

bond was only delivered in contemplation of the transaction ; and the pursuer craved, that the depositor, in whose hands the bond was put, with a translation thereto, and Mr John Smith, who were the defender's curators, and others who meddled in that transaction, might be examined *ex officio*. It was *duplied*, That the bond being now retired, and in the defender's keeping, that debt could not be proved but *scripto vel juramento*. THE LORDS did sustain the summons and reply, notwithstanding of the defence and duply, and ordained witnesses to be examined *ex officio*, because the manner of the delivery of the bond, and the cause thereof, were so evident, and the probation so strong and pregnant.

*Fol. Dic. v. 2. p. 216. Gosford, MS. No 349. p. 168.*

No 33.

1671. November 22.

PITTILLO against FORESTER.

No 34.

A BOND being vitiated in *substantialibus*, and this consequently presumed *dolose* done, the LORDS found it not relevant to be proved by the instrumentary witnesses that the writ was vitiated at subscribing ; for though the tenor of a bond may be proved by witnesses, this is *ex necessitate*, which obtains not in the present case ; for, in executing writings, it is easy to avoid vitiations.

*Fol. Dic. v. 2. p. 213. Stair.*

\* \* \* This case is No 217. p. 11536, *voce* PRESUMPTION.

1677. July 3.

MR WILLIAM AIKMAN against JOHN AIKMAN of Cairnie.

IN the action betwixt the said parties, wherein, by interlocutor, the LORDS did find, that the provisions granted by Mr William, who was then apparent heir to his father, in favour of his mother-in-law and her children, were not obligatory, as being founded upon a contract of marriage, whereby the said Mr William was to receive a considerable tocher, seeing the marriage was dissolved, within year and day, by the decease of his future spouse ; it was farther *alleged*, That, by a prior bond and contract, he was obliged for the same provision. It was *replied*, That, if any such bond was granted, it was thereafter cancelled, and was not obligatory. It was *duplied*, That it was offered to be proved, by witnesses of near relation, that the bond was only borrowed up upon trust from the father, and cancelled by the son, without his knowledge or order. It was *answered*, That the same was only probable *scripto vel juramento*.—THE LORDS having advised, if, in this case, they might examine witnesses *ex officio*, as being an alleged trust betwixt father and son, did at last find, that it was only probable *scripto vel juramento* of the son, there being no force alleged, but a naked trust, especially seeing the only parties concerned were a mother-in-law and her children. See APPENDIX.

*Fol. Dic. v. 2. p. 116. Gosford, MS. No 989. p. 667.*

No 35.

The delivery back of a bond uncanceled must be proved *scripto vel juramento* of the receiver, if no force be alleged, and witnesses here cannot be received *ex officio*.