

thereto; and repel the condescence given in by the said defenders, of Mr John Elies his fraud and dole, in respect of the answers made thereto; and discern the defenders to concur with the pursuer, in defence of the process of count and reckoning at William Lockhart's instance against the pursuer; and declare they shall be liable to relieve the pursuer proportionally of what he shall be found liable in to the said William Lockhart, at the event of the count and reckoning betwixt them.

Lee's defence was, that he acted not as tutor, but by virtue of a separate right, *viz.* the disposition in trust, granted by John Lockhart to him.

Culterallers' and Chiesly's defences were, *1mo*, The warrants whereon Elieston was found tutor, wanted witnesses, and so they denied Bailie Chiesly's subscription. *2do*, Elieston was the sole contriver and carrier on of that disposition of trust, and declarator of *liege poustie*, by which the lesion and damage arose to William Lockhart the pupil; *et nemo debet ex suo dolo lucrari, vel actionem mandati contra contutores habere.*

ANSWERED,—*1mo*, There are four parties subscribing; which supplies the want of witnesses, each being witness to one another: as was found on the 22d July 1676, Forret, &c. against Maxwell of Pollock; and on the 20th of February 1680, Nisbet against Bruntfield. (But these were *in re mercatoria*: And see a contrary decision in Dury, 14th Feb. 1633, Rankine.) *2do*, The other warrant has witnesses, and *ob indivisibilitatem actus* it must sustain; as if I subscribe a submission before witnesses, and the blank on the other side for the decret-arbitral without witnesses; as was found in Dury, 26th January 1625, Ferry against Johnston. *3tio*, As to the fraudulent contrivance, it is denied. *Et dolus non præsumitur, et quævis causa probabilis excusat.* And Elieston truly thought that disposition a valid deed; and, *esto* it had been a fraud, the co-tutors were as deeply engaged in it as he; and so can never liberate themselves from relieving him, on that pretence.

There being bills given in against this, and the parties of new heard in presence; the Lords, on the 28th January 1685, notwithstanding of what is alleged for Culterallers and Robert Chiesly, adhered to the former interlocutor; and ordained them to concur with Mr John Elies in the defence of the process pursued against him by William Lockhart. And find and declare that they are liable to relieve Mr John *pro rata*, of what shall be decerned against him in the count and reckoning at the said William's instance; and particularly of any damage arising to the said William, upon account of the disposition of trust granted by the deceased John Lockhart, and of the decret of declarator of *liege poustie* thereafter obtained.

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See prior, intermediate, and posterior parts of the Report of this case, in the Index to the Decisions.

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1683 and 1684. RENTON of LAMERTON *against* The EARL of ANNANDALE.

1683. February 9.—THE case, Renton of Lamerton, against the Earl of Annandale, being reported by Harcous; the Lords found, the pursuer's and defender's predecessors being two of the six cautioners for the Earl of Home's

debt, and Lamerton having paid the whole, Annandale could not be liberated on his offering to pay his fifth part of the sum, but behoved to bear one half, and the pursuer the other, and so divide the whole betwixt them; because it was notourly known, that the other four, *viz.* Home of Dirington, Sir Hary Home, &c. were insolvent or dead, without any representatives, and so needed no discussion. See this altered 18th December 1684. *Vol. I. Page 216.*

1684. *December 18.*—The Lords *in præsentia* reponed the Earl of Annandale against a decret obtained by Renton of Lamerton against him, as heir to his father, who was one of the co-cautioners with Lamerton's father for the Earl of Hume, as mentioned *supra*, 9th February 1683; and allow him yet to prove that some of the other co-cautioners have representatives, and are solvent, and so the Earl of Annandale cannot be liable for their parts; and this in respect he was minor the time of obtaining that decret.

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1684. *December 18.* WILLIAM BECK *against* CRAWFURD of DRUMSUY.

WILLIAM Beck against Crawford of Drumsuy is reported by Saline. There being two several bonds granted by Crawford, one to Mungo Beck, and the second to Elizabeth Boog his relict and executrix, (though it does not bear nor design her as executrix;) the last being declared to be in satisfaction of a sum owing to her, and no word of the bond due to her husband; and the first being for 400 merks, and the second for 430 merks, (which 30 merks was alleged to be but the accumulated annualrent of the first;) and so the two bonds were neither *ad idem quoad* the sums, nor *quoad* the creditors:

The Lords, before answer, *ad indagandam veritatem*, ordain the writer and witnesses of the second bond to be examined, what was the true cause thereof, and if they heard that it was for the first bond or not. One of the witnesses, being the debtor's brother, was objected against as *testis suspectus et inhabilis pro fratre*; but, being instrumentary, he was sustained; and though the term was circumduced for not bringing in the two witnesses, yet the Lords, on a bill, granted a farther day: and both having deponed, and their oaths being advised, the Lords found it clearly proven that the second bond was granted for the first.

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1684. *December 20.* HUGH WALLACE and The BISHOP of DUMBLAIN *against* The PARISH of CRIEFF.

HUGH Wallace, cash-keeper, and the Bishop of Dumblain, competing with the ministers and parishioners of Crieff, about the rents of a prebendary which once belonged to the bishopric of Dumblain, and was suppressed and annexed, to make a part of the minister of Crieff's stipend:—the Bishop alleged that it was never legally suppressed, and the demission of the prebendary was but done