

pass against the suspender on this bond; and therefore ought to be suspended. *2do*, The very bond charged on, bears an express clause, that it shall not be lawful for the charger to uplift the said money, without the special advice and consent of her said two brothers: she accepted the said bond under that condition. But so it is, they have not consented to the said charge, but, on the contrary, have assisted the suspender in procuring this suspension of the said charge; and that in respect they are afraid that she and her said husband will dilapidate the same; and therefore, &c. This suspension being called, the charger's procurators allege against the said second reason of suspension, as insisted on, that it ought to be repelled, because, *1mo*, The charger is married since the granting of the said bond, and has children and a family to maintain; and so in reason cannot be debarred by her brothers from uplifting the said money; especially seeing this clause is to their behoof, they being her nearest heirs. *Item*, Her husband may trade therewith. But, *2do*, for a peremptory answer thereto, there is produced a consent or declaration under her brothers' hands, whereby they declared that their intention in inserting of the said clause, was not to seclude their sister, now charger, from uplifting the same from the suspender, providing she should secure it in some other manner of way, best tending to her advantage, and not dilapidate the same: *item*, Declared, that if she should take any preposterous course therewith, or sinisterously employ the same, that then this their consent should be null. To which it was replied by the suspender, *1mo*, That he opposed the clause in the bond, whereby it was provided, that no time during her lifetime, (*ergo nihil refert*, as to suspender, whether she be married or unmarried,) she shall uplift the same, without the consent foresaid. *2do*, As to the declaration, it is replied, that the same is no positive consent; but allenarly their intention of inserting the said clause. *3to*, It bears a clause irritant, *videlicet*, that if she take any preposterous course to her prejudice, that then the same shall be null. Where to it was duplied for the charger, that she opposed the foresaid declaration; and as to the clause irritant, it says nothing, unless the suspender were able to subsume, (which he is not,) that she has taken any such dishonourable course. In respect whereof, the letters ought to be found orderly proceeded.

All which the Lords having considered, they find the letters orderly proceeded, and decern the suspender to pay to the charger the said 3500 merks. *Item*, Suspend the letters simpliciter as to the 300 merks of expenses, and L.10 of failie.

*Charger*, Mr. Thomas Baird. *Alt.* Mr. Thomas Lermonth.

*Signet MS. No. 57, folio 18.*

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1664. *July 12.* ISOBELL NICOLL and JAMES INNES, her Husband, *against* THOMAS BLAIR and SIR THOMAS WALLACE of Craigie, Advocate.

THOMAS BLAIR, merchant in Edinburgh, by his bond obliges him to content and pay to Andrew Nicoll, burgess there, the sum of L.27, 11s. Sterling money, in 1662. Sir Thomas Wallace of Cragie, advocate, by his [bond,] obliges him

to cause the said Thomas end counts with the said Andrew Nicoll, and that under the pain of L.8 Sterling. Andrew dies. His relict, Isobell Nicoll, confirms his testament, and gets her nominated to him executor dative, and that by being surrogated in the place of the commissary fiscal of the commissariat of Edenburgh; *item*, gets licence to pursue for her deceased husband's debts. Whereupon, with consent of James Innes, writer in Edenburgh, her spouse, she registrates the said two bonds; obtains decret thereon before the Lords; and on this decret raises letters; and then charges with horning: which they suspend, *Imo*, Because the said decret is for null defence; for if they had been cited thereto, then the said [Thomas] Blair would have alleged, as [he] does now, that the said decret could not be pronounced; because the said L.27 ought to be compensated in the first end of 4000 merks owing by the charger to the pursuer, at least to his pupil, to whom he was nominated curator *sine quo non*; for whom he had advanced and disbursed considerable sums of money on aliment and education, and so had good right to the said 4000 merks; so that he has intended action, for payment thereof to him against this charger, as intromitter with her husband's goods, even now depending before the Lords of Council and Session: and therefore, till that process be discussed, thir letters ought to be suspended; especially seeing he is willing to compensate the said sum of L.27 with the said 4000 merks. And as to Sir Thomas Wallace, *Imo*, It is strange how this decret could pass against him, seeing he, being a member of Court, and constantly attending on the house, the said decret (if any such had been) could not have escaped him. But, *2do*, He has an unanswerable defence, to wit, that his ticket is alternative, obliging him either to make the said Thomas Blair end counts with the said Andrew Nicoll; or otherwise to re-deliver him a bond, (deposited then in his hands,) for the said L.8, granted by the said Thomas to him, that he might thereupon suit execution; but there is no clause in the said ticket that can on any ways be construed obligatory on the said Sir Thomas to pay the said L.8 himself. But so it is, that by warrant from Andrew Nicoll, he delivered the said bond to Thomas Blair, granter thereof.

At the calling of the suspension, of consent of parties, the copy of the suspension is holden for the principal. The charger's procurators declare, that they passed from Sir Thomas Wallace; and that they charged him with, and insisted only against, the said Thomas Blair. For instructing the summons against him, there is produced the extract of the said decret alleged obtained, with the letters of horning raised thereupon.

Against the reason of suspension, it was ALLEGED for the charger,—That compensation was not in this case receivable; yea, that to allege or crave the same was both absurd and irrelevant, seeing there was a decret of the Lords produced; whereupon, according to the law of Scotland, there was *parata executio*, by act of Parliament in King James VI. his time, Parl. 12. act. 141. whereby it is appointed, that no compensation be received after sentence, except the debt were both liquid, and could be instantly verified.

To the which it was DUPLIED for the suspender,—That the act of Parliament extended only to decreets given in *foro contentioso*. *Item*, that there was a process intended [at] the suspender's instance, in his own name, and in behalf of his pupil, for the recovery of the said 4000 merks, wherein all the instructions of compensation are produced.

Whereto it was TRIPLIED for the charger,—That the act of Parliament was general, of all decreets; and that by the undeniable practice of Scotland, the said act doth militate against such as are contumaciously absent; otherwise it were to no purpose to obtain sentence, *et contumaces lucrarentur ex suo dolo*. 2do, It were against all reason, that upon raising or intending of a process, (which is in every man's power,) execution of sentences or decreets should be stopped after they are pronounced by the Lords of Session; and especially when the defender has many just defences against the pursuit intended against him; and when the pursuit is only raised at the instance of the suspender's pupil after obtaining of the decret whereupon this charge, by him suspended, is founded; by the which it evidently appears that the same is only raised, *dolo malo et animo protelandi litem*. And all that could be now craved was, that action might be reserved, at the instance of the said pupil, as accorded of the law. 3tio, Neither in this suspension, nor in the said process, are there any [writs] produced to instruct the said suspender's title as assignee, or having right from the said minor; so that, albeit decret were obtained at the said minor's instance, for the said sum of 4000 merks, against the charger, (as is not,) yet it were against all law, equity, and reason, that the curator should compensate debts justly owing by himself, with debts owing to his pupil. *Igitur*, The letters ought to be found orderly proceeded.

The Lords repelled the reason of suspension, with the duply, in respect of the reply and triply made thereto; reserving always to the said Thomas Blair, suspender, action for the said 4000 merks, upon his pretended assignation thereto. In the mean while, find the letters orderly proceeded, ay and while the suspender pay to the charger the said L.27, 11s. Sterling, with the said L.8, also contained in Sir Thomas Wallace, his ticket.

*Suspenders*, Mr. Thomas Winziet, and Sir Thomas Wallace. *Alt.* Mr. George M'Keinzie.

*Signet MS. No. 65, folio 20.*

1664. *July 12.* THEODORE BEATON *against* ANNA MACMORRAN, Lady Newhall, ANNA MAXWELL, Old Lady Newhall, and CAMPBELL of Cesnock.

KING CHARLES the First, by his gift under his hand, at Whitehall, 1627 years, grants to Sir Ja. Scot of Rossie, all and hail the maills and duties of the lands of Kingsbairnes, within the stewartry or sherifffdom of Fyfe, extending yearly to twenty chalder of victual, nine of wheat, and eleven bear; with L.48 of silver, and 100 capons; and that during his lifetime. Sir James, in 1631, assigns the said gift of pension to Doctor David Beaton, and Ester Gillen, his spouse; who obtain a ratification thereof from his Majesty, during Sir James, his lifetime. Doctor Beaton, in 1631, assigns the same to Edward Sedler of London, Esquire, and Mary Sayer, his spouse, and her assignees, during her lifetime. The said Mary dies in 1661; and nominates her daughter, Margaret Lauder, her executrix, as the testament confirmed in England bears. This Margaret Lauder, in 1663, assigns this pension to Theodore Beaton, son lawful to the said Doctor Beaton; at least