

1669. February 24.

The EARL of ANNANDALE *against* YOUNG and other CREDITORS of HUME.

No. 10.

Upon trust of an assignation to an apprising, witnesses, *ex officio*, were examined.

The Earl of Annandale having obtained assignation from John Joussie to a sum of money due by the Earl of Hume, whereupon inhibition was used *in anno* 1634, and shortly thereafter an apprising upon which Annandale was lately infest; whereupon he now pursues reduction of the infestment granted by the Earl of Hume to Young, as being after his inhibition, which inhibition being anterior to the most part of the debts, wadsets, and apprisings of the estate of Hume, and being supposed to be the leading case, that the decision thereon might rule all the rest, many of the creditors did concur with Young, and produced their interests, and craved to see the process. It was answered, that they had no interest in Young's right, and so could not crave a sight of the process. It was replied, that albeit the sentence against Young could not directly operate against them, yet indirectly it would, as being a decision, and practise in the like case.

The Lords found this no interest to stop process, but allowed any creditors that pleased to concur in the dispute. It was then alleged *absolutor*, because this assignation, inhibition, and apprising, albeit standing in the person of the Earl of Annandale, yet it was truly on trust to the behoof of the Earl of Hume, and if to his behoof, it did accresce to the defenders, as having right from him, and for evidence of the trust they condescended upon these grounds; *First*, That the debt was contracted 35 years since, and no diligence ever used thereupon till now, except an apprising, whereupon no infest was taken till of late, albeit infestments were taken of the estate of Hume, upon many posterior apprisings, which are now expired, and will exclude this apprising; *2dly*, The assignation granted by Joussie to Annandale's father, was immediately after the lands of Dunglas were sold by the Earl of Hume, to the Laird of Dunglas, by whom Joussie was paid, as a part of the price, by Sir William Gray, who was then debtor to Dunglas; likeas Joussie's oath being taken *ex officio* upon his death-bed, he depones that Sir William Gray paid him the money, albeit he knew not by whose means, or to whose use, yet he knew nothing of any payment made by the Earl of Annandale's father; *3dly*, This inhibition and apprising were never in Annandale's or his father's possession, but still in the possession of the Earl of Hume and his agents, and still in his charter chest; *4thly*, The Earl of Annandale took a security from the Earl of Hume for all sums due to him, or for which he was cautioner, wherein there is neither mention nor reservation of this sum or apprising; *5thly*, The Earl of Annandale has consented to many of the creditors' rights, which he would never have done, if this apprising had been to his own behoof, thereby preferring others to himself: The creditors therefore craved witnesses to be examined *ex officio*, upon all these points for clearing of the trust, which being an obscure contrivance, can be no otherwise proveable, all the actors being now dead, and is most favourable in the behalf of creditors, who, if this pursuit take effect, will be utterly excluded;

for if the inhibition reduce their rights, the pursuer's apprising supervenient upon that same sum, is now expired, and irredeemable. The pursuer answered: He did declare he would make only use of this right, for satisfaction of the debts due to him, and for which he was cautioner for the Earl of Hume, and was content that witnesses should be examined anent the inhibition and apprisings being still in the possession of the Earl of Hume in his charter-chest, but not upon any other ground to take away his assignation and solemn right, which cannot be taken away by witnesses, but *scripto vel juramento*; and most of these presumptions are but weak conjectures, nowise inferring that Joussie was paid by the Earl of Hume's means, and the great friendship that was betwixt Annandale and Hume alleviates the same, it being the cause for which Annandale forbore to take ineffectment, or do diligence, thereby to alarm Hume's creditors, that his inhibition would always work his preference, and on that same ground did consent to several creditors' rights, there being enough remaining for him, and which was an evidence that this right was generally known, and that without it Hume could not give security.

The Lords ordained witnesses *ex officio* to be examined upon all the points alleged for clearing of the trust.

Stair, v. 1. p. 612.

1669. June 22.

HAMILTON of Corse against HAMILTON and VISCOUNT of FRENDRAGHT.

Wishart of Cowbardie having wadset his lands of Bogheads and others, to George Hamilton, from whom the Viscount of Fren draught has now right, he did thereafter sell the same lands to John Hamilton of Corse, who took the gift of Wishart's escheat; and having thereupon obtained general declarator, pursues now in a special declarator for the mails and duties of the wadset lands. Compears George Hamilton and the Viscount of Fren draught, and produced the wadset right, and alleged that the life-rent right cannot reach the wadset lands, because the gift is simulated to the behoof of Wishart the rebel and common author, and so is *jus superveniens auctori accrescens successori*, to defend this wadset right; and condescends that it is simulated, in so far as it is offered to be proved, that Wishart the common author did allow to the donatar in the price of the lands, not only the sum whereupon the horning proceeded, but also the expenses of the gift; so that it is purchased by the rebel's means, whence the law presumes it to be to his behoof. It was answered, That this condescence cannot infer simulation to the rebel's behoof, because it was lawful to Hamilton of Corse, finding that his right was not secure to fortify the same by this gift, and in his account of the price of the land upon the warrandice, he might require retention, not only of the sum in the horning, but of his expenses in necessarily purchasing the gift, and might apply the same for the security of the lands bought from the rebel only, which is

No. 11.
What affords presumption, that a donatar of escheat is a concealed trustee for the rebel?