

tained to supply the production, because in all tenors there must ~~not~~ only be adminicles in writ, but there must be a probable *casus amissionis*; and in any doubtful case, *rei gestæ veritas* must be proven; but here there is no warrantable *casus amissionis*; but the parties taking up the principal, without instructing how he lost it; neither is there any pretence that there are witnesses who saw the husband give warrant to the notaries to subscribe; and therefore the naked sight of a writ, in a case so suspicious, is no way sufficient to astruct the verity, or to instruct the tenor thereof: And if this method were sustained, it lays a sure way for all forgery, that the forger may register the writ, and then take it up; and after showing of it to some witnesses, destroy it, and prove the tenor thereof by those witnesses, who could not exactly know the truth of the subscription, much less when it is by notaries.

No 37

THE LORDS granted certification, and improved this disposition, and refused to sustain the tenor thereof, as it is libelled. See TENOR—PROOF.

And the defender having then *alleged*, That he being a singular successor, and having bruiked *bona fide* by a disposition from his wife, in their contract of marriage, could not be liable for the bygone profits, and therefore the improbation could not be simple improving the writ *ab initio*, nor yet from the citation, till by production of the register his *bona fides* were interrupted.

Which the LORDS sustained, and found also, that the reparations made by the defenders, in so far as they were profitable and increased the mail, should be restored.

Fol. Dic. v. 1. p. III. Stair, v. 2. p. 347.

1677. December 14. DICK against OLIPHANT and Others.

SIR THOMAS TYRIE of Drumkilbo as principal, and the Lord Oliphant as cautioner, being addebted to Janet M'Math in the sum of 10,000 merks, she arrested the like sum in the hands of Sir Archibald Douglas of Kilspindie, and having pursued to make furthcoming, it was *alleged*, That Kilspindie had granted assignation to Douglas of Lumsdean, of the sum in question, which was intimated by a horning produced; whereupon Sir Laurence Oliphant of Gask, as having right from Lumsdean, was preferred; and the arrester having then *alleged* that the said assignation was false, relating to a decret of registration of a later date than the assignation, and offering to prove the same; yet the assignation was preferred, and the improbation was only reserved: Whereupon the arrester *insisted* in an improbation, in which the foresaid assignation was improven, which was found forged, and made up to answer to the charge of horning, which proceeded upon, and did relate to the assignation; and the true assignation was produced, which was of another tenor, bearing 'to be granted to Lumsdean for 'relief of Kilspindie's cautionry;' but by several writs produced it was instructed, that this true assignation was made only in trust, and was never delivered to Lumsdean; and therefore the arrester was now preferred. And Dick of

No 38.

The proponing of improbation, which is ordinary and of course, not being sustained, but reserved, was not found to induce *malæ fides*.

No 38. Grange, as executor to her, did *insist* against Sir Laurence Oliphant, who, upon a false assignation, had excluded the pursuer, and affected the debtor's land; who having *alleged*, That he had possessed *bona fide*, and was denuded in favour of Sir James Douglas; for whom the like was *alleged*, That he was denuded in favour of Blair of Gleschinie; for whom it was *alleged*, that they had possessed *bona fide*, having acquired the right made by Kilspindie to Lumsdean, to the sum in question, and all right that Sir Laurence Oliphant had; and having affected Drumkilbo's lands, by adjudication thereupon, they were possessors *bona fide*, and so could not be liable for the bygone fruits.—It was *answered* for Dick the executor, that *bona fides* can operate nothing *sine titulo*, and a false title is no title; and it would encourage falsehood to secure possession upon any such title.—It was *replied*, That whatever may be alleged against the forger, it cannot be extended to singular successors, who are not conscious to the falsehood, and acquired, enjoyed, and spent it *bona fide*.—It was *duplied* for the arrester, That *bona fides* cannot be pretended; because improbation was proponed, and carried on all along against their rights, and all the defenders knew the same, and entered into a bond of mutual relief.—It was *triplied*, That the allegiance of improbation, which is ordinary, and of course, not being sustained, but reserved, doth not *inducere malam fidem*.

THE LORDS found the defenders not liable for the fruits intromitted with, and consumed by a colourable title standing, though found false thereafter; and that the grounds then known did not put them in *mala fide*; but seeing they did possess and exclude the arrester upon a false title, the LORDS found them liable in *quantum lucrati*, viz. in so far as Sir Laurence Oliphant and Sir James Douglas had gotten a greater price than they gave. And Blair having offered to dispoise and resign his right in favour of the pursuer, ay and while he were satisfied of the sums arrested for, the LORDS found the same sufficient, seeing he was not further personally liable, having only enjoyed the fruits, and not dispoised the lands.

It was further *alleged* against Sir Laurence Oliphant, That Drumkilbo having dispoised the lands of Gleschine to the Lord Oliphant, he gave a back-bond, bearing, That so soon as he were relieved of his cautionry to Kilspindie and others, he should denude himself, whereupon he was infest; and likewise the Lord Oliphant got a gift in Exchequer of Kilspindie's liferent escheat, both which he dispoised to Sir Laurence Oliphant, whereupon he gave a back-bond produced, bearing, That when satisfied of 2300 merks due to himself by the Lord Oliphant, he should make furthcoming all benefit he had by these two rights, by relieving the Lord Oliphant of his cautionry for Drumkilbo; which right Sir Laurence had dispoised to Blair, with the burden of the back-bond, and Blair became obliged to relieve the Lord Oliphant; whereby both Sir Laurence and Blair being obliged to relieve the Lord Oliphant, who was liable for the arrested sum, as cautioner, both are liable to pay the arrester.—It was *answered*, That both rights resolving into a relief to the Lord Oliphant, the arrester could not

found thereon, neither the Lord Oliphant himself, till he were distressed, and had paid, which cannot be, there being none to represent the Lord Oliphant.— It was *replied*, That the arrester being now insisting in a declaratory right, justly craving it to be declared, That so soon as he had got sentence against the apparent heir of Oliphant, as charged to enter heir, he might thereupon adjudge the infestment of relief :

THE LORDS sustained that part of the declarator, and ordained Sir Laurence and Blair to compt for what profits they had made by the infestment of relief and liferent escheat, over and above the 2300 merks, the arrester always adjudging the infestment of relief from the apparent heirs of Oliphant, who was cautioner in the arrester's debt.

Fol. Dic. v. 1. p. 111. Stair, v. 2. p. 580.

No 38.

1712. February 20. MONCRIEF against MONYPENNY.

AN executor-nominate being appointed by testament to lay out a sum upon a tomb to the defunct; and having begun the work, was found not to be put *in mala fide*, to complete it, by a process of reduction of the testament. Therefore the expence was allowed out of the first end of his intromissions, though the testament was afterwards reduced upon this plain ground, that the testator was *in extremis*, and insensible when made to subscribe it.

Fol. Dic. v. 1. p. 111. Fountainball, v. 2. p. 587. & 727.

* * See The particulars, *voce* TESTAMENT.

No 39.
An executor was allowed the expence of a tomb, carried on during a reduction of the testament upon which he acted, which was reduced.

1715. July 19. MILN of Hatton against The LADY GALRAW. (FALCONER.)

MILN of Hatton having right by progress to an adjudication led against John Falconer, apparent heir to the deceased Sir John Falconer of Galraw, adjudging from him, as lawfully charged to enter heir to his father, the whole lands that belonged to him, particularly the lands of the Bank of Ballochrie: He did insist in an action against the Lady Galraw, for repetition of the rents of the said Bank, intromitted with by her, from 1690 to 1702.

And it being *answered* for the Lady, That she having intromitted with the rents of the said lands by her son's right of apparency, and applied them to his aliment, (which she instructed) she was *bonæ fidei* possessor, and not obliged to repeat.

THE LORDS found the Lady's intromissions with the said rents were *bona fide*, and ascribable to the aliment and education of the apparent heir, ay and while she was interpellated by the citation in the mails and duties against the tenants.

Act. Archibald Ogilvie. Alt. Horn. Clerk, Robertson.

Bruce, No 120. p. 156.

No 40.
Lands were adjudged from an apparent heir. His mother intromitting with the rents on her son's right of apparency, was as a *bona fide* possessor, found not obliged to repeat, till citation in an action of mails and duties against the tenants.