

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

this case, where the conjunct person was only related by affinity, that *talis qualis probatio* was sufficient; but where the condescence did bear, giving to the disponent money when he was in prison and in distress, which she confessed was after the disposition, they refused to sustain the same as a part of the onerous cause, and reduced *pro tanto*.

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1673. July 9. NICOLL HARDIE *against* THOMAS WILSON.

IN a removing from a brewery, within Edinburgh, pursued at the said Nicoll's instance, against Thomas Wilson, who had obliged himself, by a minute, to remove himself at Whitsunday, notwithstanding of a comprising and infetment;—It was ALLEGED, That the minute, wherein he was obliged, was conditional,—the pursuer paying a part of the sums of money contained in the comprising, which was not yet satisfied; and albeit he were now ready to satisfy the same, yet it being within the term, he could not be decerned to remove until Martinmas next.

It was REPLIED, That he being warned fourteen days before the term upon payment of that sum, which was the condition in the bond, he ought presently to remove.

The Lords found, that the condition, not being offered to be performed before the term, the defender was not obliged to remove until a new warning; but, in respect of his consent, they decerned him to remove at Martinmas next, he being paid.

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1673. July 19. The LAIRD of UDNEY *against* AYTOUN and PLENDERGAST.

IN a summons, to make arrested goods forthcoming, at Udney's instance, against the Laird of Aytoun, who was debtor to Plendergast for the price of some lands dispoised to him by Plendergast, against whom the Laird of Udney had obtained decret for a great sum of money:—

It was ALLEGED for Aytoun, That he could not be decerned to make forthcoming, because he was conjunct-cautioner, with Plendergast, for the Lord Mordington, and they were mutually bound to relieve others; and he being distressed, ought to be relieved, or otherways might detain whatsoever sum is due by Plendergast, by way of compensation.

It was REPLIED, That the pursuer having used arrestment long before any distress, he did thereby affect the sums arrested, and his right acquired thereby cannot be taken away by any subsequent distress; seeing, if he had pursued to make forthcoming before the distress, Aytoun could never have defended himself upon a naked obligation of relief.

The Lords did find the allegiance relevant to assoilyie the defender from making forthcoming the sums arrested, seeing he was actually distressed during the dependence, and that the dependence was drawn back to the obligation of