

matter, as if he had been judge, procurator, and party. *Item*, that he was charged, contrary to Mr. William Wallace, Sheriff-Depute, his order and express prohibition. *3tio*, This decret is null, because pronounced in time of vacance, without a dispensation; *Item*, because pronounced without probation, that either the said cauldron was only entrusted to the suspender by the said Nicoll, or that the said charger, his spouse, ever required this cauldron of him before his lawful poinding of it. On thir same reasons, a summons of reduction of the said decret is intended. At the calling of this suspension, the suspender insisted on the first reason. Whereunto it was answered, that the said poinding was null, because executed *extra territorium*, without the privilege of the Canongate. *2do*, He opponed the Sheriff's decret, wherein that same defence is proponed and repelled, in respect of a reply made thereto.

Which the Lords having considered, they found the letters orderly proceeded; and assoilyied from the reduction.

*Suspender*, Mr. Thomas Learmonth. *Alt.* Mr. Patrick Oliphant.

*Signet MS. No. 58, folio 58.*

1665. *February 11.* ALEXANDER CLUNIAS, Provost of Cromarty, *against* WILLIAM CLUNIAS.

ALEXANDER CLUNIAS, Provost of Cromarty, by his bond obliges him to pay 600 merks to Alexander Clunias of Dunskeith. This bond Dunskeith leaves in legacy to William Clunias. Which William, pursuing therefor, in the English time, obtains decret; on which raising letters, the Provost suspends them in 1662. Yet protestation or a decret of suspension is recovered against him; on which he is of new charged. He suspends on reasons which, at the calling of it, are reformed thus. *1mo*, Ought to be suspended, because the decret whereupon it was raised was for null defence and not compearance. *2do*, Because he ought to have compensation for 1000 merks paid by the suspender, for Dunskeith the charger's cedent, to Mr. Alexander Ross, minister at Logie, to whom he was debtor in L.5000; and that in obedience to an arrestment laid on by the said Mr. Alexander, of the very same bond now charged for: which payment he was in *bona fide* to make, since it was before the said pretended legacy was left to the charger, at least before the intimation thereof. Now, if Dunskeith were living, and pursuing the suspender upon the foresaid bond left in legacy, the said compensation would be receivable against him; and therefore the same must now also be received against his legatar or assignee, especially seeing there is no other estate personal nor real belonging to the said defunct upon which the suspender may recur for his warrandice for the 600 merks bond. *Item*, at the best it is but a legacy which can have no place where there is debt: now the suspender is creditor to the defunct for his warrandice for the said 1000 merks paid out for him as is aforesaid. *3tio*, Dunskeith by his testament and latter will left the 600merks to sundry persons, who have made over all their rights to one Alexander Manson; who, confirming himself executor dative and legatar to Dunskeith, is pursuing the suspender for payment making to him of the said 600 merks; till he therefore be discussed, this charge must be suspended. *4to*, They must be suspended *quoad* the annualrents and expenses of

the said pretended legacy, because the words of the legacy bear only 600 merks *simpliciter*; and therefore, *esto* the legacy sustain in law; yet, at the best, it cannot be judged of greater force nor a testament, wherein if a defunct give up only a man debtor in a principal, omitting annualrents, its judged in law a discharge to the debtor of what is omitted. *5to*, The charge must be suspended for the half of the said sum of 600 merks, because the same is due to the defunct's relict, the defunct having died without children, and the relict is preferable therein to any legatar; therefore the suspender craves retention thereof in his own hands, because the relict is his own daughter, he having good interest both as her father, and as a party contractor, to crave the sum to the effect he may pay it to her; especially seeing he has maintained her ever since her husband's decease, she having nothing of her own left her by the defunct but the half of that 600 merks, which the law provides her to. And as for the decret, given in the English time, it was most unjust, seeing the testament wherein the legacy charged for was left, was not confirmed; without confirmation whereof nothing could be acclaimed thereby.

To the first reason it was ANSWERED for the charger,—That notwithstanding thereof, the letters ought to be found orderly proceeded, in respect of the decret; and opposed the same pronounced *parte comparente*. Where to it was replied, that though comparence was made, yet the same was most officiously done, without all order or warrant. To the second reason, answered that, *Imo*, He opposed his answer to the first reason. *2do, et separatim*, offers to prove, by the suspender's oath, (if need be,) that he or his son has obtained decret before the Commissary of Rosse and his deputes, against the said Mr. David [Alexander] Rosse, at least against his heirs and executors, decerning them to give up to the suspender or his son the very bond of 1000 merks specified in the second reason, at least a sufficient discharge thereof. To the third, answered, *Imo*, Its *jus tertii* to the suspender. *2do*, Opposed this legacy now charged on as long posterior to any pretended legacies made to the said W. Manson his cedents. Yea, though W. Manson had either compared for his interest in the first decret, or were compareing now, he could never be heard to crave preference, in respect there is nothing more clear than that the defunct's last will and legacy innovates all prior testaments and legacies. But so it is, that these legacies mentioned in this reason, are long anterior to this. To the fourth, answered, opposes the decret obtained *parte comparente* decerning him to pay annualrent. *2do*. Opposes the legacy, whereby the defunct leaves that bond of 600 merks granted to him by the suspender: but so it is, the said bond bears annualrent: now it were absurd, that because the same is left in legacy, that therefore annualrent may be detained and kept, especially seeing it has now been owing these eighteen years, and there have been many decreets and suspensions therein. To the last answered, *Imo*, its *jus tertii*, *2do, et separatim, non relevat*, since the defunct was known to be a man of a plentiful fortune, why might he not leave that bond in legacy to whom he pleased; especially seeing the relict was sufficiently provided and secured *aliunde* by her contract of marriage.

All which dispute being considered by the Lords; *item*, The suspender's procurator refusing to produce his client to depone upon the second reason of suspension, they repelled the whole reasons, and found the letters orderly proceeded, ay and while they were obeyed.

*Suspender*, Ja. Aberneithy. *Alt.* Sir G. M'Kenzie.

*Signet MS. No. 60, folio 58.*