

ample. However, I find the Lords wanted not precedents for what they did ; for Dury tells us, on the 23d of June, 1626, the same was then decided between Maxwell and Drumlanrick ; see him, also, at the 26th of July, 1622, Esilmont and Buckie. *Vide infra*, in February, 1676, James Brown and Matthew Loury, *numero* 470.

When the probation came to be advised, the Lords found the insufficiency of the horse proven, and the offer back ; and thereupon suspended the letters, and assoilyied from the price. But if they had adverted, that the charger never got back his horse, but that he strayed waiff, it had been much more just to have modified something to the charger for his horse *actione quanti minoris*, upon the account of the scab it was proven he was infected with, and not make him lose both horse and price ; but Sir Jo. Dalrymple was for the suspender. See Stair's System, tit. 10. Of Conventional Obligations. Dury, 9th January, 1629, Brown and Nicolsone.

Advocates' MS. No. 429, folio 228.

1673. *November.* HALBERT LAUDER *against* WILLIAM ALISONE.

HALBERT LAUDER having married William Alisone's daughter, in the contract of marriage William obliges himself to pay L.1000 in tocher : 500 merks of it in good and sufficient ware ; 500 merks in assignations to bonds ; and the other 500 merks in money. Halbert charges for the L.1000. Alisone suspends. *1mo*, That he had given him 500 merks worth of goods. *2do*, He had assigned him to the value of 800 merks of bonds. *3tio*, Upon compensation ; he having given his daughter, before her marriage, merchant ware, to set up a little shop with, to the value of 400 merks. *4to*, He had alimeted them an year in his house after their marriage, for which he craved 600 merks. And, upon thir grounds, he had a process depending before the bailies of Edinburgh against his son-in-law, to hear and see it found and declared, that he had paid the L.1000 of tocher in manner foresaid, and were owing him 800 merks over and above it.

To this it was ANSWERED,—That the ware and bonds were acknowledged and accepted in part of payment : except one, which proving desperate, he offered to retrocess, since he was obliged to give him good and sufficient bonds ; and he never accepted it in satisfaction. And if it be pretended, that assignations are presumed to be taken in satisfaction, where the contrary is not expressed and provided ; it is answered, the presumption is just opposite, that assignations are not supposed to be accepted in satisfaction. See Hadinton, 25th February, 1624, Wishart *against* Ferme.—As to the third reason, it was absurd and ridiculous to think, that goods given to a maid *in familia* with her father, (like a *peculium profectivum*, to trade with apart,) and before marriage, can constitute a debt, so as to be obtruded for a ground of compensation, or imputed *ex post facto* in satisfaction of an obligation for a tocher, contained in a posterior contract of marriage, not relative to that furnishing, or mentioning that it shall be ascribed in the fore-end of the tocher.—Yet it may be doubted, whether what a father so gives his children *in familia* will be reputed *animo donandi*, or *animo repetendi*, at least *animo* to impute and attribute it in their legitim and natural portion, *pro tanto*.—As to the fourth, anent the aliment,—*non relevat*, unless it were offered to be proven, that it was promised and

conditioned by paction. As for the suspender's desire to have the suspension, or ground of it, remitted to the bailies of Edinburgh, since the cause coincident and of equivalent nature, is depending before them, it is impertinent; since the *connexitas et continentia causæ* ought rather to attract that of the bailies hither, as the nobler Court, than the action before the bailies should draw this to them.—See Stair's Form of Process, p. —. and the laws there cited on the margin.* Dury, 25th November, 1624, Hamilton *against* Mathison.

There was also another reason of suspension insisted on, viz. that, by the contract-matrimonial, Halbert, the charger, was mutually obliged to ware and employ L.1000 Scots, on sufficient security and annualrent to the wife and children; which reciprocal obligation not being performed, he was not tied till that were done.

ANSWERED,—That can never stop execution for payment of the tocher; no execution being ordained to pass at the suspender's instance, and the wife and children concerned not craving it; and it being more their interest that it be employed in merchandizing, by which it will afford double the annualrent. And, therefore, I think that destination should be dispensed with where the party uses trade.

See the information of the cause *apud me*. *Vide supra*, No. 180, in June, 1671; and 321. [Laird of Balnamoon *against* M^rIntosh,] in 9th February, 1672.

Advocates' MS. No. 430, folio 228.

1673 and 1677. LADY GRANGE and WILLIAM DICK, her son, *against* SIR LAURENCE OLIPHANT of Gask.

1673, *November*.—IN 1618, Sir William Tyrie of Drumkilbo, and his cautioners, granted bond to Sir Patrick Douglas of Kilspindy for 7000 merks. Kilspindy assigns this bond to Douglas of Lumsdean in 1638; who thereupon obtains a decret of registration *against* Sir William Tyrie's heir, and charges him, and such of the cautioners as were living, with horning. This assignation having been apparently to Kilspindy's own behoof, was afterwards given up to him, and cancelled. Kilspindy, in 1642, becomes bound, as cautioner for John Rind, to William Dick of Grange and Janet Macmath, his spouse, the longest liver, in 10,000 merks. Janet, in 1647, arrests the 7000 merks, due by Tyrie to Kilspindy. For evicting and eluding of which arrestment, this conveyance was thought on,—to make a new assignation, by Kilspindy to Douglas of Lumsdean, of the bond, in place of the former cancelled one, and of the same individual date it bore, viz. the 17th of April, 1638; that so, the hornings on the former assignation answering to this, it might pass for the first intimated by the charges of horning, and be preferable to the arrestment; and, for making it more obscure, Lumsdean, the assignee, transfers it to Gask.

The Lady Grange insisting *against* Tyrie for making forthcoming, he suspended, on double pointing between the assignee and arrester, in which she proponed an exception of falsehood *against* the assignation. But the Lords then, in 1658, preferred Gask; reserving to her, action of improbation.

* *Videlicet* that *judiciorum contiguïtas, connexitas, et continentia, non est dividenda*; l. 10. C. de *Judiciis*; l. 13. C. de *Rei Vindictione*. *Hippolitus de Marsiliis singulari*, 654.