FRANCIS SCOTT, - - - *Appellant;*
FRANCIS, LORD NAPIER, *et alii.* - *Respondents.*

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SCOTT
v.
LORD NAPIER.

29 *November*, 1749.

WITNESS.—EXHIBITION.—ADVOCATE.—A defender being cited upon a general diligence against havers, is not obliged to depone or exhibit except upon a special condescendence of the writs called for.

A defender being cited under a diligence against havers for proving a trust, found that he is not bound to produce the writs specially condescended upon, if he depone that they contain no clause instructing a trust.

Found that lawyers and agents cited as havers, are bound to answer only such interrogatories touching writings that have come to their knowledge in the course of their employment, as might competently be put to their clients.

PROCESS.—APPEAL.—A pursuer having judicially passed from the defender's oath, and an interlocutor being in consequence pronounced circumducing the term; it was found to be incompetent to appeal from previous interlocutors relating to the defender's deponing upon and exhibiting the writings called for.*

[Elchies, *voce* Witness No. 3 and 5. Cl. Home. Mor. 358 and 3965.]

No. 84.

LORD Napier being pursued by Scott in a process of reduction, improbation, and declarator, for setting aside his right and titles to the lands of Thirlestane and others, produced a complete feudal title by charter and sasine, upon which he averred that prescription had run. The pursuer alleged interruption, and that the lands had been originally

* In this way it appears that the House of Lords did not decide upon the other points noticed above. *Vide* Judgment.

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acquired by Lord Napier's authors in trust, and upon a redeemable right; and a diligence having been granted by the Lord Ordinary (Polton) against havers in support of this plea, was executed against the defender himself, who was required to "depone and exhibit all writings that concerned the "estate of Thirlestane, and which might tend to "prove interruption of the prescription, or the "terms of the trust in the person of Patrick Scott "of Tanlawhill, or continuance thereof, or other "transactions relating to the pursuer's right to the "estate."

Lord Napier having refused to depone, the Lord Ordinary, (Murbile, 9 February 1734,) found, "That the original right in Tanlawhill's person, "who was the Lord Napier's predecessor, though "in the form of an absolute disposition from Scott "of Harden to the wadsetter, with consent of Sir "John Scott of Thirlestane, the pursuer's grand-"father, was qualified by the declarations produc-"ed to have been originally a trust right for "Thirlestane's behoof, for security to Tanlawhill "of 44,000 merks, thereby declared to have been "all that was paid to Harden the wadsetter; and "therefore, that the Lord Napier must depone and "exhibit every writ passed between these parties' "predecessors that may serve to interrupt the pre-"scription, or instruct the terms of the trust, and "particularly," &c. &c. "And in general every "writ of whatever kind which may serve to inter-"rupt prescription, or prove the continuance of "his predecessor's trust."

But the case being afterwards reported, the Lords found, (26 June and 18 November 1735,) "That the Lord Napier is only obliged to depone

"upon a particular condescendence of writs craved "to be exhibited to instruct the alleged trust, or "the alleged continuance thereof, or the alleged "interruptions of the prescription; and that he is "not obliged to depone in general."

The pursuer next insisted that the lawyers and agents employed by Lord Napier should be examined touching such writings as related to the premises, upon a general interrogatory, as other havers. The Lords upon report found, (16 Feb. and 12 July 1737,) "There can be no interroga-"tions put to the lawyers and agents employed by "the Lord Napier or his predecessors, as to such "writings as they had come to the knowledge of "in the course of their employment; but such as "are competent to be put to the Lord Napier by "the Lords' interlocutor in presence."

Several interlocutors were thereafter pronounced restricting the interrogatories proposed to be put to Lord Napier. *Inter alia*, The Lords found, (22 July 1740,) "the Lord Napier is obliged to de-"pone whether the conveyances condescended on "contain any clause instructing a trust or not, "and in case he acknowledge they do contain any "such clause, he is bound to exhibit, but if he de-"pone they contain no such clause of trust, that "he is not bound to exhibit them."

The pursuer conceiving that he could derive no advantage from the oath when so limited, judicially passed from the same, (28 November 1740); where-upon the Lord Ordinary, (29 November,) "in re-"spect of the pursuer's procurators judicially pass-"ing from my Lord Napier's oath, found that he "could not be holden to depone thereafter;" and cir-cumduced the term accordingly. The parties were

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Entered, 13 Dec. 1748; 26 April and 9 June 1749.

then heard upon the proof and whole case, and judgment was pronounced upon the merits.

The appeal was brought from the interlocutors of the 26 June, 18 November, 10 and 19 December 1735; 9 January 1736; 16 February and 12 July 1737; 3 July and 29 November 1739; 22 and 29 July, and 28 November 1740; 15 December 1742; 5 January, and 2 December 1743; 18 and 20 January 1744.

Pleaded for the Appellant:—The several judgments refusing to examine the respondent on general interrogatories, and requiring a condescendence of the particular writings, which in the circumstances of the case it was impossible for the appellant to give, were contrary to law; since it being admitted that a defender, by the law of Scotland, is bound to exhibit writings particularly condescended upon, it follows that he must exhibit other writings tending to support the pursuer's claim, even upon a general interrogatory, more especially in a case like the present, where the trustee must be presumed to have in his possession such writings.

Although it is true that bonds or other *instrumenta apud debitorem reperta*, could create no obligation upon him, yet such documents would be good evidence that there had been such obligation, sufficient to determine the nature of other rights and transactions.

The rule of the civil law, *nemo tenetur edere instrumenta contra se*, does not take place in the law of Scotland, as is plain from the proceedings in the present action; the Court having obliged the respondent to depone and exhibit all writings against himself upon a particular condescendence thereof;

and there is the same reason for exhibiting upon a general interrogatory. Indeed, in some cases, the defender is bound to exhibit all writs whatever, in which the pursuer may have any interest, as in exhibitions *ad deliberandum*, at the instance of an apparent heir; and the adjudication which founds the present action, being led against the appellant, the apparent heir, for his own behoof, it is of the like kind with an exhibition *ad deliberandum;* or at least it ought to have the same privilege, especially against his trustee, in order to discover matters relative to the trust.

Pleaded for the Respondent:—Although the law of Scotland does give a right to a party who hath *prima facie* a title to the lands, by an action of reduction improbation, to compel the production of all deeds and incumbrances which may affect the same, and in case they are not produced, to have them declared void; yet it is equally certain that a defender in such an action, producing a title preferable to the pursuer's, is held to exclude him, and is thereupon assoilzied from the action. The pursuer, in such a case, cannot supply his want of title, or enforce a further production, by alleging that the defender's title, sufficient in law, is vested in him in trust, unless the reality of such trust, and that it still subsists, be first proved. And this rule is applicable in the strongest manner to the present case, where the lands have been possessed upon proper legal titles of absolute property, for a century, and no notice ever taken of this pretended trust.

The appellant's demand was quite irregular and unprecedented, compelling the respondent to depone *in jure*, and not *in facto*,—not whether he

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had this or that writing particularly described, but whether he had any writings which, in his own opinion, might serve the appellant's purpose of making out a better title to the estate. Not being a lawyer, he could not do this upon his own judgment, and to do it with the assistance of another, would be attended with excessive difficulty and expense.

Supposing even the most proper and direct evidence of a trust were to be discovered by a search among the respondent's writings, such as a declaration, backbond, or obligation to denude, it could avail nothing, any more than a bond for a sum of money, by reason of the maxim, *quod instrumentum apud debitorem repertum, presumitur solutum.*

Judgment, Nov. 29, 1749.

After hearing counsel, " it is declared, &c. That " it appears that on the 28 November 1740, the " appellant's procurator did, before the Lord Ordi- " nary, judicially pass from the respondent, the Lord " Napier's oath, and consented in Court, that the " term for proving and producing might be cir- " cumduced against the appellant conditionally, if " he should not prove and produce further betwixt " and that day eight days; whereupon, by the in- " terlocutor of the 29th of the said November, the " term was circumduced accordingly: It is there- " fore ordered, that so much of the said appeal as " complains of the several interlocutors, relating to " the respondents, deponing upon, exhibiting, or " producing any deeds, writs, or instruments of any " kind, be dismissed: And it is further ordered " and adjudged, that the rest of the interlocutors

"complained of in and by the said appeal be af-"
"firmed, and the said appeal dismissed."

For Appellant, *C. Maitland, C. Erskine.*
For Lord Napier, (Respondent,) *William Grant, W. Murray, A. Hume Campbell.*

JAMES, Duke of HAMILTON, *et alii*, - *Appellants.*
THOMAS, Earl of HADDINGTON, *et alii*, CREDITORS of JAMES, Duke of HAMILTON, deceased, - - *Respondents.*

16*th January* 1750.

TRUST.—JUS TERTII.—A trust for payment of such of the creditors of the granter's son, as the trustees should agree and compound with, and declaring that no action or diligence thereon should be competent to any of the creditors, but, on the contrary, that they should thereby forfeit all interest in the same; and the trustees having for a length of time taken no steps towards a distribution,—action was sustained at the instance of the whole creditors, for the purpose of calling the trustees to account for their intromissions with the trust estate.
Action being raised against the representatives of the original trustees, without opposition from the substitute trustee, it was found to be *jus tertii* to the representatives to object the above forfeiting clause.

[Elchies *voce* Trust, No. 9 and 13.—Fal.—Mor. 16201.]

No. 85.

ANNE, Duchess of Hamilton, in her own right, had a claim upon the crown of France for 500,000 livres, as arrears of rent from the Duchy of Chatle-