1676. *November* 8. JOHN FINDLAY, Waiter in Leith, *contra* THOMAS ROBERTSON, late Treasurer in Edinburgh.

FINDLAY having charged the said Thomas upon a decreet of the Sheriffs of Edinburgh for L.172, contained in a subscribed account, it was suspended on this reason, That the truth of the account, and articles thereof, being referred to Thomas his oath, his procurator, without his knowledge, had taken a day to produce him, and not being advertised, the term was circumduced, and he holden as confessed, and decreet given against him; whereas he in manner foresaid purged his contumacy, offered to refund to the charger the expenses of the decreet, condescended on the exorbitancy of sundry of the articles, and craved to be reponed to his oath.

Strathuird inclined to repone him, but they opponed the decreet, and no reasonable cause alleged to take off contumacy, such as sickness, absence forth of the town at that time, or the like; whereupon we deferred the truth and reasonableness of the articles of the count to the charger's own oath, who compearing, deponed the same were just and true: whereon Thomas Robertson agreed with him, and gave him his money. See the information *apud me*. *Vide supra*, December 1669, Semple and Walker, No. 6.

Advocates' MS. No. 504, *folio* 264.

1676. *June and November.* The EARL of SOUTHESK *contra* Mr JOHN ELEIS, Elder of Eleiston.

June.—THIS is an exhibition of some writs of the Countess of Dirleton's. ALLEGED against delivery, That he cannot denude of the right of the bond produced till, *Primo*, he be relieved of his cautionry for the Countess, as executrix in the Earl's testament. *Secundo*, He cannot denude with reservation of a fifth part of the sum, because, by a contract betwixt the pursuer and him, it is declared he shall have right to a fifth part of what shall be recovered, both for his pains, depursements, and discovery.

ANSWERED, *Primo*, He ought not to detain the pursuer's evidents on that pretence, they not having been deposited and put in his hands on these terms, that he should have right of retention till he be relieved. *Secundo*, He cannot condescend upon any distress, existent or apparent. *Tertio*, To take off all cavil, the Earl is content to find caution to warrant him. To the second, answered, that the transaction in the contract is unjust, unlawful, and exorbitant; because, *Primo*, *Pactum de quota litis*, he being an advocate. *Secundo*, Taking acknowledgment for discovering what *ex bona fide* he was obliged to do *gratis*. *Tertio*, This needed no discovery, for they knew this particular bond. *Quarto*, The contract relates to the common interests among all the daughters of William, Duke of Hamilton, whereas the Lady Carnegie has *jure proprio* right to this.

REPLIED, To the first, he is content of sufficient caution. To the second, *Primo*, It was not *pactum de quota litis*, nor fell under the 216th act of Parliament in 1594, discharging the buying of pleas, because he was not then an advocate. *Secundo*, The penal sanction of that act of Parliament is only deprivation of the doer, not omission

of the cause. See Catherine Home's information *apud me*, against Mr Archibald Nisbet, writer to the signet; where the Lords inclined to find, that if there was a previous communing before the intenting and raising of the action, and a part offered, and the same accepted, by a member of the College of Justice, the same was not a reprobate *pactum de quota litis*, because there was no plea then depending. But really this is only a subterfuge and palliation to such villainies. See *Bouritius de Officio Advocati*, pp. 8, 9, and 10; *item*, cap. 44, p. 337, *et seq.*; where, *ex lege*, 5. C. *de Postulando*, he shews such pactions are unlawful, either when the plea is already intented, or when the client has discovered the secrets and mysteries of his cause; but if *res* be *integra*, and the action not raised, he does not condemn a paction then, yet commends such as forbear. Vide *L.* 3. *D. de Litigiosis; Tit. C. Ne liceat Potentioribus Patrocinium*, with the two following titles; *Dury, penult.* July, 1635, *Richardsone. Secundo*, The taking of an acknowledgment is no violation of his trust, for when a thing is given more *honoris et remunerationis gratia* than *quasi prætium et merces operæ*, it hinders not but it still remains to be gratuitous, and of the nature of a mandate: *L. C. Si remunerandi, D. Mandati.* See the rest of the reply in the informations *apud me.* See Connanus *in Commentario Juris Civilis, libro* 5, cap. 5. *Vide* the Lords' interlocutor on this matter, *infra*, No. 507, [17th November, 1676,] and 509, [Weir *v.* Ruthven, 24th November, 1676.] See 23d June, 1680, Weir and Ruthven.

Advocates' MS. No. 482, *folio* 249.

November 17.—The Lords having this day advised the debate, *supra*, No. 482, in June, 1676, they found Eleiston was not obliged to denude of the right of the bonds, till, first, he were sufficiently secured against his cautionry in the Earl of Dirleton's testament. 2*do*, That he was only to denude of four parts, and retain a fifth part of the haill to himself, without being *pactum de quota litis.* Found, by the contract of marriage between Southesk and his lady produced, the old Earl had no right to that bond, as was alleged, but the same belonged to the present Earl, *jure mariti:* Found Eleiston was obliged to retrocess the Earl of Southesk, if he pleased, or, in his option, should prosecute their common affairs; and ordained him to exhibit the L.1000 sterling bond of the Duke of Hamilton for that effect.

This whole interlocutor was in favours of Eleiston, except only the last clause, anent producing the bond, which was occasioned by the Lords' inadvertency; for had they considered Eleiston's oath, they would have found that he declared the bond was not in his hands, as also *quomodo desiit possidere*, viz. In 1656, Thomas Dalmahoy having a pursuit before the Chancery Court of England, these writs, and particularly that bond, was by commission called for, and sent up, and never returned.

Whereupon Eleiston gave in a bill; the Lords were ashamed to retract their sentence, but superseded execution till the 1st of June, 1677, betwixt and which Eleiston might use his endeavours to recover that bond, and said they used this only to be a spur to make him serious in the getting it back; and for his encouragement, the Lords granted to give him a letter recommendatory to the Chancellor of England, head of that Court, to further the search of it, as they would expect the like favour; subscribed by the President in name of the Lords, *In P. D. Vide supra, 22d February*, 1671, No. 139.

The crampet of the recommendatory letter was this: " And by complying with this our just desire, your Lordship may expect a good correspondence in the like

cases with us, as is usual between eminent judicatories, that we may promote his Majesty's service, and give a testimony that we * * * * * * * * * * * * * * * * *." *Vide infra*, No. 574, *Dalmahoy*, [*June*, 1677.]

Advocates' MS. No. 507, *folio* 265.

1676. *November.*

ABOUT this time it was inquired, where a liferentrix and a minor are both convened anent the reduction of an heritable right, and the minor propones upon the maxim, *quod non teneatur placitare*, if the liferentrix may be compelled to answer? One would think not, *ob contingentiam causæ*, which cannot be divided. So teacheth Craig, *libro* 2 *feud: Dieg:* 12, page 220, confirmed there in the margin, from *Regiam Majestat.* and the Roman law; and Dury, 25th November, 1624, *Hamilton;* vide *Legem* 10 *in princ. D. Quemadmodum Servitutes amittuntur.* Yet they affirm the Lords found she should answer; which seems hard, for she will recur on the warrandice, and so the minor will be put consequently to answer and debate.

Advocates' MS. No. 508, § 1, *folio* 266.

1676. *November.* ISOBEL GUTHRIE, and LINDSAY of Pitscandly, her Husband, *against* ———

ISOBEL GUTHRIE, sister to the Laird of Guthrie, and Lindsay of Pitscandly, her husband, for his interest, pursuing a special declarator of the escheat single of the last Laird of Guthrie, and pretending sundry leases of lands in Ireland fell under the same; it was alleged they did not, because they being tacks set for 59 years' duration, they behoved to be at least reputed of the nature of liferent tacks, which, by the act of Parliament, 1617, fall not under single escheat, but are only carried by the liferent escheat. For evincing whereof, it was alleged that a 19 years' tack (which is far short of a 59 years' lease) is in common estimation equivalent to a liferent tack *quoad* the value, if one were to buy them; and that they ought to be so reputed as not to fall under a single escheat, may be urged from Stair's system, *Tit.* 13, *No.* 4, *in fine, pagina mihi* 170; and Hope's Collection of Practicks, *titulo* Hornings and Escheats, pages 192 and 198. They talk of an old decision about this, *The Earl of Louthian, contra* ———

There was another defence against this special declarator, viz. that thir leases could not fall under a Scotch outlawry and denunciation, they lying in Ireland, an independent kingdom, and ruled by different laws. But see more of thir two defences, *infra*, No. and in the informations. *Vide infra hoc eodem numero*, § 12.

Advocates' MS. No. 508, § 2, *folio* 266.