

1631. June 18.

WRIGHT against KER.

IN a special declarator of the liferent escheat of John Ker of Howden, pursued by James Wright against his relict as executrix, &c. *alleged*, No declarator at the pursuer's instance, because offered to be proved that the gift was taken to the rebel's behoof, and was passed upon the rebel's expenses, which was to be proved *per membra curiæ*. Likeas, further offered to prove, That the pursuer after count and reckoning with the rebel, was paid and satisfied of all his debursements in passing the said gift; whereby it is clear, that his name was only borrowed to it for the rebel's use, *hoc maxime attento*, that he was the rebel's agent, and the gift being purchased in 1623, he had suffered the rebel to possess his lands as long as he lived. In respect of which circumstances, this last part of his exception was admitted to be proved *prout de jure*.

Spottiswood, (PROBATION.) p. 244.

No 598.

Allowed to be proved *prout de jure*, that the expenses of taking a gift of escheat had been paid by the rebel himself.

1631. November 25.

DOUGLAS against LAWDER.

IN a contract betwixt Robert Lawder of Edrington and Sir James Douglas, the said Robert set a tack of some lands to Sir James, upon which contract he being charged, to fulfil the heads thereof, the said Robert suspends, *alleging*, That the contract was consigned in a depositar's hands, to remain undelivered while Sir James should fulfil the conditions agreed, whereon he condescended, and if he did not, the contract to cease; and Sir James Douglas having recovered the same by some disorderly means, the conditions not being kept, no execution ought to follow at his instance thereon; which he offered to prove by the depositar, and other trysters betwixt the parties, the time of the contract: And the charger *alleging*, That this was only probable by writ, or oath of party, seeing the allegiance tended to destroy the contract, which being a mutual contract, and now in his possession, could not be taken away by the depositions of any persons, except the party's own declaration, for the reason of suspension tending to destroy the contract, could not otherwise be admissible, albeit sometime the depositar's oath might be taken, to approve a security before it was delivered, when the party and depositar are pursued for delivery thereof; but where the writ is in the party's own hands, and the allegiance tends to destroy the same, it were an unheard of preparative to admit that manner of probation to destroy it; notwithstanding whereof, the LORDS found no necessity to restrict the probation to the party's oath, but found that *ante omnia*, they would examine the depositar and trysters, *ex officio*, and thereafter they would consider the reason.

No 599.

A bond having been deposited, until conditions should be performed, and got up irregularly, without performance, the depositary and commurers were ordered to be examined, although the effect might come to be to extinguish the bond.

Act. Dunlop.

Alt. _____

Clerk, Hay.

Durie, p. 603.