

trary to his back-bond and trust, apply the composition to his gift, and not to his wadset, which the Lords found relevant, and for instructing the trust of the gift, the Lord Lyon was appointed to depone, who deponed, (the other party not being present to give interrogatories) that he might dispose of the gift at his pleasure; but thereafter he was ordained to be re-examined, whether Philorth's good-brother had told him that he would take a gift in his name of Salton's escheat, and that the declarator raised upon it, was managed by Philorth, by his charges and expenses; and though the Lord Lyon lived several years thereafter, yet he never deponed upon these interrogatories, but after his death, his testament being confirmed by his children, without owning the sums due by these vassals, or confirming them as belonging to their father, the Laird of Boyn had confirmed the same as executor *ad omnia* to the Lord Lyon, having no interest in him, but a confident of Philorth's.

The Lords found these adminiculations sufficient to instruct, that the gift of the escheat was in trust in the Lord Lyon's name, to Philorth's behoof.

*Stair, v. 2. p. 690.*

1679. December 20. FOTHRINGHAME *against* MAULD.

Fothringhame of Pourie having obtained a decret of pointing of the ground of lands belonging to Mauld of Ballumby, he raised reduction on this reason, that Pourie having bought the lands of Muirhouse, and being obliged to procure himself infest by the superior upon his own charges, he had taken a right from the Earl of Crawford, superior, to many years by-gone of the non-entry of these lands, in the name of Bandoch, his cousin-german as his confident, in trust to his behoof. This being a matter of trust, the Lords *ex officio* ordained Bandoch to depone, who accordingly deponed upon several interrogatories, given in for Ballumby, and his oath did bear, "That the gift was to his own behoof, and nowise to the behoof of Pourie," which were the first words of the oath, and did also bear, "Answers to his special interrogatories;" which oath coming to be advised, it was alleged, that thereby the trust was proved, it bearing, "That Pourie was advised, that a gift in his own name of the non-entry, would afford him no more than what he paid for it, and that Pourie had paid the Earl of Crawford the composition, without bond from Bandoch, but that Bandoch had repaid him. It was answered, That Bandoch's oath being positive, "That the gift was to his own behoof, and not to Pourie's," nothing else in the oath could be made use of to infer a trust, as the Lords had already practised, and resolved, that after a general interrogatory deponed upon *negative*, no special interrogatory expiscating the same thing, should be allowed, least parties might be ensnared, either to swear falsely, or by inferred contradictions, to be perjured. It was replied, That the Lords had only given warrant, that after any party had upon their interrogatories taken the deposition in general,

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No. 20. that the deponent might not be examined thereafter upon particular interrogators, that might contradict the general deposition ; but in this case the general interrogatory is last, and Bandoch his not examined precisely in order to the interrogatories, but begins his oath in answer to the general interrogatory, and then depones as to the rest, so that his oath must be considered as to the whole tenor of it ; neither is the general deposition clear, for Bandoch might probably have been in the opinion, that there was no trust, because trust was not expressed, nor any promise of back-bond, which no cautious party uses to adhibit ; but on the contrary, they are prohibited to have any promise, or back-bond, and it is a most proper trust, when the true meaning of the parties is, that he whose name is in a right, shall not apply the whole benefit of it to himself, but shall apply it in whole, or in part to another, which is properly *fidei commissum*.

The Lords found that the whole tenor ought to be considered, and ordained Bandoch to depone what his meaning was in his former deposition, that the gift was not to Pourie's behoof, whether that was only that he had given no promise or back-bond, to apply it to Pourie's behoof, or whether the true meaning and design was not, that Pourie put him upon it, upon confidence that he would apply the benefit of it to Pourie ; whereupon Bandoch having deponed *negative*, as to both these points, the Lords found the oath proved no trust.

*Stair, v. 2. p. 725.*

1680. February 6.

ELPHINSTON *against* SYME.

No. 21.

Where evidences of trust were offered, a previous accounting was ordered.

Mr. James Elphinston having right to an apprising, deduced at the instance of Agnes Denholm, relict of one James Cameron, whereby for some annuities due by her contract of marriage, certain tenements in Edinburgh were apprised by her husband *in anno* 1659, upon a decree obtained against Helen Syme, as executrix to David Grahame her second husband, for payment of the sum of 12,000 merks, which he provided to the said John, James, and Janet Camerons, in case of the decease of his own two daughters, which decree was obtained *in anno* 1646 ; upon this right Mr. James Elphinston pursues the tenants for mails and duties. Comparence is made for Helen Syme, who alleged that she had raised reduction of all this progress, upon two reasons, *1mo*, That the decree against her as executrix was in absence, and she now alleges that before that sentence, the defunct's testament was exhausted ; *2do*, That she suffered decree to pass, and also her third husband granted a disposition of all his goods to her children, that thereby they might be preferred to other creditors of her third husband ; and condescends upon several evidences of trust, and produces a back-bond for that purpose. It was answered for the pursuer, That the reason of exhausting, though competent *ab initio*, or *de recenti*, yet it is not competent now after so long a time, the right passing through two singular successors, and upon that decree there being two apprisings ; but if exhausting had been proponed in due time, a reply of super-