

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 disponder; 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.

Vol. II. Page 34.

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.

REPLIED,—Latent insufficiency of goods is always probable by witnesses ; and the suspender will yet get declarations of their insufficiency from abroad.

The Lords found, Seeing he had neglected the order prescribed by the Act of Parliament, his reason founded on the brackishness and utter uselessness of the herring was now only probable by the charger's oath. *Vol. II. Page 35.*

1699. *January 17.* WILLIAM WALWOOD *against* ROBERT WALWOOD.

WILLIAM Walwood against Robert Walwood, his uncle and tutor, who being charged with sundry debts he had suffered to perish, he founded on a discharge he had got from his pupil some time after his majority, bearing, That he was convinced of his integrity, and therefore exonerated him of all omissions, he making faithful account of all his intromissions, and delivering up to him all the inventories and count-books. William repeated a reduction he had raised of that discharge, That it was taken from him by surprise three or four days after he was major, *et ante redditas rationes*, and when he knew nothing of his affairs ; and bore a quality of fair counting and delivering up the books : none of which he had done.

ANSWERED,—Omissions were odious, and might be discharged the next day after the expiring of his minority ; and the provision in the discharge of counting was neither conceived *irritanter* nor conditionally, and so could not annul the discharge ; and the truth is, he was ever willing to count.

The Lords sustained the discharge to exoner from omissions, and assoilyied from the reduction.

Then he craved allowance of £1500 of expenses wared out in selling the wines and other goods his brother left behind him. ANSWERED,—By the Act of Parliament 1672, a tutor neglecting to make inventory can claim no expenses. REPLIED,—His brother having left an inventory, he thought it needless.

2do. His discharge cutting off omissions, must also reach this of his neglecting to make an inventory. REPLIED, *1mo.* His brother's inventory was not full, neither what the law requires in this case. *2do.* The discharge only means omissions in seeking in debts and other deeds of administration, but can never be extended to the necessary requisite, previous to his entry of making inventories.

The Lords, by a narrow plurality, found it comprehended the omission in making of legal inventories, as well as other omissions. Some thought the discharge ought not to cover him, where the omissions were gross and considerable ; for as *lata culpa æquiparatur dolo*, so none are presumed, under general words, to have discharged dole. *Vol. II. Page 35.*

1698 and 1699. The MERCHANTS of EDINBURGH *against* The VINTNERS.

1698. *June 28.*—Phesdo reported the advocation raised by Mr Charles Dal-
K k k