

received; because the bond, being granted to them *conjunctim*, did belong equally to them; and any one might pursue for his own half: And albeit it was for the price of goods of the copartnery, yet the bond being taken and received, as said is, was not to be regulated as the goods themselves would have been, wherein every one of the copartners would have had an equal interest, as to all particulars; whereas the bond being conceived, as said is, ought to give right according to all bonds of that nature; and so gave right to each of the creditors to the half which they might lawfully uplift.

Page 141.

---

1671. *January 26.* FERGUSON *against* The PARISHIONERS of KINCARTH.

ALEXANDER Ferguson, as one of the prebends of the Chapel-Royal, having pursued the heritors of the Parish of Kincarth, for their teinds, for bygones and in time coming;—Compearance was made for the parson of Rothesay, whereupon it was ALLEGED for him and the parishioners, That they ought to be assoilied, because he had a presentation to the said kirk and parsonage, bearing the teinds of Kincarth, and was in possession by the space of 40 years.

It was REPLIED, That the pursuer, being a prebend of the Chapel-Royal, to which the teinds of the said parish were annexed, ought to be preferred to the said parson of Rothesay, whose right was only a naked presentation clad with possession.

The Lords, as to all bygones, did assoilvie the Parishioners who had made payment; but did decern for all years since the citation: the pursuer always instructing by the books of assumption, or an extract forth of the same, that the kirk of Kincarth is one of the prebend kirks of the Chapel-Royal.

Page 143.

---

1671. *January 27.* The EARL of DUMFRIES *against* ALEXANDER BURNET and HAY his Mother.

THE Earl of Dumfries's father being debtor to Andrew Smith, by bond, in the sum of £4600; whereupon inhibition was served, before that Dumfries did dispoise the Lordship of Sanquhar to the Earl of Queensberry, in the year 1638: by a subscribed condescendence, Queensberry was to retain as much of the price of the lands as that sum did amount to, until the inhibition should have been paid; after which, *in anno* 1643, Dumfries, having got a discharge from Andrew Smith, the creditor, did deliver the same to Mr Alexander Burnet upon a ticket of receipt; whereby he was obliged to registrate the same, and give an extract thereof for purging the inhibition: And, in the year 1669, Dumfries did intent an action against Burnet's heir and executor, for delivery of an extract of the discharge, or payment of his principal sum, and annualrents accordingly.

The Lords did decern, superseding extract until November thereafter; that, in case the defender should recover a discharge from Smith's heirs, or obtain a

decreet of improbation against the bond and inhibition, and then no decreet should be given against them.

The said defenders having pursued an improbation, and certification therein granted, and before extracting, both parties being heard ; It was ALLEGED, That a decreet of improbation could not secure either Dumfries or Queensberry, because Andrew Smith, the creditor, might have either assigned the bond to another, or it might have been comprised, and legal intimations and executions used against Dumfries, at the pier and shore of Leith, when he was out of the country for many years together ; so that nothing could secure but a discharge from Smith's heirs.

The Lords did, notwithstanding, assoilyie the heirs and executors of Burnet from payment ; and ordained the decreet of improbation to be extracted ; but withal ordained the defenders to find sufficient caution to warrant both Dumfries and Queensberry during the whole years of the prescription ; especially upon this consideration,—that, by the space of thirty years, there was never any pursuit used by any assignee, compriser, or arrester.

Page 145.

---

1671. *February 1.* MARK CASS of COCKPEN *against* DOUGLAS and OTHERS.

IN an action, pursued at Cockpen's instance, against some of the Laird of Bonjedburgh's tutors, upon a missive letter subscribed by them in name of the whole tutors, bearing,—that their pupil being debtor to Henry Douglas, who was debtor to the pursuer ; that the pursuer should fit an account with the said Henry, and write to the defenders what sum was due to him, and appoint one to receive the same, or bond therefor ; which they were willing to grant, or make payment in a very short time : whereupon he did subsume, that he having gotten a bond, from the said Henry Douglas, for 524 merks, the defenders ought to be decerned to make payment.

It was ALLEGED for the defenders, That the missive letter was not now obligatory ; because,—it being subscribed *in anno* 1658, when the defenders were tutors to Bonjedburgh, and bearing only an offer to become debtors within a short time, upon closing of accounts and reckoning with Henry Douglass ; the pursuer never having declared his acceptation thereof until the defenders were all out of office, and did never intimate the same, but by intending this action, by the space of 11 years after the date of the letter, before which time payment was made to Henry Douglas,—the missive letter could not be sustained as obligatory ; it being of the nature of a bill of exchange, which should have been intimated, and returned within year and day.

It was REPLIED, That the letter was opposed, bearing no special time. But that whensoever count and reckoning should be made with Henry Douglass, the defender should be liable ; after which, they should have retained as much in their own hands, of their intromission with the pupil's means, as should have relieved them.

The Lords did sustain the defence ; and found, That the letter was not obligatory after the expiring of the tutory ; unless the pursuer will prove, by the tu-