No. 10.

for if the inhibition reduce their rights, the pursuer's apprising supervenient upon that same sum, is now expired, and irredeemable. The pursuer answered: He did declare he would make only use of this right, for satisfaction of the debts due to him, and for which he was cautioner for the Earl of Hume, and was content that witnesses should be examined anent the inhibition and apprisings being still in the possession of the Earl of Hume in his charter-chest, but not upon any other ground to take away his assignation and solemn right, which cannot be taken away by witnesses, but *scripto vel juramento*; and most of these presumptions are but weak conjectures, nowise inferring that Joussie was paid by the Earl of Hume's means, and the great friendship that was betwixt Annandale and Hume alleviates the same, it being the cause for which Annandale forbore to take infeftment, or do diligence, thereby to alarm Hume's creditors, that his inhibition would always work his preference, and on that same ground did consent to several creditors' rights, there being enough remaining for him, and which was an evidence that this right was generally known, and that without it Hume could not give security.

The Lords ordained witnesses *ex officio* to be examined upon all the points alleged for clearing of the trust.

Stair, *v.* 1. *p.* 612.

1669. *June* 22.

HAMILTON of Corse *against* HAMILTON and VISCOUNT of FRENDRAUGHT.

No. 11.
What affords presumption, that a donatar of escheat is a concealed trustee for the rebel?

Wishart of Cowbardie having wadset his lands of Bogheads and others, to George Hamilton, from whom the Viscount of Frendraught has now right, he did thereafter sell the same lands to John Hamilton of Corse, who took the gift of Wishart's escheat; and having thereupon obtained general declarator, pursues now in a special declarator for the mails and duties of the wadset lands. Compears George Hamilton and the Viscount of Frendraught, and produced the wadset right, and alleged that the life-rent right cannot reach the wadset lands, because the gift is simulated to the behoof of Wishart the rebel and common author, and so is *jus superveniens auctori accrescens successori*, to defend this wadset right; and condescends that it is simulated, in so far as it is offered to be proved, that Wishart the common author did allow to the donatar in the price of the lands, not only the sum whereupon the horning proceeded, but also the expenses of the gift; so that it is purchased by the rebel's means, whence the law presumes it to be to his behoof. It was answered, That this condescendence cannot infer simulation to the rebel's behoof, because it was lawful to Hamilton of Corse, finding that his right was not secure to fortify the same by this gift, and in his account of the price of the land upon the warrandice, he might require retention, not only of the sum in the horning, but of his expenses in necessarily purchasing the gift, and might apply the same for the security of the lands bought from the rebel only, which is

No. 11.

to his own behoof; but if he were extending the gift to other lands of the rebel's, that might be presumed to the rebel's behoof, because the donatar had no anterior interest of his own to these lands. It was answered, That if the rebel had given the money to purchase the right before it was purchased, it would infer unquestionable simulation; and it is wholly equivalent, that having then the rebel's money in his hand, the rebel *ex post facto*, allowed the expenses of the gift; 2*dly*, Albeit such an allowance *ex post facto*, would not be sufficient, where the donatar acquired the right to the lands *bona fide*, and then *ex necessitate* behoved to purchase the gift to maintain his right; but here the donatar was *in pessima fide*, and most unfavourable, because if need be, it is offered to be proved by his oath or writ, that he knew of George Hamilton's right, and that the same was complete before he bought from the common author, and so is *particeps fraudis* with his author, in granting double rights contrary to law; and therefore the presumption of simulation and fraud, ought to proceed against him upon the more light evidence.

The Lords found the ground of simulation not relevant, upon taking allowance from the rebel of the price, if it was done for the maintaining of a right *bona fide* acquired; but found that it was sufficient to infer simulation, if the right was *mala fide* acquired; and that the donatar, at, or before he bought the land, knew of the other party's right.

Stair, v. 1. *p.* 621.

1672. *January* 24. BOYLSTON *against* ROBERTSON and FLEMING.

No. 12.

A person receiving money to buy goods for another, having bought and received them in his own name, without mention of the truster, the property was found to be in him, and his creditors arresting were preferred.

Stair.

*** This case is No. 6. p. 15125. *voce* SURROGATUM.

*** This decision has been considered to be erroneous.—See p. 13439.

1673. *February* 21.
JAMES RAE *against* ALEXANDER GLASS of Sauchie.

No. 13.
A person trustee on one subject who buys in a right, which might, in other hands, compete with the right in which he is trustee, must

In the count and reckoning betwixt the said parties, there being an article of discharge given in, craving deduction of £.8000, in so far as Sauchie before ever he recovered payment of any part of the sums assigned to him by James Rae, he did advance out of his own means 4300 merks, whereby he purchased a right to a prior comprising led against the Earl of Loudon's estate, which did extend to the payment of the said £.8000, and therefore he ought to have the benefit thereof, and that interest could not be charged upon him as accountable therefore; but the said right ought to be looked upon as Sauchie's own purchase with