

William gave up an inventory of debt due to him, and so did John, without mentioning this debt.

No 657.

THE LORDS declared the trust, the pursuer giving his oath in supplement, but the defender's curators made no great opposition.

*Harcarse, (ASSIGNATION.) No 115. p. 22.*

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S E C T. XIII.

Trust posterior to the Act 1696.

1708. December 9. WATSON against FORRESTER.

JOHN WATSON, merchant in Edinburgh, being debtor to the deceased William Forrester, Writer to the Signet, in 5000 merks, by bond, John assigns to him, for his better security and payment, 3000 merks, owing by Campbell of Calder, and L. 107 Sterling, due by Sir Peter Fraser of Durris, and pays him in L. 900 Scots in cash, and gets a backbond from William, that he being paid of his 5000 merks, should account to him for the superplus. William having received partial payments, in the year 1697, the principal backbond is given in to him by Watson, to rectify and transcribe the same, to be renewed for the sum then resting, and accordingly, William Forrester writes on the back of it, with his own hand, that he had got in that backbond, because there were several things to be altered therein, because John Watson had uplifted and infromitted with some of the debts assigned by him, and the new backbond was to be formed accordingly; but William dying before that was done, John Watson raises a declarator against William's relict and children, that his 5000 merks bond is more than paid by the debts assigned, and L. 1400 more, which he craved they might refund, and craved exhibition of his account-books, and the foresaid backbond so marked and interlined; and the same being produced, and proved to be William Forrester's hand-writ, he craved decret, declaring the bond satisfied, and the superplus to be repaid him. *Alleged* for Mr Forrester's Heirs, There was neither foundation in law nor reason in this process, for the backbond being in the granter's hand, it was *chyrographum apud debitorem repertum*, which presumes liberation, satisfaction and solution; and as to the notes written on the back of it, only for his own memory, it were a strange and extraordinary case to make that probative, when it might be the state of their affairs at that time in 1697, whereas he lived four or five years after, viz. till 1701, during which time Watson and he have cleared all their

No 658.

An unsubscribed scroll found to afford no evidence of trust after the death of the person who wrote it.

No 658.

accounts, otherwise there was more than sufficient time for Watson to have got his backbond renewed, which he never did during all that space. *Answered*, The case is indeed extraordinary, and therefore needs an extraordinary remedy, for what could make William Forrester write that memorandum on the back of the paper, if it had not been the express meaning and communing of the parties, and whether subscribed or not should bind him, even as minutes of partial payments set down in accounts-books, though unsubscribed; and by L. 21. § 1. *Cod De testamentis*, and the authentic there subjoined, a schedule written by a father, dividing his inheritance amongst his children, or gifting it to pious uses, is probative though destitute of the usual solemnities required by law. THE LORDS considered this was after the 25th act 1696, declaring that trusts thereafter should be only proved by subscribed writ, or oath, and therefore found the said unsubscribed scroll not probative of the trust, but prejudice to the pursuer to extinguish his bond by proving that William Forrester has got payment by the debts assigned to him.

*Fel. Dic. v. 2. p. 272. Fountainhall, v. 2. p. 470.*

1710. February 8.

JOHN M'LAREN of Craigfield, and JAMES DIN, *against* The EXECUTORS and CREDITORS of MAJOR CHIESLY.

No 659.

A person had been in use to draw bills in favour of his servant. One of these in the custody of the servant at his death, was, on account of the circumstances, found to be for behoof of his master.

MAJOR CHIESLY having been in use to borrow money out of the bank, by drawing bills upon his debtors, in the ordinary stile of bank bills, payable to Robert Currie his domestic servant, whose name was only borrowed *ad hunc effectum*, that Currie might indorse them to the treasurer of the bank, for value to the Major; one of these bills drawn upon Sir Alexander Brand, (which in respect of his refusal to accept, could not be transacted in the bank, where no unaccepted bills are negociated,) being neglected by the Major as an useless paper in the hands of Currie, who died shortly thereafter, his Representatives got hold of it, and brushed it up as a true debt upon the Major's Representatives, in a multiplepointing at their instance, against the Major's creditors.

*Alleged* for the Major's Representatives, No respect can be had to the bill, because Currie was the Major's servant at the date of it, and in constant use to uplift his money, and never indorsed the bill to any person in his lifetime; but on the contrary, when he made a disposition to his father of all his effects, made no mention of such a bill, though the particulars specified were of far less value; besides, it is ordinary in negociating bills in the bank, that the person to whom the money is payable in the bank, has no manner of interest in the bill, nor concern in the bank.

*Answered*, Currie being creditor in the bill, albeit he was the drawer's servant, a trust in his person can only be proved *scripto vel juramento*, conform to the act of Parliament 1696.