

petition against Thomas Moffat, merchant, and James Shaw, writer, narrating, that she had a bond from James Edmonston for 6000 merks, as her tocher; and he, having, in August last, unhappily engaged himself with Captain Charteris and others at cards and dice, had lost £1500 sterling. She and her husband thought it high time for them to stir; and, having registered his bond, and taken out caption and apprehended him, they caused the messenger bring him first to Mr Oliver's chamber, to capitulate with him what farther security he would give them. And, Mr Moffat having all his bonds and writs in his custody, he was desired to grant a bond, as cautioner, to present him; but he refusing, he went away and employed James Shaw to draw a bill of suspension; which they got passed, without James Edmonston's concurrence or knowledge, and came and intimated it to Mr Oliver; and, he still refusing to part with James, the prisoner, they interposed, and, shuffling with him, bade Edmonston get to his heels; and immediately he fled to the Abbey for sanctuary: by which trick Mr Oliver and his wife are defrauded of their debt, and the further security then offered them.

ANSWERED,—That they knew nothing of Edmonston's being under caption; neither seeing any messenger in the room nor any caption nor concurrence from the magistrates of Edinburgh; so they were *in bona fide* to obtain a bill of suspension passed, and to intimate it; and he was as much warranted to go away, seeing there was no legal restraint to detain him, Mr Oliver having no right to hold him *in privato carcere*, that being *crimen plagii*.

The Lords were clear, If the messenger had been present with the caption in his hand, no passed bill of suspension could have liberated him, unless it had been passed by three, being in vacance time, and bore expressly that he was apprehended by the messenger, though not, as yet, imprisoned. But, this being denied, the Lords allowed the Ordinary to try if the messenger was present at intimating the passed bill of suspension, and if they used any violence in rescuing him when Mr Oliver offered to detain him. And further, to try what writs Mr Moffat had of the debtor's effects at that time, out of which his sister and her husband might be secured, or satisfied for their debt. For the Lords thought, Albeit, in strict law, they might advise him to go away, yet there was too much art and trick in the managing of it.

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1707. November 21. MARGARET PURSEL against JOHN PATERSON.

LORD Register reported Pursel against Paterson. Margaret Pursel, relict of one Brown, tenant in Meggitland, pursues John Paterson, jeweller in Edinburgh, for adherence, before the Commissaries, as having got her with child under promise of marriage; and craves that he may accomplish the same.

In that process, witnesses being led and advised, the Commissaries found that it did not amount to a marriage consent; and therefore assoilyied from the adherence; but found strong insinuations whereby he had enticed her into that belief proven; and therefore decerned him in £100 sterling to be paid her for his abusing her, and for the expenses of her in-lying, alimending the child, and its interment. This decret he suspended on this reason,---That it was *ultra petita*, the libel being allenarly for adherence; and so, he being assoilyied from that, the

Commissaries' decret had no foundation, for there was not the least conclusion in the libel for damages or reimbursement of expenses. He acknowledges, he being then an unexperienced apprentice lad, by her seduction, had to do with her; and she gave him up as the father of the child, though there were many about it beside him, as appears by the scandals delated against her in the West-kirk books: and, he being now lawfully married to another woman, whores are not to be encouraged in such unjust claims, but ought to suffer for the damage arising from their own sins.

ANSWERED,—The Commissaries' decerniture for her expenses, though not expressly libelled, is no more but a native consequence of the process resulting from the probation; which, though it did not amount to a marriage, yet imported that she was exceedingly damnified both in her reputation and fortune; and it were *frustra* to put her to raise a new libel; but, without any violent detortion, her former process might be transformed into an action of damages; even as criminal judges, where death is libelled, turn it into an arbitrary punishment.

The Lords found the decret *ultra petita et libellata*; and therefore suspended the letters, and assoilyied from the Commissaries' modification on this process, whatever they might do in a new one. *Vol. II. Page 395.*

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1707. December 2. JAMES CORBET *against* WILLIAM COCHRAN of KILMARONOCK.

[See the prior part of this Case, *supra*, page 634.]

JAMES Corbet, merchant in Glasgow, pursues Mr William Cochran of Kilmarnock, on this ground,—That, they being partners of a ship freighted outward to Guinea, there to take in slaves and carry them to their market in America, James sells his 12th part to Kilmarnock, and insures it for the premium of 10 per cent.; whereon James Corbet gets from Kilmarnock two bonds, one for £300 sterling, as the price of his 12th share, and the other for £30 sterling, as the premium of insuring. But Kilmarnock inserted this clause in his bond of £300,—That it should be payable if the ship returned to Scotland or England; but, if it returned not, the bond should be void and null, and Kilmarnock free of paying the sum. The ship went safe to Guinea, took in 70 slaves, carried them to the West Indies, and sold them there, but never returned to Britain; Pitisco the skipper, and Corse the supercargo, having sold the ship there, because it was insufficient to sail home, and was delated to the governor as an unfree ship. The price and effects were remitted to Scotland; and Kilmarnock took his own 12th share, but would not meddle with Corbet's, (though dispoed to him,) because he thought his bond null, the condition never existing; whereupon Corbet pursues him to pay the £300 sterling. His defence arose from the quality of his bond, that he was only to pay it when the ship returned; but, *ita est*, it never came back: and so, the obligation being conditional, and not purified, he cannot be liable.

ANSWERED for Corbet,—That the bargain being mercatorian, and of the nature of an insurance, if the ship had failed to return, on the usual events provided against by such policies of insurance, as tempests, shipwrecks, firing, rifling, reprisals, seizure by capers or buccaneers, embargos of foreign states, &c. then