

merks to the said Elizabeth, and some other children of a second marriage, upon this reason,—That the charger, and the rest of the children, were confirmed executors to their father, and an inventory given up by their own mother, exceeding the provisions contained in the contract; so that, *intus habent*, and the debt being moveable, they ought to relieve the heir, if he should pay the same.

It was ANSWERED, That the pursuer, and the rest of the children of that marriage, being but very young, and some of them infants, the mother's confirmation, who was not their tutor, nor had any authority, could never prejudge them; unless they had homologated the same, by receiving by count and payment from their mother of her intromission: whereas they were so far from taking that course, that they did pursue a transferring against the suspender, and obtained decret so soon as they came to years.

The Lords did find the letters orderly proceeded, notwithstanding of the reason of suspension; and that the mother, not being tutrix, her deed could not prejudge the infants; unless she had satisfied them out of her intromission, or that they had homologated her confirmation: but found it just that the executors should purge all intromission, and assign the suspender, as heir to his father, to pursue his intromitters with his goods, for his relief.

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1676. December 22. DAME JEAN LESSLY and her CHILDREN *against* SIR JOHN LESSLY of NEWTOUN.

SIR John Lessly, being party-contractor in his sister's contract of marriage with Sir Andrew Dick, and at whose instance diligence might be done for the provision of his sister in liferent, and the heirs of the marriage in fee, for eighty-five thousand merks,—being pursued for not doing of diligence against Sir William and Sir Andrew Dick, for securing the said provision, but only by using horning in the year 1652, which was never registered until after they had disposed their estate in favours of their creditors; as likewise, the said Sir John, having gotten a right from the said Sir Andrew to several debts, for his sister and her children, their security, he did grant back-bond, whereby he became obliged to use his utmost diligence, or lend his name whensoever he should be required, or to denude himself to any trustee for doing thereof; Sir John having intented process, that he might be declared free of all these obligations to do diligence, and of denuding himself, he being willing to do the same to whatsoever person they shall condescend upon.

It being ALLEGED for the said Dame Jean and her children, That he had omitted to do exact diligence, being a trustee for his own sister and her children,—the Lords, by their interlocutor, 28th June 1676, before answer, did ordain that the Lady and her children should give in a particular condescendence of omissions and commissions; and it being referred to Sir John's oath that he had the whole instructions, *viz.* the contract of marriage, and the grounds of the debt assigned, and that he was required to make use thereof, and do diligence, he having deponed *negative*.

Thereafter there was a condescence given in of omissions, bearing, That he had executed letters of horning against Sir William and Sir Andrew, upon the contract, but had never registered the same, nor used inhibition or comprising against Sir Andrew or Sir William, to affect their estates, before they were denuded in favours of their creditors.

It was ANSWERED for Sir John, That the condescence could not be respected to make him liable ; because the contract of marriage being by his deceased father and him, it was only declared that diligence might be done in his name ; but he was not particularly obliged to do the same ; and, for the back-bond, he had never contravened the same ; seeing Sir Andrew, albeit he had granted an assignation and disposition, yet he did still retain the whole grounds and evidents whereupon he could pursue ; and having most fraudulently kept up the same, until he heard his father had disposed his estate, it were against all law and conscience to make him liable to more than his own estate would amount to : and, for the not registration of the horning used in his name, it could not militate against him as any omission, seeing they were raised and executed by Sir Andrew himself without his knowledge ; and the omission of registration can only be imputed unto him.

The Lords did consider the contract of marriage ; and found, That Sir John being only a party-contractor with his father, who was then an old man, and that it did only bear, that it should be leisome to do diligence in his name against Sir William and Sir Andrew Dick ; that these words were no particular obligation for doing diligence, unless he had been required, and he refused the same ; for, if it were otherwise interpreted or extended, it might bar the door to all friends and relations to be party-contractors, and to lend their name to be made use of, the fulfilling of the contract being particularly upon Sir Andrew, the husband, and who was obliged to see the same performed by the father, and whose condition he did only know as being the only person intrusted therewith, and did transact with his whole creditors. As to the back-bond and letters of horning, they found, That Sir John, never being required, nor instructions offered or delivered to him, nor the horning executed or raised by his warrant or knowledge, that it did not oblige him for contravention ; and, therefore, decerned that he should subscribe a blank factory and commission to such a fit person as Sir Andrew should name for doing diligence upon his charges, Sir John himself being *in lecto ægritudinis*, and by all appearance irrecoverable.

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1677. January 19. The LAIRD of KINNEIR against JOHN and WILLIAM PATIES, his Shepherds.

IN an action at Kinneir's instance, against his shepherds, for the price of 100 lambs, upon this ground, That he desired the shepherds to separate the lambs from the rest of the sheep and ewes, who were all bleating and crying, which was a clear presumption that they were not the natural lambs of his ewes ; but, instead of doing thereof, he drove in the lambs to a house, where he did cut