

No. 20. that the deponent might not be examined thereafter upon particular interrogators, that might contradict the general deposition ; but in this case the general interrogatory is last, and Bandoch his not examined precisely in order to the interrogatories, but begins his oath in answer to the general interrogatory, and then depones as to the rest, so that his oath must be considered as to the whole tenor of it ; neither is the general deposition clear, for Bandoch might probably have been in the opinion, that there was no trust, because trust was not expressed, nor any promise of back-bond, which no cautious party uses to adhibit ; but on the contrary, they are prohibited to have any promise, or back-bond, and it is a most proper trust, when the true meaning of the parties is, that he whose name is in a right, shall not apply the whole benefit of it to himself, but shall apply it in whole, or in part to another, which is properly *fidei commissum*.

The Lords found that the whole tenor ought to be considered, and ordained Bandoch to depone what his meaning was in his former deposition, that the gift was not to Pourie's behoof, whether that was only that he had given no promise or back-bond, to apply it to Pourie's behoof, or whether the true meaning and design was not, that Pourie put him upon it, upon confidence that he would apply the benefit of it to Pourie ; whereupon Bandoch having deponed *negative*, as to both these points, the Lords found the oath proved no trust.

*Stair, v. 2. p. 725.*

1680. February 6.

ELPHINSTON *against* SYME.

No. 21.

Where evidences of trust were offered, a previous accounting was ordered.

Mr. James Elphinston having right to an apprising, deduced at the instance of Agnes Denholm, relict of one James Cameron, whereby for some annuities due by her contract of marriage, certain tenements in Edinburgh were apprised by her husband *in anno* 1659, upon a decree obtained against Helen Syme, as executrix to David Grahame her second husband, for payment of the sum of 12,000 merks, which he provided to the said John, James, and Janet Camerons, in case of the decease of his own two daughters, which decree was obtained *in anno* 1646 ; upon this right Mr. James Elphinston pursues the tenants for mails and duties. Compareance is made for Helen Syme, who alleged that she had raised reduction of all this progress, upon two reasons, *1mo*, That the decree against her as executrix was in absence, and she now alleges that before that sentence, the defunct's testament was exhausted ; *2do*, That she suffered decree to pass, and also her third husband granted a disposition of all his goods to her children, that thereby they might be preferred to other creditors of her third husband ; and condescends upon several evidences of trust, and produces a back-bond for that purpose. It was answered for the pursuer, That the reason of exhausting, though competent *ab initio*, or *de recenti*, yet it is not competent now after so long a time, the right passing through two singular successors, and upon that decree there being two apprisings ; but if exhausting had been proponed in due time, a reply of super-

intromission might have been sustained, or a dative *ad omnia et male aspretiata* taken, which can be of no effect now, the goods being disposed of, and the executrix insolvent. It was replied, That it is an unquestionable principle, that parties may be heard on a reduction in the second instance against decrees in absence; and the common style is, "That if they had appeared, they would have alleged, and now do allege," &c. which nothing can exclude but prescription, and though it be not so favourable after so long a time and progress of rights, to reduce the same, and might infer that the reducer should satisfy the whole expenses of that progress, yet that cannot exclude lawful defences; but it cannot be pretended, that if a party decerned in absence would produce a discharge, but it would reduce the decree at any time within prescription, and all the diligence founded thereon would fall in consequence, though the right had gone through an hundred hands for most onerous causes; the defect of the ground being, that the decree was in absence, is effectual against all singular successors, for *bona fides non patitur ut idem bis exigatur*, which holds as well in this case as in the case of payment and discharge; for if the executrix was exhausted, she had made payment of all she was due as executrix; and if she must pay this sum after she is exhausted, it would be double payment; and in this case there is not so much as favour, for though there was a decree in 1646, and though the sum decerned did bear no annual-rent, which might have been helped by a horning upon the decree, yet nothing followed till the apprising 1659; and since no possession was attained upon the said apprising, but is now sought, the executrix having still remained in possession by her life-rent right, of the tenements appraised, and it is not debated, but after her decease the apprising will be effectual.

The Lords, before answer to the point of trust, ordained the parties to count, to know whether the executrix be exhausted, for they did not find exhausting excluded by the length of time alleged, or the progress to singular successors.

*Stair, v. 2. p. 753.*

1686. January.

GORDON against LEARMONTH.

In an exhibition at the instance of Mr. William Gordon, advocate, against Mr. Robert Learmonth, apparent heir of Balcomy, wherein the pursuer called for an apprising, and the grounds thereof, led by ——— against the estate of Balcomy, and assigned to Gordon of Lesmore, the pursuer's father, who stood thereon infest; the defender repeated a declarator of trust of the said right, upon these grounds; 1st, It is not probable that the pursuer's father, who was son-in-law to Balcomy, would acquire such an apprising for a small sum, and suffer it to expire without using an order; 2do, The whole writs were always in the possession of George Learmonth, the last apparent heir, and now in the hands of Mr. Robert the present heir-apparent; and Lesmore's assignation being granted after Lord

No. 22.

What facts amounting to evidence of trust?