

1673. *July 1.* CAPTAIN CRAWFORD, Collector of the Vacant Stipends, *against* MR JOHN BEATTON, Minister at Ayton.

CAPTAIN Crawford, as collector of the vacant stipends, having charged the minister for payment of the stipend uplifted by him for the year 1667, in respect he had neither collation nor institution until the year 1668; before which time he could have no right, seeing his presentation before that time could be no title, and might have been refused by the Ordinary, or he himself might have passed from the same:—

It was ANSWEED, That he having a presentation in the year 1668, after which he did officiate immediately by the bishop's warrant, until he got collation and institution, and so did discharge the duty for which the stipend is due; and so soon as he was admitted by collation and institution, the same must be drawn back to the presentation, and give him a right to a year's stipend, for which he had served the cure.

The Lords did SUSPEND the letters, and found, that the minister having served the cure, as said is, and received collation and institution, was not in the case of a vacant stipend; and his condition was different from an actual minister, who had received a presentation to be transplanted, and retained the stipend of his own kirk until he was of new admitted.

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1673. *July 1.* ROBERT MITCHELL *against* JOHN PRINGLE of WOODHEAD.

ROBERT Mitchell, as assignee to a decret before the commissary, against John Pringle of Woodhead, having charged him to make payment of one hundred and fifty three pounds, as the price of merchant ware, sold and delivered by his father, did SUSPEND, and intent reduction, upon this reason;—That the ground of the decret being for a merchant's account, was not probable but *scripto vel juramento*, and was prescribed as to all probation by witnesses: notwithstanding whereof, witnesses were led; and, upon their depositions, decret was given.

It was ANSWERED, That the ground of the decret was founded upon the suspender's promise of payment, which he having confessed, in case the delivery of the goods should be proven, and not having adjected that quality, that it should be proven by writ, the prescription was taken off, that they might prove *prout de jure*.

The Lords did find the letters orderly proceeded, in respect of the promise confessed, without that quality, that the libel was probable by witnesses.

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1673. *July 3.* MR ALEXANDER SEATTON of PITMEDDEN *against* JOHN FORBES of CRAIGIVAR.

PITMEDDEN, as executor to his goodsire, and thereby having right to a bond

granted by Craigivar's father, whereby he was obliged to cause one Burnet transfer a bond to him of five hundred merks, who was made assignee to his behoof; which bond was granted by Seaton of Disblair to one William Donaldson; did thereupon pursue Craigivar, as representing his father, to make payment of five hundred merks, seeing his father had not performed the obligation, and caused his servant, Burnet, grant the translation, at or before the term to which he was obliged to procure and deliver the same.

It was ALLEGED for the defender, That he could not be decerned to refund the five hundred merks upon that ground, because the pursuer's goodsire, nor father, did never require the same, which, in law, they were bound to do; seeing, in the bond charged upon, he did grant the receipt of the bond and assignation, without which the translation could not be drawn.

It was REPLIED, That the bond being pure and absolute, without any condition to procure a translation betwixt and a certain day, the same being elapsed, *dies interpellit hominem*; and there being no condition that Pitmedden should require or exhibit the writs delivered for drawing of the translation, he became debtor in the bond, for not fulfilling. And the reason why he had not been pursued for so long a time, since the year 1633, was, that the pursuer's goodsire did soon die thereafter, and his father was killed in the king's service at the Bridge of Dee, in the year 1639, and himself minor a great part of that time.

The Lords decerned, notwithstanding of the defence, and found, that Craigivar, being bound to perform at a certain day, without any condition, in case he should be required, that there was no necessity, upon Pitmedden's part, to do the same; and that Craigivar, if he had need of the bond and assignation for drawing of the translation, should have required him to exhibit the same; which not being done, the bond was obligatory against him and his heirs.

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1673. July 5.

SINCLAIR against JULIANA SMITH.

IN a reduction of a disposition of a tenement of land in Dunse, at the instance of one Sinclair, as being made *inter conjunctas personas*, in so far as the said Juliana was the disponder's wife's sister:—

It was ANSWERED, That the defender having no relation of blood, but only by affinity, and the disposition bearing for sums of money, and an onerous cause, could not be taken away but *scripto vel juramento*.

It was REPLIED, That the law puts no difference betwixt relations of affinity and consanguinity; and, therefore, the defender ought to condescend upon the onerous cause, and instruct the same. After which, she being ordained to give in a condescendence, and lead witnesses for proving thereof, or any writs she could adduce; before answer, she condescending that the onerous cause was for two bonds delivered up, wherein the disponder was debtor; which, with the expenses of the infettment, did amount to the value of the land: for proving whereof, she could only adduce *testes singulares*, as to one of the bonds; and another witness, that deponed only *ex auditu*, that he heard the disponder confess that he was debtor by another bond.

The Lords did take the defender's oath in supplement, and found, That in