

No. 2.

pended the pursuer's decret whereupon he was warded; so that the debt being so suspended, and this suspension seen by the Bailies, they had no ground whereupon to detain him any longer, but might lawfully enlarge him. This exception was repelled, seeing the suspension gave no warrant to put the party to liberty, without which, and that they, upon that warrant, had been orderly charged to do the same, they could not, at their own hand, have put him to liberty; for the suspension might have been discussed against the debtor, and so the creditor greatly prejudiced; and they were not judges to consider of that suspension, neither ought to have done any deed prejudicial to any of the parties before it had received a decision, or that they had received a specific warrant for their proceeding, or had been charged to put him to liberty by the Lords' letters.

Clerk, *Gibson*.

*Fol. Dic. v. 2. p. 414. Durie, p. 201.*

\* \* A similar case was decided, 25th June, 1642, Whyte against the Bailies of Wigton, No. 16. p. 7793. *voce* JUS TERTII.

1626. July 7.

BROWN *against* PITCAIRN.

No. 3.

One of two debtors having suspended a charge, the defence, that no execution could pass against the other till the suspension should be discussed, was repelled.

John Brown and Elizabeth Mercer, being executors confirmed to Matthew Allan, recover decret against Patrick Pitcairn, and certain other persons bound with the said Patrick, for a sum of money addebted by them to the defunct; and the said Patrick being charged thereupon, he suspends, upon these reasons, viz. that the decret foresaid was recovered upon the charges of John Brown, the other co-executor; likeas, Elizabeth Mercer promised to him, before ever she should seek any execution thereupon, that she should pay to the said John Brown the half of the expenses bestowed by him in obtaining of the said sentence, and also to refund to him what she had received of the defunct's goods more than her own half; it being of verity, that she had meddled with more than her part would extend to, so that she could seek nothing by virtue of this sentence, she being full handed, as said is, of her own half and far more; and the said John Brown compared in this process, and adhered to this reason, and desired count and reckoning of the said Elizabeth Mercer, co-executor with him. The second reason was, that another of the persons bound conjunctly in the said bond with the said Pitcairn, suspender, had suspended the charges before any charge given to this suspender, which suspension ought to be first discussed before any new charges can be executed against the suspender. These two reason were both rejected; for the Lords found, that Mercer, the other executor, now charger, might charge for the one half of the debt acclaimed, albeit the other executor should not charge for his half, and albeit that the one executor had intromitted with more than her half, but prejudice of the action which any of them might move against the other for count and reckoning, which they found was not proper to come in this suspension, concerning the pay-

ing of the debt owing to the defunct, and acclaimed by one of his executors, which might be sought for that executor's own half, albeit the other should not concur: And sicklike, albeit one of the parties bound had suspended, the Lords found, that that was no cause but that execution might be sought against any other party bound conjunctly and severally, he who first suspended being dead, and that the person now charged ought to repeat, in this suspension, any reason and argument contained in that suspension, if any was contained therein, which might suspend the charges and payment now used and sought from him; which former suspension the Lords found not to be a reason to stay execution against this suspender, except the reason thereof being repeated here be relevant to import the same.

No. 3.

*Alt. Oliphant.**Durie, p. 210.*

1628. *March 4.* GLEN *against* FRASER and HAMILTON.

Glen of Barre is charged by Fraser of Knock, and Hamilton, for fulfilling of a contract, containing divers heads. Barre suspends, and one of the heads of the suspension is discussed; and Knock is content to take out his decret anent that head, and to pass from the rest *pro loco et tempore*, and that Barre shall be charged of new before he can put the letters to execution against him; but alleged the pursuer could not so do, but that the hail suspension behaved to be discussed *simul et semel*. The Lords found he might pass from part of his charge, although the hail be suspended.

[No. 4.

*Auchinleck MS. p. 225.*

1628. *December 13.* M'CULLOCH *against* EARL of MORTON.

In suspensions of double-poining, sometimes one of the parties compears, and propones reasons to exclude the other party, and yet will not crave to be answered and obeyed of the duty in question; which the Lords sustained in the suspension of double-poining received by M'Culloch of Ardwall against the Earl of Morton, principal tacksman of the teind of Ardwall, to the Earl of Galloway, who had let the suspender a sub-tack, with consent of the said Earl on the one part, and the Earl of Galloway on the other part; which of them had best right to the duty of the suspender's sub-tack: It was alleged by the Earl of Galloway, that the duty could not belong to Morton, because Morton's was reduced, and so *per consequentiam* the debtor's sub-tack; but at this time he would not dispute farther but to exclude Morton.

No. 5.

*Auchinleck MS. p. 226.*