

The Lords considered, If they sustained the reason of advocation on iniquity, then it rejected the witnesses ; therefore they caused the Ordinary try if they would advocate of consent ; in which case they would ordain them to be reëx-aminated, and to produce the letter inviting them in, if so be they had it.

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1702. *January 2.* The DUCHESS of BUCCLEUCH *against* SIR JOHN SCOT of ANCRUM.

THE Duchess of Buccleuch and Monmouth against Sir John Scot of Ancrum. The deceased Patrick Scot of Langshaw, father to the said Sir John, having had an exuberant trust from the Duchess's curators and commissioners, as head chamberlain, factor, general receiver, solicitor, and agent, for which he had a fee and pension of 2500 merks *per annum* ; the sub-chamberlains, in making their accounts in December 1665 for the crop 1664, discharge themselves of £1500 sterling, received by them from the tenants, and paid in to Langshaw, conform to his receipts for the same : And the friends, having revised these accounts, write on the margin, " Allowed and instructed to us per Langshaw's receipts:" But he not coming to make his accounts with the Duchess's commissioners till 1673, he then gets a discharge *cum elogio* ; but these articles of the £1500 sterling are not particularly stated nor brought into the account. Some time after this, Langshaw dying, and the Duke of Monmouth falling into troubles and mistakes, this omission was not adverted to ; but, at last, being discovered, there is a process raised at the Duchess's instance against Sir John Scot, as representing Langshaw, his father, for refunding the said £1500 sterling, *cum omni causa*, on the foresaid grounds, That the sub-chamberlains state it as given to him upon his receipts, and the respondents acknowledge they have seen his receipts, and therefore allow it ; that, to palliate and conceal the embezzlement, he inverted the order of counting used in the management of that estate, which was, that the sub-chamberlains counted first, and then the general receiver made his ; whereas, in the year 1665, wherein this omission happens, Langshaw counts before the under-chamberlains : Likeas, by the title of the account in 1673, he imposes on the Duchess's commissioners by the generality of its conception, and yet thir articles are nowise brought into the account ; and, being general receiver, he either had the instructions in his hands, or access to the place where they lay, by which it was easy for him to withdraw his own receipts ; whereas, of all the instructions of these accounts, there are none wanting but only this of the £18,000 Scots : Likeas, being factor and agent, he, by the nature of his office, was liable in exact diligence, and ought not to have suffered this money to perish to the Duchess ; or else his son must tell what way it went and how it was employed.

ALLEGED for Sir John,—That neither the assertion of the sub-chamberlains, nor the allowance and declaration of the friends, can bind and constitute a debt against him, unless his father's receipts were produced. *2do*, After all this, Langshaw had made his accounts with the commissioners, and obtained a full discharge and exoneration ; and which containing some exceptions, these *fir-*

*mant regulam in casibus non exceptis* ; and to call such public and solemn deeds in question, *post tanti temporis intervallum*, may disquiet the minds of the lieges, and unhinge their securities. 3to, As to the inverting the order of counting, that did not depend on him, but was the act of the curators and commissioners, whose method he behoved to follow. 4to, That he had access to the charter-chest, and so might become master of his own receipts ; it is absolutely denied, and was both naturally and morally impossible ; for the very fitments of the accounts bear, that the instructions were laid up in the charter-chest, and whereof there were three keys kept by several trustees. 5to, That, by his office, he was tied to diligence ; his factory is opposed, only obliging him for his actual intromissions ; *et dolus non præsumitur*, except the evidences be very pregnant.

ANSWERED for the Duchess,—That the whole *tractus negotii* was a conviction and demonstration that Langshaw had received this money, though the receipts were not extant ; and therefore he behoved to document and instruct what he had done with it. It was true, a bond in the debtor's hand presumes liberation, though you should produce letters relative thereto, because that retiring is the common and natural way of extinguishing *debita chirographaria* ; but it was quite otherwise in accounts, where the articles must be charged and discharged, and there omission imports plain fraud : Likeas, both Langshaw and his son have homologated the sub-chamberlains' accounts, where thir articles are stated, by subscribing witnesses thereto ; and whereof he could not be ignorant, (as witnesses ordinarily may be of the contents of a writ,) he being at the framing of the same. And for his general discharge, it must be regulated by the accounts ; and, however large and comprehensive it may be, can extend to no articles but what were therein contained.

The Lords first considered if the presumptions and qualifications adduced for the Duchess were sufficient, without production of the receipts, to make him count for these omitted articles. Some inclined to find him liable thereon without any farther ; but others demurred, unless it could be made appear that the instructions were left in his custody, or he had access thereto ; in which case all were convinced he might have abstracted his own receipts : therefore the Lords agreed upon an act before answer, to try if the accounts and instructions were laid up in the charter-chest, or in boxes in the Duchess's chamber ; and if he had access thereto, and in what manner, if alone or in presence of some of the friends and commissioners. And as to his discharge founded on, in regard it was doubted whether the commission to the friends empowered them to discharge, or only to audit the accounts and report ; the Lords, before answer, likewise ordained the said commission to be produced.

As to the presumptions arising against chamberlains and other administrators, who invert and alter the former method of counting, the Duchess's lawyers cited Munnez de Escobar *de Ratiociniis Administratorum*, lib. 1. cap. 2. et cap. 10. who tells us that *intricata ratio non est ratio, sed magis, ex intricacione rationum, fraus et dolus præsumitur, et adversus intricantem juramentum in litem deferri potest* ; and that all intromitters and administrators are bound to make their accounts *secundum consuetudinem loci, et moram suam purgare*, and not to involve them in generals.