

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

FINDLAY having charged the said Thomas upon a decret 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 decret given against him; whereas he in manner foresaid purged his contumacy, offered to refund to the charger the expenses of the decret, condescended on the exorbitancy of sundry of the articles, and craved to be reponed to his oath.

Strathuird inclined to repone him, but they opposed the decret, 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.*

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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