

No 125. workmanship and materials, and his damages, through his not having a house to lodge his family, and otherwise.

Answered; It was specially articulated, that the charger should build a dwelling-house on the farm by Burgess's entry; and that Burgess himself should build all other houses he might think necessary, at his own expense; and that the charger, for his part, built the dwelling-house in due time. The agreement he offered to prove by witnesses, who were present when it was made, and other persons to whom Burgess afterward gave an account of it, &c.

"THE LORDS found, That it is not competent for the master to prove, by parole-evidence, any obligation against the tenant, which is not contained in the tack; and remit to the Lord Ordinary to hear parties farther on the import of the tack, as it now stands; and to do therein as he shall see cause."

Act. Grosbie.

Alt. Hay Campbell.

Clerk, Robertson.

Fol. Dic. v. 4. p. 158. Fac. Col. No 51. p. 134.

1773. February 4.

GILBERT MOSES *against* WILLIAM CRAIG, ROBERT M'LINTOCK, and JAMES CLARK, Trustees for the Creditors of John M'Ewan.

No 126.

Parole evidence of the *actum et tractatum*, at the time of one's signing a deed, admitted, upon a charge of fraud and deception, to relieve from the effect of it.

GILBERT MOSES having made a demand on M'Ewan, his debtor, for payment, who offered to dispone to him a tenement of houses, as payment *pro tanto*, a minute of sale, written by the defender Clark, was executed between the parties, and deposited with the writer, to make out a formal disposition; which not being done, (owing, as he alleged, to collusion between Clark, and Craig and M'Lintock, who were all creditors themselves of M'Ewan,) Moses proceeded to execute and register inhibition against M'Ewan, for his own safety; and, afterwards, he brought an action of reduction and improbation, concluding, *1mo*, For reduction of a trust-right, in form of an agreement, among M'Ewan's creditors, nominating the defenders sole trustees for the management and division of M'Ewan's effects; which deed, the pursuer alleged, was contrived by the defenders, for their own purposes, and whereto they had elicited his subscription, on false pretences, and greatly to his prejudice; *2do*, That the defenders should be decerned to implement the aforesaid minute of sale, according to the terms covenanted between him and M'Ewan.

THE LORD ORDINARY, upon advising a condescence, and other papers, before answer, allowed the pursuer to prove, *proat de jure*, the facts set forth by him; particularly, that, when he signed the trust-right, he was diverted from reading it, by assurances from the Trustees, that his purchase, and previous diligence, were not thereby hurt; and allowed the defenders a proof of their allegations.

A proof was accordingly brought; and the LORD ORDINARY pronounced the following interlocutor: "Having considered the memorials for both parties, and,

particularly, that the pursuer's purchase and right to the tenement in the old wynd was completed by the minute of sale, and inhibition thereon, before his accession to the agreement of the creditors; and as, at the time when he subscribed the agreement, he declared, without objection, that this subject was not understood to be included in the debtor's estate to be conveyed to the Trustees; therefore finds, that, notwithstanding his accession, he is entitled to the benefit of his purchase, and that the bankrupt's conveyance of the subject cannot hurt his right and interest therein."

No 126.

Upon a reclaiming petition and answers, the point of law, as to the competency of parole evidence to defeat writing, was particularly under consideration of the Court; and, as there was apparently fraud practised at the time of signing the deed,

"THE LORDS adhered."

Act. *Walter Campbell.*

Alt. *W. Craig.*

Clerk, *Gibson.*

Fol. Dic. v. 4. p. 158. Fac. Col. No 55. p. 138.

1787. February 26.

WILSON and CORSE against JOHN KAY.

WILSON and CORSE shipped on board a vessel at Leith, of which Kay was master, bound for Newcastle, a number of empty pipes and hogsheads, the bill of lading bearing, 'That the casks were to be delivered at the last mentioned port, to Green and Company.'

No 127.
Parole proof found not relevant to counteract a bill of lading unretired.

Green and Company, however, denied that they ever received those casks, or had any notice of their arrival; upon which Wilson and Corse brought, before the Magistrates of Edinburgh, as Admirals-depute, an action against Kay for the value. The Magistrates allowed to Kay a proof of delivery; but afterwards decerned against him. He then removed the cause into Court by suspension; and the Lord Ordinary allowed a farther proof by witnesses. Kay admitted that he had not got up the bill of lading, nor obtained any separate written receipt for the goods; but insisted on establishing the actual delivery by the parole proof.

The question being brought under review by reclaiming petition, and answers,

The Court were of opinion, That parole proof could not be admitted to counteract the unretired bill of lading; and found Kay liable.

Lord Ordinary, *Alva.*

Act. *Cullen.*

Alt. *W. Craig.*

Clerk, *Home.*

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Fol. Dic. v. 4. p. 157. Fac. Col. No 325. p. 499.