

1694. *June 27.* MR DAVID FORBES, Advocate, *against* WILLIAM COCKBURN, Merchant.

MR David Forbes, advocate, as creditor to William Cockburn, merchant, offering to poind his shop ; his daughter compeared, and was content to deponé that the goods were hers ; and the messenger going to proceed notwithstanding, the Lords, on a bill, stopped him till they heard the parties.

MR David ALLEGED, That this was only a palliation of fraud, and collusion ; the daughter being still *in familia*, and having no *peculium* nor stock of her own whereon to trade, but only her father's credit ; who would rather gift them to his daughter, who would always make the price forthcoming to him, than let them be poinded by the creditors.

The Lords, thinking the case suspicious, they ordained the pointing to go on ; but, in case she deponed, they allowed her the goods, she always finding sufficient caution to restore them, or the value, to Mr David, if he prove the property belonged to the father.

*Vol. I. Page 622.*

---

1694. *June 28.* WILLIAM RUTHERFORD *against* MR JOHN GRIEVE of PINACLE.

CROCERIG reported William Rutherford against Mr John Grieve of Pinacle : who, being debtor to Rutherford in 700 merks, he gives him an assignation to one Gray's bond for that sum ; with this quality, that, in so far as he could not recover it, he should be liable to make it up himself. When Rutherford charges the Grays, they SUSPEND, upon partial payments, and produce discharges ; which is intimated to Grieve, and he takes up the discharges, and keeps them several years ; and, being now convened on the warrandice, he alleges they cannot recur against him, till they discuss Gray's suspension.

ANSWERED,—You are *in culpa et mora*, seeing you gave not back the receipts.

REPLIED,—You never required them ; and, if you had, I would have concurred with you, and instructed that they did not prove payment.

The Lords were clear, that such an assignee was bound, in the terms of the back-bond, to have insisted for the recovery of the debt assigned to him ; but, in regard of the circumstances, that he had taken up the receipts, and kept them several years, without furnishing Rutherford with defences against them, therefore, in this case, they found the cedent, and not the assignee, was bound to discuss the debt : and ordained Rutherford to retrocess Pinacle to the right of Gray's debt : and found the letters orderly proceeded against Pinacle for the 700 merks.

*Vol. I. Page 622.*

---

1694. *June 28.* ROBERT CHAPMAN, in Kirkaldy, *against* THOMAS ROW.

THIS was a charge, on the Sheriff of Fyfe's decret, for 400 merks, conform to Chapman's obligation in a discharge. The reason of suspension and reduction was, That the obligation being relative to a clause, obliging him to pay all Doctor

Lumsden's debts contracted during the time he was married to the said Robert Chapman's mother; *sed ita est* this was none of them. One question arose, Whether the principal discharge needed to be produced, seeing it was fully narrated in the Sheriff's decreet, and the tenor of it was not controverted by the parties, but only the meaning and interpretation of it. Therefore, the Lords found the obligation of the 400 merks was separate and distinct; and found the letters orderly proceeded: reserving his reduction, when the production should be satisfied, by the principal discharge being produced in the process.

*Vol. I. Page 622.*

1694. June 29. WALTER SCOT of TUSSILAW against JOHN GRIEVE of PINNACLE.

IN the declarator of trust, pursued by Walter Scot of Tussilaw, against John Grieve of Pinnacle, a quaker, that the disposition he gave him of his lands was in trust, and only for his own behoof; the qualifications of the trust were partly founded on some missive letters of Grieve's, and on the smallness of the price; and that the narrative of the disposition does not bear an obligation to pay it, either to Tussilaw or his creditors, but only, that the land shall stand affectable for the creditors' diligence, in so far as may extend to 25,000 merks, &c. Pinnacle opposed the disposition, as simple and absolute, and bearing an onerous cause,—*viz.* the 25,000 merks, the undertaking of 1700 merks of yearly annuity to Tussilaw's grandmother, and the disposing the roun of Easter Pinnacle to Tussilaw, being worth 300 merks yearly; and denied any trust, farther than what ease he should drive Tussilaw's creditors to give him down; that it was to accresce to Tussilaw himself: and that this was all that his letters imported.

The case was intricate; and some were for allowing either party a mutual probation, before answer, as to the grounds inferring trust, or eliding it; but the plurality thought this was to involve them in a labyrinth of trouble and expenses; therefore, they found the trust proven, in regard the disposition could not import a sale, there being no price. And, in law, *emptio et venditio subsistere non potest sine pretio*: and, therefore, reponed Tussilaw to his own right. (But I think this will not extend to rescind a posterior sale of a part of thir lands, made by Pinnacle, with consent of Tussilaw, to Michael Anderson; but only that Pinnacle shall count for the price received, and how far he has expended it in payment to Tussilaw's creditors.) And ordained them to count and reckon; and declared, that Pinnacle should have deduction and allowance of all payments, expenses, and disbursements, on Tussilaw's affairs, together with a consideration for his pains.

*Vol. I. Page 624.*

1694. June 29. The CREDITORS of SIR ADAM BLAIR of CARBERRY against ROBERT DICKSON of SORNBEG.

AN objection was reported against the roup of Sir Adam Blair of Carberry's estate, in favours of Robert Dickson of Sornbeg, as he who offered most for it.