

N. B.—Our old decisions, and even law books, seem to suppose, that by law even a gratuitous promise, where it is within the value of L. 100 Scots, may be proved by witnesses ; but it is thought that no such thing now obtains with us.

Fol. Dic. v. 4. p. 155. Kilkerran, (PROOF.) No 16. p. 449.

1754. February 28.

THOMAS DUNCAN *against* His MAJESTY'S ADVOCATE.

DUNCAN entered a claim upon the forfeited estate of Sir James Kinloch-Nevoay for L. 100 Scots, contained in a bill accepted by Sir James, dated 28th August 1745. He offered a proof, by witnesses, that this debt was not a new contraction of the date of the bill, but was the balance of an old debt, contracted many years before the 24th June 1745, the term of the vesting act 20th Geo. II. cap. 41.

Objected for his Majesty's Advocate ; *1mo*, That the claim was not relevant ; because, supposing the balance of an old debt was the cause of granting the bill, yet the bill was an innovation of the debt ; and the date of it being posterior to the term when the estate was legally vested in his Majesty, the estate could not be burdened with it. And as an argument analogous, it was urged, that a disposition falling under the bankrupt act 1696, or under an inhibition, could not be supported upon this ground, that it was a *surrogatum* to an old debt. In a competition of infeftments, a creditor under a second infeftment could not plead preference to a first infeftment, because his infeftment had come in place of one which had been prior to the first.

Answered for the claimant ; That, in terms of the vesting act, this was a debt which was binding on the forfeiting person, and might have affected his estate before the respective days and terms whereon the same was vested in his Majesty. That, in the claim of Mr John M'Farlane upon the estate of Lovat, 12th July 1751, the objection here made had been repelled by one of their Lordships as an Ordinary, after having advised with their Lordships, and uniformly by their Lordships as Ordinaries, in many other cases. That the cases of the bankrupt act, of inhibitions, and infeftments, were not parallel ; because, in all these cases, the law is express, and in the two last, the record is held to be notice of the circumstances of an estate, and they who give trust after such notice *sibi imputent*.

Objected, 2do, for his Majesty's Advocate ; That a proof by witnesses was not competent in this case ; because thereby a door would be opened to fraud ; for that persons intending to rise in rebellion would always, when they granted bonds, take care to say before witnesses, that these bonds were for prior debts.

Answered for the claimant ; That the vesting act has not prohibited a proof

No 44.

No 45.

In a claim upon a forfeited estate, contained in a bill, the creditor offered a proof by witnesses, that the debt was not a new contraction of the date of the bill, but was the balance of an old debt, contracted many years before the term of the vesting act 20th Geo. II. cap. 41. The Lords found the proof was competent, and sustained the claim.

No 45. by witnesses. Our law admits of such proof in similar cases: In reductions of writs on the head of death-bed, where the defence is, that the writ is for onerous causes, Lord Stair says expressly, 'That witnesses are sustained to prove the onerous causes in the writ;' L. 3. Tit. 4. § 30. Parole evidence will be allowed to prove the date and delivery of holograph deeds. In reductions upon the act 1621, the onerous causes of deeds may be proved by the like evidence. See Lord Stair, L. 1. Tit. 9. p. 84.

"THE LORDS found the proof by witnesses was competent, and sustained the claim."

Act. *Scrymgeour.*

Alt. *Alex. Home & And. Pringle.*

Clerk, *Murray.*

B.

Fac. Col. No 103. p. 152.

1763. June 22.

GEORGE NORVEL of Boghall *against* JOHN RAMSAY of Kinnalty.

No 46.
Witnesses allowed to be adduced in support of a *legatum liberationis.*

IN the years 1753 and 1754, John Ramsay of Kinnalty granted two bonds to Katharine Lady Dowager of Halkerton, for the sum of 10,000 merks each.

The said Lady Halkerton appointed George Norvel of Boghall her sole executor; and having died in February, 1762, William Bell, Minister of the Gospel at Edinburgh, brought a process of multiplepinding against the said George Norvel and John Ramsay of Kinnalty, in which he set forth the following circumstances: That, in the year 1761, Lady Halkerton put into his hands a packet, sealed up, which she desired he should keep till she called for it: That on the back of this packet were written the following words: 'For Mr David Nevay, merchant in Edinburgh, to be delivered to my Lady Dowager of Halkerton, or to John Ramsay of Kinnalty, late factor for the Lord Halkerton, and to no other person; and, in the event of my Lady's death, to the said John Ramsay.' That, on the seal-side of the packet, were written these words: 'Notwithstanding this is directed for Mr David Nevay, it is designed to be given to Mr Bell.—K. Halkerton.'—That he, the pursuer, kept this packet in his custody during the Lady's life; and that, having opened it after her death, he found therein inclosed the two bonds above mentioned, granted by John Ramsay, and a letter of her Ladyship's hand-writing, dated Miln of Pert, 9th July 1759, in these words: 'Sir, There are herewith inclosed two bonds, 10,000 merks each, to be used by you as your own property after my death. Your humble servant, K. Halkerton.'

Mr Ramsay *insisted*; That the two bonds should be delivered up to him; and, in order to corroborate the evidence of the *legatum liberationis*, arising from the writings themselves, he offered to prove the following particulars, by the oaths of John Ogilvy of Inshuan, and the said Mr William Bell; *1mo*, That Mr Ogilvy was witness to, and assisted Lady Halkerton in inclosing the bonds in the before mentioned cover; *2do*, That he saw her affix her seal thereto, or