

1684. *December 11.*—In Carleton's action against Janet Ramsay and Mr Arthur M'Gill, mentioned 5th March 1684,—The Lords advised the last point of this process, anent the jewels abstracted by Mr Robert Byres; and found it was a *casus fortuitus* on John Ramsay's part, and that he did sufficient diligence for recovery thereof; and therefore assoilyed him from restitution of the same.

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1684. *December 16.* CHARTERIS against ———.

IN the case of one Charteris, reported by Castlehill, the Lords demurred exceedingly if they should grant an aliment to one party from the other, seeing they had granted one already, and the process was not yet brought to a close; and that it was *nobilioris officii*; and that such modifications were more ordinarily granted by the Privy Council than by the Session. *Vol. I. Page 320.*

1684. LOCKHART, MENZIES, &c. against JOHN ELIES of ELIESTON.

*January 8.*—Mr John Elies's action of relief against the Co-tutors of William Lockhart, mentioned 16th March 1683, is again reported by Kemnay; and the Lords decern them to relieve him *pro ratis portionibus* of what he shall be decerned in, upon the event of his count and reckoning with William Lockhart: and decern them to concur with Mr John in defending against the said William. *Vide 24th January 1684.*

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*January 24.*—Mr John Elies of Elieston's cause against Menzies of Culterallers, Lochart of Lee, Robert Chiesly, and the other Co-tutors, (mentioned 8th January current,) being reported by Kemnay; the Lords repel the allegiance proponed for Culterallers, and find him liable as tutor; and decern him to concur with the pursuer in the count and reckoning at William Lockhart's instance; and find he is liable *pro rata* to relieve the pursuer for what shall be decerned against him therein; reserving to his procurators to be heard in the said count and reckoning, upon this point, If he can be liable to relieve Mr John Elies the pursuer of what shall be decerned against the said Mr John, upon any ground arising from his own dole and fraud: and repel the allegiance proponed for the said Robert Chiesley, and decern him to concur in the said count and reckoning; and find him liable to relieve the pursuer *pro rata* of what shall be decerned against him therein: as also decern against the Laird of Lee; and find him liable to concur with the pursuer, and to relieve him *pro rata*. But, if the Laird of Lee his procurators shall apply to my Lord Kemnay, recommend to him to hear them upon any special defences for him not proponed already. *Vide 16th December 1684.*

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*December 16.*—Mr John Elies's action of relief against Lockhart of Lee, &c. mentioned 24th January 1684, is reported by Kemnay; and the Lords repel the special defence proponed by the Laird of Lee, and likewise the special defences proponed for Culterallers and Robert Chiesly, in respect of the answers made

thereto; and repel the condescence given in by the said defenders, of Mr John Elies his fraud and dole, in respect of the answers made thereto; and discern the defenders to concur with the pursuer, in defence of the process of count and reckoning at William Lockhart's instance against the pursuer; and declare they shall be liable to relieve the pursuer proportionally of what he shall be found liable in to the said William Lockhart, at the event of the count and reckoning betwixt them.

Lee's defence was, that he acted not as tutor, but by virtue of a separate right, *viz.* the disposition in trust, granted by John Lockhart to him.

Culterallers' and Chiesly's defences were, *1mo*, The warrants whereon Elieston was found tutor, wanted witnesses, and so they denied Bailie Chiesly's subscription. *2do*, Elieston was the sole contriver and carrier on of that disposition of trust, and declarator of *liege poustie*, by which the lesion and damage arose to William Lockhart the pupil; *et nemo debet ex suo dolo lucrari, vel actionem mandati contra contutores habere.*

ANSWERED,—*1mo*, There are four parties subscribing; which supplies the want of witnesses, each being witness to one another: as was found on the 22d July 1676, Forret, &c. against Maxwell of Pollock; and on the 20th of February 1680, Nisbet against Bruntfield. (But these were *in re mercatoria*: And see a contrary decision in Dury, 14th Feb. 1633, Rankine.) *2do*, The other warrant has witnesses, and *ob indivisibilitatem actus* it must sustain; as if I subscribe a submission before witnesses, and the blank on the other side for the decret-arbitral without witnesses; as was found in Dury, 26th January 1625, Ferry against Johnston. *3tio*, As to the fraudulent contrivance, it is denied. *Et dolus non præsumitur, et quævis causa probabilis excusat.* And Elieston truly thought that disposition a valid deed; and, *esto* it had been a fraud, the co-tutors were as deeply engaged in it as he; and so can never liberate themselves from relieving him, on that pretence.

There being bills given in against this, and the parties of new heard in presence; the Lords, on the 28th January 1685, notwithstanding of what is alleged for Culterallers and Robert Chiesly, adhered to the former interlocutor; and ordained them to concur with Mr John Elies in the defence of the process pursued against him by William Lockhart. And find and declare that they are liable to relieve Mr John *pro rata*, of what shall be decerned against him in the count and reckoning at the said William's instance; and particularly of any damage arising to the said William, upon account of the disposition of trust granted by the deceased John Lockhart, and of the decret of declarator of *liege poustie* thereafter obtained.

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See prior, intermediate, and posterior parts of the Report of this case, in the Index to the Decisions.

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1683 and 1684. RENTON of LAMERTON *against* The EARL of ANNANDALE.

1683. February 9.—THE case, Renton of Lamerton, against the Earl of Annandale, being reported by Harcous; the Lords found, the pursuer's and defender's predecessors being two of the six cautioners for the Earl of Home's