

1710. November 28. MARION GOURLAY *against* CHARLES DUMBRECK.

No. 29.

Trustees
bound to
keep exact
accounts.

Marion Gourlay, relict of Thomas Caldwell, merchant in Edinburgh, pursues Charles Dumbreck, captain of the town-guard, on this ground, that her husband had right to £.49 Sterling, of arrears, owing to Lieutenant Innes in Colonel Rowe's regiment, for which he drew a bill on Rowe, payable to Captain Dumbreck; and she, as having assignation to this debt from her husband, pursues Dumbreck either to pay the money, or retrocess her to the bill, seeing she offered to prove by his oath, that he was only trusted with the said bill for recovering payment, and was to be compatible to her husband for the same. He deponed, That he received the said bill from her husband on Rowe, and acknowledged it was in trust, and not for his own behoof; and that he transacted with Colonel Rowe, and got £.17 10s. Sterling from him on his assertion there was no more, (there being no written instruction of the debt) and that he does not remember what was the sum in the bill, and he was willing to pay her what he had got. This oath coming to be advised, it was alleged, That it clearly proved the trust, and that he had no proper interest of his own in the sum; and therefore he had no power to transact and compone the debt, and give down on Rowe's word; but he ought to have consulted his constituent, and either taken his consent to the abatement and transaction, or have reponed him in his own place, and not given up the bill to Rowe;—and as to the quality, that he did not remember what was the sum contained in the bill, that could never exonerate him, being *in facto proprio et recenti* within these few years, and was *ignorantia affectata*, and approaching to dole; for he who undertakes a trust, ought to have kept some record, memorial, or note of the debt, and *non memini* was repelled in a case less favourable than this, 6th Feb. 1675, Irvine *contra* Carruthers, No. 105. p. 12031.; for allow this, a compendious way is paved, to cover all perjury, and he being a mere trustee, only interposed to receive the money, he was *in mala fide* to take any small sum in satisfaction of the whole without his constituent's advice, *et nemo debet ex sua culpa lucrari*. Answered, That Caldwell reposed that trust in him, as knowing he could recover it much better than himself, he being acquainted with all the officers of the army, and Caldwell could never have made so much of it as he has done. And it is no wonder, that, after some years, he cannot precisely mind the sum, and he is a soldier, and cannot come up to all the exactness a lawyer might have used; but the truth is, he got no more. The Lords thought his carelessness in not keeping an account of what the precept contained, was unwarrantable and unjustifiable; and therefore held him as confessed on the £.49 Sterling, libelled; but if he was able to adduce any document or evidence, that Colonel Rowe owed Innes no more but £.17. 10s. Sterling libelled, they gave him 14 days to recollect his memory; and failing thereof, they ordained the decret to be extracted after that time; for the Lords thought it evident from his oath, that the sum in the bill behoved to be more than what he received, because it bears, that Colonel Rowe affirmed, Innes' arrears came to no more than

the £.17 10s. Sterling, which assertion Dumbreck ought not to have acquiesced in without Caldwell's concurrence and assent thereto.

No. 29.

Fountainhall, v. 2. p. 600.

1712. June 24.

MARTHA WRIGHT, and DAVID KINLOCH of Conland, her Husband, *against* JOHN WRIGHT, Merchant in Edinburgh.

The deceased John Wright, Bute-pursevant, January 28, 1707, did (under the reservation of his own liferent, and of his whole household-plenishing, and a liferent of 200 merks yearly in favour of Lillias Sanderson, his wife) dispone his whole estate, heritable and moveable, to Alexander Wright, his only child, and the heirs of his body, which failing, to Laurence and Martha Wrights, his brother and sister, and John Wright, merchant in Edinburgh, his brother-in-law, equally among them, and their heirs. Which disposition bore the said John Wright to be named tutor to the disponent's son, the institute, and that the writs were instantly delivered to him, in name of the son and the other substitutes. On the same day, Lillias Sanderson procured from her husband another disposition of all his moveables to their son, and, failing of him, in favours of herself, over and above the 200 merks of liferent. Which disposition was perfected by an instrument of possession, of the date thereof, in favours of the wife; and thereafter transferred by her to John Wright, one of the substitutes in the other disposition, for payment of the liferent provided to her in that other disposition. The disponent's son, and Laurence Wright, another of the substitutes, having died, Martha Wright, as heir served to them, raised a reduction of the disposition in favours of Lillias Sanderson, the wife, upon these reasons, viz. Either it was prior or posterior to the pursuer's disposition; if prior, it was *donatio inter virum et uxorem, quæ solum morte confirmatur*, and was revoked by the subsequent disposition; if posterior, it was *a non habente potestatem*, the disponent being *ab ante* denuded by the other disposition, containing warrandice from fact and deed.

Answered for John Wright: The pursuer ought to be positive in the fact whereupon she founds her reason of reduction; for a pursuer is not, as a defender, privileged to propose contrary allegiances; and how can the Judge determine any thing certainly, while the pursuer is at an uncertainty how to insist? *2do*, The defender answers the pursuer's *dilemma*, by proposing another, that is, If the disposition in favours of the wife was granted before the other, it is not revocable, being a reasonable provision to a wife, no otherwise provided; if posterior, (which is more probable), it ought to subsist, in respect it doth not appear that the first disposition was a delivered evident, and it bears no clause dispensing with not delivery.

Replied for the pursuer: The disposition in favours of the pursuer, and the other substitutes, bears to have been instantly delivered to the defender, as tutor

No. 30.

A trustee who buys a right which may compete with the right wherein he is trustee, cannot thereby prejudice the trust.