

and to charge the representatives of the Doctor to denude, as accords of the law; and remitted to the Lord Edmonston to bring the count and reckoning to a close.

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1684 and 1685. BAILIE JOHN HALL *against* JAMES CLELAND.

1684. *January 9.*—BAILIE John Hall against James Cleland, merchant in Edinburgh, was reported by the Clerk-register. The Lords ordained John Hall of AuldCambus, to condescend upon the onerous causes of that disposition he had gotten from William Johnston, conjunct debtor to him with the said James Cleland, to the effect they might consider if the application he made of the goods disposed was rational; and if he could prejudge James Cleland, a cautioner, by applying these goods to other causes of debt between him and Johnston, who is now turned bankrupt, especially seeing the narrative of the disposition was indefinite, without mentioning one debt more than another; in which case, both by the civil law, *L. 1 et seq. D. de Solut.* and by our decisions, (see Stair, *tit. 11*, Liberation from Obligations,) it is always ascribed and imputed *in sortem duriozem debitori*.

This was only carried by one vote, that the onerous causes ought not to be referred to his oath; but he ought first to condescend on them. *Vide 13th November 1685.*

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1685. *November 13.*—THE case of John Hall and James Cleland, mentioned 9th January 1684, was debated *in presentia*, and advised. The Lords having considered the condescendence given in by John Hall, anent the onerous causes of the disposition of some goods granted to him by William Johnston, whereby he ascribes it to other debts than this wherein James Cleland was bound as cautioner for the said Johnston; they found it did not prove James Cleland's reason of suspension, that this debt behaved to be one of the causes of that disposition, and that John Hall was not obliged to ascribe it *primo loco* to this debt of Cleland's; seeing the narrative of the cause of his disposition was general and indefinite, without mentioning one cause more than another: and though William Johnston was failing at the time he made the said disposition, yet seeing he was not then a notour bankrupt, and there was no diligence done by Cleland the suspender, or any other, against him at that time, that John Hall was *in bona fide* to transact with him, and receive the said disposition, and apply it to the payment of any debts resting to him by the disponent; except it were offered to be proven, by Hall the charger's oath *vel scripto*, that the disposition was granted by the said William Johnston, for payment of this debt charged upon *pro tanto*; otherwise found the letters orderly proceeded.

This seemed hard, when it consisted with most of the Lords' knowledge, that William was then *lapsus* and went to Ireland, so that he and John Hall could not then collude to James Cleland's prejudice, and misapply it, though there were no legal diligence then against him, for he was *in effectu* bankrupt; especially seeing John Hall did not fully instruct those other debts to which he ascribed the disposition, *aliunde* than by his oath.

Then James Cleland offered to prove, *scripto*, that John Hall had given Archi-

bald Johnston, William's son, (who would not otherwise give up the disposition,) a factory to sell these goods, and to count to him for the price, towards payment of this debt of Cleland's *per expressum*. ANSWERED,—*Esto*, yet, before payment, he might alter the destination.

The Lords allowed eight days for a diligence against Archibald to produce that commission. And he having compeared, and deponed that he had given it back to John Hall, and that he produced an exact double of it; and his oath being advised on the first of December, with the doubles of the factory and back-ticket, they, before answer, ordained Hall to depone upon the condescence given in by him, and his stated account with William Johnston; as also, if he received the disposition from William Johnston for payment of his own debt, in which Cleland was not bound to him, in the first place, or of both debts indistinctly: and superseded to give answer to the 28 hogsheads of tobacco, or price thereof, acclaimed by Bouden, till the result of the process at Bouden's instance against Bailie Hay.

The Lords, on the 28th January 1686, having advised John Hall's oath, with the subscribed account to which it relates, they found the price of the goods, contained in the assignation by Johnston to Hall, cannot be employed for payment of the debt for which Cleland is charged, until first the other debt (in which Cleland is not bound,) resting to him by Johnston be paid: and found the said debts are not fully satisfied by that disposition; and therefore found the letters orderly proceeded, for the sums contained in the charge, in so far as they are not yet satisfied.

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1685. November 13. The LORD ABERDOUR *against* SIR WILLIAM BRUCE OF KINROSS.

LORD Aberdour, Morton's son, against Sir William Bruce of Kinross. This was a reduction of a discharge of the price of Lochleven given by the last Earl of Morton to Sir William, as being done after he was at the horn; which Aberdour, as donatar to his escheat, now quarrels. ALLEGED,—Aberdour has given a ratification of this discharge. ANSWERED,—This is only for any kindness he might claim or pretend; and Aberdour was not then donatar.

2do, ALLEGED,—The discharge is sufficient, being prior to the gift and declarator, as was found in *Veitch, Pallat, and Maxwell's* case, November 1673. ANSWERED,—Payment prior to the gift is sufficient, but not a discharge; and if Sir William offers to prove paid, they will sustain it as relevant.

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1685. November 14. EUPHAME ELPHINGSTON *against* JAMES CLELAND.

THE debate between Euphame Elphingston in Gilmerton, and James Cleland, merchant in Edinburgh, is advised, how far he was *in tuto* to pay a sum contained in a bond to one Geddes and his children, which they were not to