

1666. *January 24.*ELES of Southside *against* MARK CASS of Cockpen.

ELES of Southside pursues Cass, as heir to Mr Richard Cass, or as being charged to enter heir to him. Compearance is made for Cockpen, who was a creditor to the defender, and had apprised his lands; and *alleged*, No process; because the pursuer pursues as assignee: The assignation being his title, is posterior to the charge to enter heir, or summons which are raised, not in the cedent's name, but in the assignee's. It was *answered* for the pursuer, That Cockpen could not object this, because he was curator to the pursuer, and had apprised the lands, and proponed this allegiance of purpose to exclude the pursuer from coming in within year and day; because, if this summons were cast (the defender being now out of the country) before a new charge to enter heir could proceed upon 60 days, and citation upon 60 days, and the special charge upon 60 days, the year would elapse. It was *answered*, That Cockpen had never acted as curator, and that this summons was raised by the pursuer himself, after his majority, who was major more than a year ago. It was *answered*, That the pursuer had but very lately recovered his writs from his curators, tho' he used all diligence, and was forced to transume *against* some of them.

THE LORDS sustained the summons, in respect Cockpen had been curator, and so near the time of minority.

Stair, v. I. p. 343.

1666. *July 13.* NORMAND LIVINGSTON *against* LADY GLENAGIES.

NORMAND LIVINGSTON having apprised the lands of Glenagies, pursues the tenants for mails and duties; wherein the Lady compeared, and *alleged*, That she ought to be preferred, because she is infeft in a liferent in the lands by her contract of marriage. It was *replied*, That the Lady and her husband, for all right that either of them had, had given a right to their cautioners to uplift the mails and duties of the lands in question, for payment of debts, and this debt particularly, whereon this appriser proceeds; with power also to the cautioners to dispone any part of the lands for payment of the debts; which the lady ratified judicially, and which now excludes her from hindering any of these creditors to get payment. It was *answered* for the Lady, *imo*, That this right was but a factory or commission, and so expired by the Laird's death; *2do*, It was only in favours of the cautioners, for their relief; but the creditors had no interest to allege thereupon; *3tio*, The cautioners were never distressed; and it was a mistake, being to them as creditors in the sum, not being so in effect.

THE LORDS having considered the commission, and that it bore not only the Lady to consent, but for all her right to grant commission; and that not only

No 10.

A curator, who had apprised the minor's lands, found not entitled to impede the diligence of another creditor.

No 11.

A prier consent founds a personal objection *against* opposing what had been consented to.

No 11. it was in favours of the cautioners, in case of distress, but also in favours of the creditors, bearing to be for payment of the creditors; therefore, they found the same relevant against the Lady, to exclude her infestment ay and while the debts were paid. But this occurred to the Lords, that if the Lady would condescend, that by the creditor's or cautioner's fault, in not making use of this commission, the Laird was suffered to continue in possession, so that if they had used diligence, the debts would have been paid in whole or in part, and the Lady's liferent disburdened, *pro tanto*; they would find the same relevant.

Stair, v. 1. p. 395.

* * * Newbyth reports this case :

UMQUHILK John Haldane of Gleneagies as principal, and several other persons as cautioners for him, were debtors by bond to Normand Livingston in the sum of 700 merks; for which sum he having comprised from Gleneagies the lands and barony of Gleneagies, Lanrick, and , and being therein infest, pursues the tenants for mails and duties for the crop 1657, and in time coming. Compearance being made for the relict, Dame Margaret Fraser, relict of the deceased Gleneagies, for whom it was *alleged*, That she ought to be preferred to the mails and duties of the lands contained in her infestment of liferent; because she stands publicly infest in liferent in the said lands, before the pursuer's comprising;—to which it was *answered*, Ought to be repelled; because, albeit the lady was infest in liferent in the said lands before the pursuers, yet she and her umquhile husband had granted a factory to the persons therein mentioned, containing an assignation to the mails and duties of the said lands, for payment and satisfaction of the annualrent and principal sums condescended on in the said factory, whereof the pursuer's debt, which is the ground of the comprising, was one; so that the lady having granted the foresaid assignation to the mails and duties for the behoof of the pursuer, and other creditors mentioned in the said factory, and which she thereafter judicially ratified, she could not be heard, upon the pretence of liferent infestment, to question the pursuer's right, by virtue of the comprising, to the mails and duties. Whereunto it was *replied, 1mo*, That the foresaid commission was a naked mandate, whereupon nothing had followed, and which was expired by the death of Gleneagies, granter of the same; *2do*, The said factory was never accepted nor made use of by the said person to whom the same was granted, and which, if it had been made use of, the pursuer and the other creditors might have been satisfied with the bygone mails and duties; *3tio*, In the foresaid assignation granted to the mails and duties, the lady was only a consenter; *4to*, The foresaid assignation and factory was not granted in favours of the pursuer, who was creditor in the said bond; but was only granted in favours of the cautioners, and for their relief; and it cannot be made appear, that the persons which were cautioners, and for whom the said factory and commission was granted, were

ever cautioners to the pursuer or to his cedent; and admitting they had been cautioners, yet the factory and assignation was not granted to the creditors, but simply to the cautioners for their relief. Whereunto it was *duplicated*, That the reply and hail members thereof ought to be repelled; *imo*, Because the foresaid factory and commission was not *in rem ipsius mandantis*; for so it was revocable, or could expire by the decease of the granter; but was a procuratory in *rem suam*, and did contain an express assignation to the mails and duties, not only for the cautioners' relief, but for payment and satisfaction of the annualrents and principal sums to the creditor, and which allocation of the mails and duties for the use and behoof foresaid, being a clause conceived in favours of the creditors, could never have been revoked, nor expire through his decease; *2do*, The said factory and commission touching the foresaid clause in favours of the creditors, cannot be prejudged, albeit the cautioners had never made use of the same, and that it is lawful to the pursuer, having comprised the said lands, to crave the benefit of the same; and it is the same case as if the lady had been personally obliged with her husband for payment of the sums, and for the creditors their farther security, and cautioners their relief, had granted an assignation to the mails and duties of the lands liferented to her; in which case, albeit the lady had not been personally obliged for payment of the sums, yet there is no question she could never have been heard to oppose against the assignation to the mails and duties, made either to their creditor, or to their cautioner for the relief of the creditors; and so no more in this case, as being done by the foresaid factory and assignation, that it was intended an action of the pursuer, and the other creditors should be satisfied out of the mails and duties of the estate; *4to*, Albeit the cautioner did never make use of the said factory, yet that could never prejudice the creditors, for whose use and behoof the same was granted; and *hoc ipso*, that the Lady and her husband Gleneagies by the foresaid commission did empower the persons therein mentioned to sell and dispone the lands to the pursuer's cedents and other creditors, in satisfaction of the sums due to them; which the Lady could never have questioned upon the pretence of her liferent infestment; so no more ought the Lady to question the pursuer's comprising, being founded upon the same debt for payment whereof she had consented that the lands should be disposed; and upon that matter, it is the same as to the Lady's interest of liferent, whether the lands had been disposed for payment to the said pursuer and his cedent's debts, or that the same had been comprised, as *de facto* they were; and the Lady is not a naked consentor to the foresaid assignation, as is pretended, but does jointly grant the same with her husband; and though she had been but a consentor, she could never have opposed against the same upon any right standing in her person of a liferent infestment, or otherways; so that the foresaid assignation and factory to the mails and duties, being made for the behoof of the creditors mentioned in the commission, amongst which the pursuer's debt is expressly one, the Lady can never be heard to question the same, or any diligence thereupon; it being clear

No 11.

that it was the meaning of the parties, that the said debts should be satisfied, not only by an assignation to the mails and duties, but an heritable right to the lands liferented by the Lady. THE LORDS found, That the Lady Gleneagies, by her consenting to the commission granted by her husband to his cautioners, being *in eandem rem*, did prejudice herself of her liferent right of Gleneagies' estate; unless she would allege, that it was the parties' own fault to whom the commission was granted, that they did not intromit.

Newbyth, MS. p. 72.

1667. February 20.

ANDREW LITTLEJOHN *against* DUCHESS of MONMOUTH.

No 12.

A wife's account of furnishings for herself subscribed by her, found valid, though she was married, and a minor.

ANDREW LITTLEJOHN pursues the Duchess of Monmouth and her curators, for payment of a taylor-account, taken off by the Duchess for her marriage *sow*, to the foot whereof she adjoins these words, 'I acknowledge the account above written, and subscribe the same.' It was *alleged* by the curators, That the Countess's subscription, being after her marriage, can neither oblige herself nor her husband, because wives' obligations are *ipso jure* null. It was *answered*, That the Duchess being *persona illustris*, and the account for furniture to her body at her marriage, her account fell not under the nullity of ordinary obligations by wives, whose bonds are null, not so much because their subscriptions prove not the receipt of the money, as because, being *in potestate viri*, they cannot employ it profitably for their own use, which ceases here, the account being for necessary furnishing, which both obliges the wife and her husband, who is obliged to entertain his wife.

THE LORDS decerned; the pursuer always making faith that it was a just and true account truly resting and owing; and would not put the pursuer to instruct the delivery by witnesses, who are at London; considering especially, that the Duchess being such an illustrious person, her subscription could not be questioned upon so small a matter, as obtained without delivery.

Stair, v. 1. p. 445.

No 13.

A sasine of a liferent to a wife not registered, found valid against the apparent heir of the granter, possessing on a prior disposition.

1667. February 22. COUNTESS of CARNWATH *against* EARL of CARNWATH.

THE Countess of Carnwath insists in her action of poinding the ground. It was *alleged* for the defender, That the Countess' sasine was null, not being registered conform to the act of Parliament. It was *answered*, That nullity cannot be proponed, either by the granter of the infestment, or any representing him, or by any person who is obliged to acknowledge the infestments; but the Earl is such a person that albeit he bruiks by a disposition from his father, yet