

lady takes up her bill, and declares she will make no opposition against his taking out the protestation ; and so, that instance perishing, there is no depending process whereon he can crave a commission.

ANSWERED,—There was *litis pendentia* when he sought it, and her withdrawing her bill and process ought not to prejudge him.

The Lords found, in strict law, she might renounce that process ; but when he insisted in his counter-action, and that it were seen and returned, then they would consider how far they might issue forth the commission craved ; but till then it had no foundation, the former dependence of her action having been at an end.

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1699. *January 11.* LIVISTON of PANTASKIN *against* The EARL of LITHGOW and CALANDER.

RANKEILOR reported Michael Liviston of Pantaskin, against the Earl of Lithgow and Calander, anent the right of winning coals in the muir of Falkirk. Pantaskin founded his right on this ground, That, by his predecessor's charter from the Earl of Calander, superior, in 1644, he had these lands feued to him, *cum carbonibus et carbonariis* ; and he offered to prove this part of the muir, where he had put down his sinks, was part and pertinent of these lands.

ANSWERED,—By an old contract in 1695, between the then Lord Liviston and Pantaskin's author, the muir was divided betwixt them by fixed meiths and marks, with an express reservation of the coal to the Lord Liviston ; and so, being *separatum tenementum*, it cannot be part and pertinent.

REPLIED,—This being only a personal contract, whereunto neither party can connect a progress, it is now prescribed, and nothing followed on it ; and nothing but a charter and seasine can prove it to be a separate tenement.

DUPLIED,—'Tis at least a predial servitude, conform to which, their possessions in the muir having been ever since regulated, it must yet be the rule ; and offers to prove Calander's predecessors have been in use to win coals in this very ground.

The Lords, before answer, ordained both parties to produce their writs, to instruct the progress, and to prove what deeds of possession, as to working the coal, and the acts of interruption ; that it might appear whether this controverted muir was a separate tenement, or a part and pertinent of Pantaskin.

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1699. *January 13.* SIR WILLIAM MURRAY of NEWTON *against* LORD EDMONSTON.

My Lord Edmonston having entered into a minute with Sir William Murray of Newton, and Charles Murray of Hadden, his brother, for the lands of Newton, for payment of 29,000 merks ; Sir William makes a second disposition of the same, and raises a reduction of Edmonston's right, that he was circumvented

by his brother Charles to enter into that minute, who had applied the price for payment of his own debts allenary; and so, being *dolo inductus*, the same ought to be reduced.

ALLEGED,—The reason is noways relevant against my Lord Edmonston, who was *in bona fide* to contract with Charles Murray, who stood infest publicly in the lands: and it was only *ex superabundanti* that he required Sir William to be a joint disponer; and if there has been any fraud and over-reaching by the one brother to the other, John Wauchop of Edmonston is not concerned therein, unless he can subsume that he was induced to enter into the said minute by some fraudulent deed of my Lord Edmonston's.

ANSWERED,—He does not controvert Edmonston's *bona fides* in entering into the bargain; but if there was *fraus* in any of the parties-contractors, that was sufficient to resolve the whole bargain; for *nemo debet lucrari ex dolo alterius*: and he is willing to refund him all he has paid out on the account of this transaction, and to keep him *indemnis*.

REPLIED,—Edmonston is not seeking *lucrari cum alterius damno*, he having paid the full adequate price; *et dolus non debet obesse ei qui eum non causavit*: and though there be nothing more contrary to a free consent than *dole*, yet what was antecedent to his bargain, and private betwixt the two brethren, can have no influence to annul his minute; but he is content to quit the land, and repon them, he being immediately refunded his money, *cum omni causa*, and the expenses they have put him to.

The Lords repelled the reason of reduction, and sustained the minute; but, in respect of his voluntary offer, appointed one of their number to see Sir William reponed again to his own place, he paying back, betwixt and Candlemas next precisely, the whole money Edmonston has advanced, with the just expenses he has debursed on this account; and, in case of failyie, he to be free of his offer.

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1699. January 13. JOHN PEARSON *against* JOHN TAYLOR.

JOHN Pearson, seaman in Dunbar, against John Taylor, merchant in Mon-trose, for payment of £338 contained in a bond, as the price of some lasts and barrels of herring. The reason of suspension was,—That it is a rule in all contracts, *dolum malum abesse debere, et emptione venditione bona fides exuberare debet*; but you was *in pessimo dolo*, for I having bought them as sufficient, when they went abroad, the first two or three rows and lays of the herring were found good, and all below them naught and insufficient, as a testificate from his factor abroad bears.

ANSWERED,—His bond is opponed, acknowledging it was granted for good and sufficient well-packed herring; which cannot be taken away but only by his oath. *2do*. The 5th Act of Parliament 1693, anent the loyal curing of herring and salmon, not trusting to factors' declarations anent the insufficiency of goods sent abroad, has prescribed another method, That if their insufficiency be discovered at the port of discharge, there must be a probation taken of it at that place by the merchants' judge, or the oaths of the merchants or skipper, that they may have recourse for their damages; which is not followed here.