

the intent of his trust in his lands, being to preserve him from the rigour of his creditors, it was against the trust to the trustee to use the same rigour himself.

No. 8.

Which the Lords found relevant, and ordained Adam only to get allowance of what he paid out.

Stair, v. 1. p. 485.

1669. February 6.

RULE against RULE.

No. 9.
Mode of
proof.

Margaret Rule having made a consignment of certain bonds, and in general of all other rights, with a disposition of all her goods, to umquhile Robert Rule, her brother, who having named Mr. David Rule his executor and universal legatar, did, upon his death-bed, acknowledge that his sister's disposition was in trust to her own behoof, granted upon that consideration, that she being a bastard, unless she disposed in her *liege pousie*, her means would be confiscated by her bastardy, she thereupon pursues the said Mr. David Rule to deliver back her assignation, with her own writs. The defender alleged, The libel was no way relevant, there being nothing libelled but the defunct's acknowledgment of a trust, upon death-bed, and that offered to be proved by witnesses only; but, *first*, The trust behoved to be declared by a declarator, and not thus by an exhibition; *2dly*, Trust is only proveable *scripto vel juramento*, being a matter of so great importance; *3dly*, Some of the rights assigned and disposed are heritable, and nothing done upon death-bed can prejudice the defunct's heir thereof; *4thly*, An extrajudicial confession, without writ, albeit it were acknowledged, hath no effect, for it cannot be known *quo animo* such words might have been expressed. The pursuer answered, That the trust might be very well libelled, with the exhibition; and albeit the defunct's confession would not alone be sufficient to prejudice his heir, yet it may very well stand as an evidence of trust, which cannot be astricted to probation by witnesses, but hath ever been found proveable by other evidences, especially where the person trusted is dead; and the pursuer condescends upon these evidences and adminicles of trust; *first*, *Communis fame*; *2dly*, The assignation and disposition bears no reservation of the disponent's life-rent, and yet she continued still in possession, and her brother (whom she trusted) never meddled, which he would not have done if the disposition had been for a cause onerous, or to his own behoof; *3dly*, He did solemnly, in presence of witnesses above exception, acknowledge the trust on his death-bed.

The Lords sustained the summons, and would not astrict the pursuer to prove by writ, or oath of party, but ordained witnesses to be examined *ex officio* anent the evidences and adminicles condescended on by the pursuer.

Stair, v. 1. p. 598.