

No 7. true cause, which being confessed as said is, the letters were suspended *simpliciter*.

*Fol. Dic. v. 2. p. 20. Haddington, MS. No 2664.*

No 8.

1624. July 24.

ROSSIE against Her CURATORS.

SUSPENSION of a registered bond of 200 merks of principal, and L. 40 of expenses: *Ratio*, no money received, nor good deed, and the man suspender who is cautioner, and the woman is principal, being to marry together, as now they are married, the charger, at the least his father to whose behoof the bond was made, being curator to the woman, would not deliver the woman's evidents till he got this bond, which was no just cause of the bond, and so the bond is given *ob instrumenta deposita reddenda*, which is a shameful cause; and refers this to their oaths, father and son.

Find the reason relevant, and grant letters to warn them to give their oaths.

Clerk, *Durie*.

*Fol. Dic. v. 2. p. 20. Nicolson, MS. No 560. p. 387.*

No 9.

A tutor in law having by the advice of friends, granted a factory to the pupil's mother, who on that account gave him a bond for a considerable sum, the Lords found this an unlawful transaction; for a tutor, though he may grant a factory, ought to make no profit to himself upon any engagements he enters into for behoof of the pupil.

1639. February 27.

MUSHET against Dog.

ONE Mushet being served tutor lawful to his brother's bairns, transacts with Elizabeth Dog, mother to the bairns, and she obtains a factory from him, for which she by the meditation of some friends, obliges her by bond to pay him 3000 merks, which the said friends appointed her to pay; upon the which bond she being charged, suspends, that it was given *ob turpem causam*, viz. for selling of his office of tutory, or for granting of a factory, which is equivalent, the factory being made for sums paid therefor, and which must tend to the prejudice of the bairns, and therefore such pactions ought not to be allowed in judgment, but are reprobate in law; and although the consent of friends was obtained to the said paction, yet that ought not to give warrant to a paction not warrantable in law; especially seeing *rebus integris* the suspender renounces the factory, and is content to reponne the charger to the same, and to his own administration. And the charger *answering*, that it is not now time to offer to reponne, after so long a time, there being more than two years and a half, since the date of his tutory, and where this bond proceeds upon decret arbitral, done by friends, mutually chosen betwixt the parties, and being done by a woman, who then was *major sciens prudens præsens et volens*, and upon her own earnest dealing, there neither being violence nor fraud used against her for doing thereof; for albeit the office of tutory may not be sold, yet there is no reason nor law, which prohibits a tutor to make a factory, and to transact

with the factor for the same; and therefore he *alleged*, That the reason was not relevant. THE LORDS found, that this transaction ought not to be sustained in law, being of the nature of *turpia pacta*, which are reprobated in law, and whereby such pactions are declared to be invalid, to produce any action upon the same; and although the condition of the paction was made, not for selling the office of tutory, but for constituting of the mother of the bairns to be factrix in the office, and that it was also done by the advice of the bairns' friends, yet it was found to be unallowable in law, seeing it was granted for so great a sum, viz. 3000 merks, which behoved to come off the pupil's estate, and consequently behoved to be to their prejudice, and so ought the be rejected; for the LORDS found, that although a tutor might make a factor, yet to constitute one for such a lucrative cause to himself could not be sustained; for it were more to be sustained in law, for the tutor to give reasonable allowance to a factor, for satisfaction of his pains, and as the same should merit, than to sell a factory, which evidently tends to the pupil's lesion; therefore the letters and charges upon that bond were suspended *simpliciter*, it being confessed, that the bond was given for that cause.

Act. Primrose.

Alt. Dunlop.

Clerk, Hay.

*Fol. Dic. v. 2. p. 19. Durie, p. 878.*

No 9.

1680. June 23.

HAMILTON against BORTHWICK.

HAMILTON of Balderston having charged Francis Borthwick upon his bond of 3,500 merks, he suspends on this reason, that the bond was procured *contra bonos mores*, and so is null; for though it bear borrowed money, yet there is a back-bond produced, bearing, that the true cause was for expenses wared out for her, ——— Brown, by the mother, for the charger her husband; and that if the marriage then intended between her and the suspender took not effect, then the suspender should be free; which being five months before the contract of marriage, shows clearly, that the bond was granted to promote the marriage, and to overvalue the expenses, where indeed none is due, the mother in her widowity being obliged to entertain her daughter in bed and board *gratis*, and the suspender since her marriage hath paid her cloths to merchants; and so it was a most unwarrantable deed by a step-father, upon an unjust pretence, to make merchandise of his step-daughter. The charger *answered*, That albeit the backbond had been inserted in this bond, acknowledging the expenses to have amounted to 3,500 merks, it did sufficiently instruct the same, and liberated the charger, all exceptions being renounced by one who was *major sciens et prudens*, who hath gotten above L. 1000 Sterling with his wife; and therefore, though her mother had been obliged to entertain her freely, he might in gratitude and remuneration have given this sum; *2do*, The law allows

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No 10.

*Turpis causa* being alleged against a bond granted by a person in suit of a woman to her mother "for expenses laid out upon her daughter," was sustained only in so far, as evidence of expenses could be given.