

No 82. time of the commissary's death; and that it did not continue, is evident; because the backbond was found retired, lying beside him cancelled the time of his decease, which extinguished the trust; it being clear and demonstrative law, that the retiring and re-delivery of the backbond to the commissary who granted it, made the assignation pure and simple, and become absolutely the commissary's own property, as fully and effectually as if he had taken a discharge of the backbond; and the finding it beside him scored and obliterated, brought it to the case of an *instrumentum apud debitorem repertum*, which presumes liberation; so we are to consider its state, not as it was *ab initio*, but as it stood at the time of the commissary's death; and though it be acknowledged in his pocket compt-book, that shews indeed his probity and integrity, but noways that it continued a trust; for his retiring the backbond shews the contrary. Now, put the case, a man who has granted a bond for 1000 merks, writes down in his note-book, that he was debtor in that sum; but after his death, the bond is found lying beside him retired; will that confession in his compt-book constitute the debt against him? *Nullo modo*, for the retired bond will preponder, and take off the presumption: Even so here. *Replied*, The having the backbond in his custody, cannot annul the trust; for he might come by it on sundry other accounts; such as his being tutor to his brothers, and so master of their papers. *2do*, It might have been delivered up to him, to draw a retrocession by it, for denuding him of the trust. *3tio*, He dying suddenly, there was a *fama clamosa* presently raised, that he was only trustee in that debt; and that the declarator was so long of raising, was, that John was a very weak person, and little distant from a fool. *Duplied*, All these are *gratis* assertions, and no term can be now granted in a concluded cause. THE LORDS found it was originally a trust; but that the same was discharged and taken off by his retiring and cancelling the backbond; and therefore assoilzied the commissary's children from the declarator of trust, notwithstanding of the presumptions adduced for its continuance.

Fol. Dic. v. 2. p. 138. Fountainball, v. 2. p. 735.

SECT. IV.

Tocher stipulated by a Wife in her Contract of Marriage when presumed paid.

1665. July 26. BROTHERSTONS *against* OGLE & ORROCKS.

No 83.

JANET BROTHERSTONS, by her contract of marriage, declaring, that she had in money, bonds, and goods, 4000 merks, is provided to all the conquest, and

to the liferent of the whole means and moveables; she pursues her husband's heirs for implement, who *alleged*, Absolvitor, because she has not fulfilled her part of the contract, and instructs not that she delivered to her husband 4000 merks in worth or ware. It was *answered*; It must be presumed that she has done it after so long a time, seeing all she had came in possession of her husband.

No 83.

THE LORDS found the presumption not sufficient; but before answer, ordained the pursuer to condescend by witnesses, or otherwise, how she would prove, that she had that means the time of the marriage, and ordained these to be examined *ex officio*.

Fol. Dic. v. 2. p. 139. Stair, v. 1. p. 302.

1672. December 11. CALDERWOOD against CUNNINGHAM.

No 84.

ALEXANDER CALDERWOOD, as donatar to the bastardy of Robert Menzies, pursues Margaret Cunningham his relict, for delivery of his goods, who *alleged*, That she was executrix-creditrix confirmed for implement of her contract of marriage. It was *replied*, That she could not retain for 3000 merks, which was her tocher, because herself was obliged to pay the tocher, and the husband was only obliged to employ it when he received it. It was *answered*, That the clause being, that she, and a friend who contracted with and for her, being obliged to pay conjunctly and severally, and he not being cautioner, or having any clause of relief, the husband ought to have put him to it, and the wife during the marriage, was not in capacity to do any thing; and it is ordinarily sustained for relicts to have their jointure, though their tocher be not paid.

THE LORDS found, That the wife and her friend being bound as co-partners, if the husband failed in diligence as to her friend, it should not prejudice the wife, and therefore gave her allowance as to the one half of the tocher, and not to the other part, in regard that her friend might have had recourse to her for that half, in case he had been distressed.

Fol. Dic. v. 2. p. 139. Stair, v. 2. p. 131.

* * Gosford reports this case.:

ALEXANDER CALDERWOOD, as donatar to the estate of Robert Menzies, by reason of bastardy, did pursue Margaret Cunningham, as vitious intromissatrix with her husband's goods, who was debtor to Menzies. It was *alleged*, *imo*, That the gift of bastardy could be no title to the donatar, but he ought to confirm, the sums being moveable; *2do*, The defender was confirmed executrix-creditrix to her husband by her contract of marriage, whereby he was obliged to employ 9000 merks to him and her in liferent, and so had right to the whole goods confirmed during lifetime. It was *replied* to this last defence, That by the contract of marriage, the husband was to employ 3000 merks of