

1676. *November 8.* SIBILLA MOODY and ALEXANDER SOMERVELL, her Husband, for his Interest, *against* WILLIAM GILCHRIST, and his Tutors.

*SUPRA*, [Page 100,] at No. 501, the seventh article thereof, reference is made to another paper-book, where there is a remark, that in July 1676 last, the Lords, by their decret, ordained the said Sibilla, as liferentrix, and her husband, for his interest, to uphold her liferent lands, and modified 800 merks for the doing of it, and ordained the said reparation to be made betwixt and the first of November then ensuing.

Upon this decret Alexander Somervell being charged 14 days before the first of November, so that the days of the charge was run at the first day, and being denounced, and a caption taken out against him, he presented a bill of suspension on thir reasons.—*Imo*, Because the charge was preposterous, since a decret *ad factum præstandum* betwixt and a day, introduced and determined that day in favours of the *debitor facti*; and till that definite time were past, *non poterat constare* if the Lords' sentence was obeyed or not, so he had all that *lavamentum temporis*: and as in a bond one cannot charge before the term of payment, so neither here till the day was elapsed; *ergo*, the charge, denunciation, and caption, is null. The other reason was upon obedience, that the tradesmen were actually working, and condescended on sundry reasons why it was not finished. See all thir more largely in the information of the reasons *apud me*. And for proving this, produced an attestation of the tradesmen, and therefore craved a farther time for accomplishing the same, he not being *in mora*. And, farther, I urged the 226th act of the Parliament 14 James VI., in 1594, allowing liferenters a year to repair, but that act seems to be in another case. [Yet see Dury, 17th December, 1623, E. of Galloway and Vauns.] My Lord Newton, who was Ordinary upon the Bills when it was presented, waved the first reason as dubious and not so material, anent the illegality of the charge, and prorogated the time till the 10th of December, betwixt and which he should perfect the reparation, and, in the mean time, stopped execution.

At that day, the chargers wakening the bill, I ALLEGED the charges now behaved to be *simpliciter* suspended, in regard Somervell had fulfilled the decret, and repaired sufficiently, and made it water-tight and wind-tight.

ANSWERED,—He could not have repaired it perfectly, since he had not waired 400 merks on it, and yet the Lords had found it would, by the depositions of tradesmen, require 800 merks.

REPLIED,—His interest being only by his wife's liferent, which might die and cease ere a month, he was not obliged to take down walls or fore-stairs that tradesmen told him would stand 12 or 20 years, or lift floors and lay new ones; but he offered him to prove he had made it in better case than it was in when he entered to it, which was more than could be demanded; for the liferentrix's error was, she had not caused take cognition of the condition (which might have been ruinous and bad) the time of her entry, which is the only rule and standard of all her future reparations, And as for the Lords modifying 800 merks, it did not tie him to expend that, for if he got it repaired gratis or cheaper than another, for mutual services, it was nothing to them; that was named as the *maximum quod sic et ne plus ultra*. 2do, Tradesmen's declarations in such cases are suspect, it being *in suum commodum et rem propriam*, hoping they, or others their friends, will get the employ-

ment, for which reason they will call things ruinous that are not ; yet where they are voluntarily, and not judicially assumed for their opinion, they will be ready for inveigling and insnaring persons once to enter in a bargain with them, to say it may be done much cheaper than truly it can be done for, and after they are engaged, then desert the work till they make a new agreement, since no other will take their work in hand ; against which we have an act of Parliament, Act 80, Parl. 5, James I., in 1426, and the Roman law there cited.

Newton, before whom it still lay, being tabled before him, ordained the Dean of Guild of Edinburgh and his Council to visit and report if it was sufficient. Both parties had declarations under tradesmen's hands, (to show what cattle they are,) the one asserting the reparations sufficient, and the other affirming they were insufficient ; but Newton regarded them not. The Dean of Guild being tried, he shifted. Whereupon we represented to Newton, that the Lords had by their decret set down the way and method of their trial, for they ordained the reparations to be made with the advice and at the sight of the deacon of the wrights and deacon of the masons ; (though there was no mason-work in it, but wright and slate work, so it should rather have been the deacon of the slaters, for *credendum est artificio in sua arte*.) Newton finding that, by the decret, would sustain no other way but that which the Lords had already appointed ; and so made an act upon it, and allowed either parties a diligence to cite the said deacons, first to sight and visit, and then to compare, and upon oath declare if it was sufficient or not.

Upon this, three scruples occurred, *1mo*, If it should be the last year's deacon who officiated the time of the decret in July last, or the deacon that came on at Michaelmas, who was meant. Newton declared it was the former deacon. *2do*, In the Cannogate the masons and wrights had not two deacons, but only one. Newton found none else could be made use of but that one. *3tio*, This being a bill of suspension, Sir William Bruce, nor those under him in the bill-chamber, could not, nor were not in use to give out such acts and diligences ; therefore, when debate is on a bill of suspension and acts made, the matter falls in the hands of the clerks of Session, and one of them must be chosen, as was done here. The chargers trinketed so far with the deacon by drinking, that they impetrated a declaration under his hand somewhat unfavourable, as if all had not been fully repaired, which was *proditio testimonii* ; and they were so gross as to cause Charles Oliphant, clerk, insert this in the body of the act whereon he was to depone ; but, upon application to Newton, he reproved them sharply, and ordained it to be deleted and expunged. This deposition was so fair, that the chargers have never thought it worth their pains to seek the advising it ; (*Quæritur*, if Newton alone, since it was done on a bill before him, or the hail Lords must advise it, and if it must be enrolled and bide its time ?) so that Mr Somervell is not yet fully assoilyed. *Vide infra*, No. 519. [*Wood and Shanks* against *Murdoch*, 12th December, 1676.]

*Advocates' MS. No. 503, folio 263.*