

the letters were dictated by him to his own man, therefore they decerned him to pay 10 shillings Scots for every one he had confessed, and allowed retention of the other 8 shillings to himself.

Andrew Atchison having, in a bill, complained that this was against the acts of the writers, to let other men's servants write their summons or letters; the Lords ordained the boy to be examined: who declared he was truly William Laing's man, and alimented by him; but his master lent him to Andrew Atchison by paction, to save that act of the writers.

Yet the Lords adhered. And the writers were resolving to fine Andrew Atchison for breaking the act, and colouring unfreemen: but he threatened to acquaint the Secretaries, his masters, to whom, at their entry, they paid of dues near 1000 merks; and yet the Lords brought in their servants *pari passu* with them, without putting them to prove there was a paction for communicating the gain. But the Lords thought it materially just, that he who was at a part of the pains should also have a share in the gain. *Vol. I. Page 373.*

1683, 1684, and 1685. DOCTOR LIVINGSTON'S RELICT and CHILDREN *against*
The EARL of WINTON.

1683. *March 15.*—IN the action, Barbara Burnet, relict of Doctor Livingston, against the Earl of Winton, my Lord Castlehill found the registration of a bond after the creditor's decease lawful; seeing the debtor who gave the mandate for registering it, was still alive. *Vide 22d current.*

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1683. *March 22.*—Burnet against the Earl of Winton, mentioned 15th current, reported by Castlehill. The Lords sustained Winton's declarator upon the trust Doctor Livingston had from him, so as, before answer, to ordain witnesses to be examined thereupon; as also sustained the Earl's allegiance of compensation upon the Doctor's intromissions with the Earl's rents, notwithstanding of the discharge; and ordain both parties to count and reckon. But, in the mean time, for her aliment, decerned the Earl of Winton to pay her the hail bygone annualrents of the 6000 merks bond, which he does not allege was in trust, with 1000 merks of the principal sum thereof. And the Earl requiring caution of her to refund, in case, in the event of the count and reckoning, the Doctor should be found paid by his intromissions, and the Earl not found debtor; this caution the Lords refused to exact from her: but, on a bill given in by the Earl, they retracted the 1000 merks given her of the principal sum.

The words of the deliverance were:—Ordain the decret to be recalled, (for her agent had extracted the act and decret wrong, and in great haste,) and to be put into the clerk's hands, and to be rectified; allowing the declarator of trust, and count and reckoning for the husband's intromission, to proceed; and, before answer, ordain witnesses to be examined on the grounds of the declarator; and ordain the decret to have effect only as to the bygone annualrents

due, but as to no part of the principal sum of 6000 merks. But do not burden the relict with finding caution to refund these annualrents if, *in eventu*, there should be less due. *Vide* thir parties at the 19th current. *Vol. I. Page 228.*

1684. *March 19.*—The Relict and Children of Doctor James Livingston gave in a bill to stop any witnesses to be received at the Earl of Winton's instance, in his declarator of trust; that the bonds he was pursued for, granted to the Doctor, were but in trust, the said Doctor being then his menial and domestic servant. Against which, they ALLEGED,—That clear liquid bonds, bearing for borrowed money, could not be taken away by a congestion of presumptions, of which this declarator of trust was made up.—Yet the Lords adhered to their former act, (23d March 1683,) and ordained the witnesses to be received, seeing it was only before answer, and the relevancy was entirely reserved, to be considered when they should come to advise the probation.

In this process, the Earl also repeating his action of count and reckoning against the Doctor's representatives;—they ALLEGED,—That they were not bound for any years preceding July 1676, because the Earl had then given him a general discharge. Whereon a debate having arisen, the same was advised the 21st March, whether it should defend against counting for intromissions preceding its date, seeing it appeared it was but a mere trust to help forward his marriage, and was truly granted without any previous count; and bore a false narrative, that the instructions of the counts were given up to the Earl, which were still in the Doctor's own hands long after; and that the said discharge was past from, by the Doctor's giving in the accounts of those very years which fell under the general discharge, to the Earl, and accepting a receipt subjecting them to his approbation, whether he would allow them or not.

The Lords, before answer, ordained Sir Walter Seaton and James Inglis (to whom the adjusting the accounts, by the receipt, was referred,) to be examined, whether the Doctor himself did not give in to the Earl and them, the accounts of the years preceding the general discharge now founded upon, as well as those posterior; and if he did not subject all to be allowed or disallowed by the Earl.—By this it appears they incline to come over the said discharge.

On the 25th March, Barbara Burnet, for herself and her children, gives in a bill against the Earl of Winton, alleging he had protracted and kept back the count and reckoning betwixt them, and that she clearly proved him to be debtor by liquid bonds: therefore craving, that she might have power, in regard of her present urgent necessities, to uplift the moneys, in whole or in part, upon her obligation to refund them in case he prevailed.

The Lords ordained the Earl to pay her 2000 merks presently, (without putting her to find caution,) upon her bond to redeliver the same, if, either upon the event of the declarator of trust, or of the Doctor's intromissions, these sums should be found not due.

The Lords had granted the same favour to her, in the end of the former Session.

The Earl gave in a bill reclaiming against this, craving it might be retracted, seeing she had *aliunde* to live on: yet the Lords adhered to their former interlocutor. *Vide* 25th November 1684. *Vol. I. Page 283.*

1684. *November 25.*—The Lords, having advised a part of the probation led by the Earl of Winton, in his declarator of trust against Barbara Burnet, relict of Doctor Livingston, mentioned 19th March 1684, found, That the

right of the tack and prorogation of some lands in Winchburgh, from George Young to Christopher Seton, and assigned by him to Doctor Livingston, was clearly proven, by the oaths of Sir John Dalrymple, Sir Walter Seton, Mr Alexander Drummond, and the other witnesses adduced, to be but a mere trust in the Doctor's person, and that his name was only borrowed thereto; and therefore decerned his children and relict to denude thereof. *Vide* 13th December 1684. *Vol. I. Page 314.*

1684. *December 13.*—THE Earl of Winton having given in a bill, craving a prorogation of the protection given to Sir Walter Seaton and James Inglis, to come in and depone as witnesses, in the cause betwixt Doctor Livingston's relict and the Earl, as appointed, *supra*, 21st March 1684; in respect they could not be adduced within the former time, being so short:

The Lords signed a new protection. But Castlehill refusing it, as being contrary to the 9th Act of Parliament 1681, the rest cancelled their names from the protection; but, upon getting back their former protection, and if the bill be reformed, and mention nothing of it, they were content to grant one as if it were the first. *Vol. I. Page 320.*

1685. *January 16.*—The Earl of Winton's declarator of trust against the relict and children of Doctor Livingston, mentioned 25th November 1684, was advised; and the Lords were much straitened how they could take away clear liquid bonds, whereof the subscriptions were acknowledged, but were only alleged to have been elicited in trust, the Earl being *major, sciens, et prudens*, and known to be frugal and provident. Yet, on the other hand, the case was between a master and a servant, who is a domestic and natural trustee, and who, within two months of thir bonds, had got large gratuities and acknowledgments for his service and attendance, *viz.* a bond of 6000 merks and a pension of 1000 merks *per annum*. So thir two bonds neither are nor can be pretended to be donations. And yet, that thir two bonds, the one for 9000 merks, and the other for 5000 merks, are for onerous causes, and borrowed money, (as their narratives bear,) can be as little pretended; for, *1mo*, The Doctor's patrimony and condition then, is so well known, that it is undeniable he had not the half of it. *2do*, The sums he gave the Earl are not charged nor carried into any count by him, nor any of the Earl's chamberlains in the year 1676, when the sums are alleged, by the dates of the bonds, to have been borrowed; which would certainly have been, if the Earl had got the money. *3tio*, It is proven, when he was showing the bonds he got from the Earl, he mentioned the 6000 merks' bond, but never thir two; nor were they ever heard of during his lifetime, but found lying in a cabinet with other of the Earl's retired papers.

Some of the Lords were for examining the writer and witnesses in the bonds, what was the cause thereof, and if they saw any numeration of money. Others were for taking my Lord's oath in supplement of the probation: and others thought it hard to take away clear bonds on such presumptions. But most of them were convinced that the Earl's discharge to the Doctor, founded on by his relict and children, was but in trust, and past from by his giving in his accounts of the years preceding the date of the said general discharge, as well as of the subsequent years, and taking a receipt of the accounts and the instructions from the Earl, with this clause, that the Earl shall, betwixt and the 1st of February 1681, give his opinion whether he approves or disapproves of the same.

However, they forbore to decide it at this time; but recommended to Pit-

medden, Edmonston, and Carse, to endeavour a settlement betwixt the parties, otherwise they would advise it on Tuesday.

The accommodation taking no effect, the Lords, on the 29th of January, having considered the debate, depositions of witnesses, and documents produced for either party, they found the discharge was granted in trust; and therefore ordained the representatives of Doctor Livingston, notwithstanding thereof, to count and reckon; but found that the bonds controverted were not granted upon trust, and therefore sustained the said bonds: and assoilyed from the reduction and declarator of trust, in so far as concerns these bonds; but stop any execution as to the principal sums contained in these bonds, till the event of the count and reckoning: but allow the children and relict to get payment of the annualrent of the sums contained in these bonds; the relict giving bond, that if, by the event of the count and reckoning, there shall be more found due to the Earl than the principal sums, that then she shall repay the same. *Vide more, 24th February 1685. Vol. I. Page 331.*

1685. *February 24.*—The Earl of Winton gives in a bill against the Relict and Children of Doctor Livingston, mentioned 16th January 1685, reclaiming, *1mo*, That they refused to denude of the trust of the tack and prorogation of George Young's lands in Winchburgh, though it was most clearly proven to have been but a trust in the Doctor's person. *2do*, That the Lords had not ordained her to find caution to refund the annualrents, in case, by the event of the count and reckoning, it should appear they were not due. *3tio*, That, on misrepresentation, they had gotten my Lord Marcus adjoined auditor in the count and reckoning to Edmonston.

The Lords ordained them to denude of the tack, and allowed Edmonston to be sole auditor; but refused to put her to find caution. *Vide 11th November 1685. Vol. I. Page 344.*

1685. *November 11.*—Barbara Burnet, relict of Dr James Livingston, against the Earl of Winton, mentioned 24th February 1685. The Lords having advised the bill and answers, with his bill of suspension of their former decret against him, and the grounds of it; they find no necessity that the relict petitioner shall now confirm the annualrents to be paid by the Earl, (as he contended,) but that she find caution to repay the same, in case the debt shall not be found due; and, in case the debt shall be found due, that then she shall confirm the same: and the Lords restrict the charge to the superplus above the discharge produced by the Earl; or otherwise ordain the arrestments to be purged before extracting; or otherwise allow the Earl retention of so much of the charge as will satisfy the sums in the arrestments produced: and find the letters orderly proceeded for the superplus,—sufficient caution being found, as said is, before extracting.

Thereafter, a bill was given in by Winton; and the same, and her answers, being advised on the 16th December, the Lords found, That the representation in the bill, as if their former interlocutor was only for the bygone annualrents, is groundless; and that their interlocutors decerned for the annualrents, as well in time coming, during the dependance of the count and reckoning, as for the bygones; and they adhered to the interlocutor, the pursuer finding caution in terms thereof to repay; and refused to ordain the relict to denude of the right of George Young's debt, (which was one of the Earl's reasons of suspension;) without prejudice to the Earl to extract his decret of declarator of trust,

and to charge the representatives of the Doctor to denude, as accords of the law; and remitted to the Lord Edmonston to bring the count and reckoning to a close.

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1684 and 1685. BAILIE JOHN HALL *against* JAMES CLELAND.

1684. *January 9.*—BAILIE John Hall against James Cleland, merchant in Edinburgh, was reported by the Clerk-register. The Lords ordained John Hall of AuldCambus, to condescend upon the onerous causes of that disposition he had gotten from William Johnston, conjunct debtor to him with the said James Cleland, to the effect they might consider if the application he made of the goods disposed was rational; and if he could prejudge James Cleland, a cautioner, by applying these goods to other causes of debt between him and Johnston, who is now turned bankrupt, especially seeing the narrative of the disposition was indefinite, without mentioning one debt more than another; in which case, both by the civil law, *L. 1 et seq. D. de Solut.* and by our decisions, (see Stair, *tit. 11*, Liberation from Obligations,) it is always ascribed and imputed *in sortem duriozem debitori*.

This was only carried by one vote, that the onerous causes ought not to be referred to his oath; but he ought first to condescend on them. *Vide 13th November 1685.*

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1685. *November 13.*—THE case of John Hall and James Cleland, mentioned 9th January 1684, was debated *in presentia*, and advised. The Lords having considered the condescendence given in by John Hall, anent the onerous causes of the disposition of some goods granted to him by William Johnston, whereby he ascribes it to other debts than this wherein James Cleland was bound as cautioner for the said Johnston; they found it did not prove James Cleland's reason of suspension, that this debt behaved to be one of the causes of that disposition, and that John Hall was not obliged to ascribe it *primo loco* to this debt of Cleland's; seeing the narrative of the cause of his disposition was general and indefinite, without mentioning one cause more than another: and though William Johnston was failing at the time he made the said disposition, yet seeing he was not then a notour bankrupt, and there was no diligence done by Cleland the suspender, or any other, against him at that time, that John Hall was *in bona fide* to transact with him, and receive the said disposition, and apply it to the payment of any debts resting to him by the disponent; except it were offered to be proven, by Hall the charger's oath *vel scripto*, that the disposition was granted by the said William Johnston, for payment of this debt charged upon *pro tanto*; otherwise found the letters orderly proceeded.

This seemed hard, when it consisted with most of the Lords' knowledge, that William was then *lapsus* and went to Ireland, so that he and John Hall could not then collude to James Cleland's prejudice, and misapply it, though there were no legal diligence then against him, for he was *in effectu* bankrupt; especially seeing John Hall did not fully instruct those other debts to which he ascribed the disposition, *aliunde* than by his oath.

Then James Cleland offered to prove, *scripto*, that John Hall had given Archi-