

1673. *June.*KINLOCH *against* ———

MANNA KINLOCH, spouse to James Charteris, writer, being convened before the Lords of Secret Council, for breaking the sumptuary act regulating apparel, two points fell to be spoken of; but were not debated, because she was assolied through lack of probation. The first was, Where a married woman is convicted of the breach of a penal statute, what the effect of the same is in law: if it can extend to her husband to make him liable in the fine; or if it will allenary operate to punish herself in her person, by imprisonment, or in her goods, at the dissolution of the marriage. I think it ought not to burden the husband: else many wives, to affront their husbands, or otherwise be avenged on them, would break it of purpose. But see this point fully debated at my observes upon the said sumptuary law, [*supra*, 1st June, 1673.] See also the 5th Act in 1670. The second thing was, If the transgression of that act was probable by women; for, being at a rousing where she was noticed, there were few others save women observed her. It seems contrary to law to find it so probable; for, albeit they admit women to be witnesses in *puerperio*, anent the vivacity of children when born, for carrying the tocher, yet an absolute necessity is the cause of the singularity there; because, if they rejected women, they should never prove it, it being an act transacted commonly by women alone, and none else present; but regulariter they are not receivable, except it be, *Imo*, In scoldings and small riots; *2do*, In crimes of the highest nature, as treason and witchcraft. See Mr Norvell's opinion on this, *alibi apud me*.

Advocates' MS. No. 397, folio 217.

1673. *June.*ROBERT DEANS *against* ———

A CHARGE, given by Mr Robert Deans, advocate, upon a bond, being suspended, on this ground, that the bond was null, because vitiated *in parte substantiali*, *videlicet*, the sum; it being clear, by ocular inspection, that 100 merks was made 800 merks; for which reason, the Lords annulled the bond *in totum*, and would not so much as sustain it for the 100 merks, which was confessed by all to have been the true sum contained in the bond *ab initio*; and that *in poenam falsi*. Though we say *utile per inutile non vitiatur*, and especially if the charger was an assignee, and not *particeps fraudis*. *Vide* something like this, *supra*, No. 362. [19th July, 1672, *Jack against Jack*.]

Advocates' MS. No. 398, folio 217.

1673. *June.*BIRNIE *against* CRAWFURD.

BIRNIE and Crawford competing in a double poinding for a sum which both of them had arrested, Crawford craved to be preferred, in regard he had arrested first. (*Vide Cavalcanum de Testibus*, p. 39, et 67, et 68.) Birnie contended, that

though he was posterior in arresting, yet he had prevenced the other in diligence, and was pursuing to make forthcoming; whereas Crawford had done nothing on his arrestment.

REPLIED, that, beside his arrestment, he had also an assignation to the same sum from the creditor in it, who was their common debtor, and that he conjoined his two titles. (*Infra No. 492, § 6.*) [July, 1676.]

DUPLIED, his assignation was of no value, being after the arrestment laid on by the duplier; and two imperfect and invalid titles could never be joined in prejudice of him who had a right, and had done diligence, preferable to any of them *separatim*.

The Lords preferred him who had the two titles, though apart they were lame, *ut quæ non prosunt singula, multa juvant*.

Many doubt if this was well decided, seeing as M^r.K. in his pleadings, page 61, has it, weak arguments conjoined can, by their mutual assistance, never astruct a right, no more than many cyphers can make a number, or many uncertainties a certainty. (Yet many beams of light may make a perfect light.) *Omnino, vide Taylor in his Ductor Dubitantium, lib. 1, cap. 4, p. 91.*

Facit lex unica, C. Qui numero tutelarum se excusant, l. 15, par. 11, D. De excusationibus tutorum. Vide tamen, l. 5 et 6, C. de probationibus; from which commentators infer the conjunction of divers sorts of probation. Vide Vinnium Selectarum Quæst. 44; L. 28, p. 3, D. ex quibus causis majores; l. 27, C. de testamentis, cap. 13, extra, De probationibus; cap. ultimo, extra, De successionibus ab intestato.

Advocates' MS. No. 399, folio 217.

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ANENT CERTIFICATIONS.

IN certifications, it is undoubtedly a good defence, that the writs craved to be produced, either in a reduction or improbation, are in the pursuer's own hands; and Hadington shows that it was so found in an improbation pursued by the Laird of Corstorphin against the Old Lady Corstorphin, at the 16th of December, 1609, No. 80.

Advocates' MS. No. 401, folio 218.

1673. June. MARGARET HOME *against* MARGARET SMITH.

IN an action of reduction pursued by one Margaret Home against one Margaret Smith, for reducing of a disposition of some lands in Dunce made to the defender, this reason was mainly insisted on, That the said disposition was, by act of Parliament in 1621, null, being made to a conjunct person, (*videlicet*, to the granter's sister-in-law, whom the common law æquiparats to brothers and sisters in this case,) without any onerous cause, in defraud of lawful creditors and their diligences. *Vide l. 27, C. De Donationibus.*