven *scripto vel juramento*. Before that, the Lords sometimes, *ex officio*, examined witnesses ; but this was judged too large and arbitrary a power.
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1700. *January 25.* WILLIAM CHARTERIS *against* FRANCIS CHARTERIS.

WILLIAM Charteris gives in a bill to the Lords, representing, That Janet Inglis, his mother, being lately dead, he, after the burial, convened sundry of his friends to inspect his writs, and invited Captain Francis Charteris, his cousin, amongst the rest ; and there being bonds for betwixt 3000 and 4000 merks found lying beside her, and which now belonged to him,—while Nicol Somervell, agent, was inventorying the same, and had them lying on the table, the said Captain Charteris did take them up, and, putting them in his pocket, run away with them ; but being afterwards informed that he could not easily get up the money, unless he had an assignation to them from the said William, he went the next day to his chamber, and taking him abroad under pretence of restoring him his papers, he carried him to Pascal a Frenchman's house, where he had a writer ready with an assignation formed, and threatened to kill him if he did not sign it ; which he, through fear, did. Against which recent oppression, he craved the Lords to reponne him.

The difficulty which occurred to the Lords was, that, being a riot, it was more properly cognoscible by the Privy Council, especially neither party being members of the Session. But Captain Charteris insisted not much upon that declinature ; but ANSWERED, That the boy being a simple young man, and not capable to manage his own business, the question arose, who should have the keeping of his papers and government of his affairs ; and Nicol Somervel intruding himself upon him, the said Captain Charteris, being his cousin and next heir, designed nothing but to preserve him from being cheated by Nicol Somervel ; and denied he had used any violence, &c.

The Lords remitted the trial of the matter of fact to the Ordinary on the Bills, to be reported to themselves, that they may determine the punishment as they see ground.
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