

No 2. the one party would not dispute, that the other party should have sentence upon his right, even as if the suspender had insisted for declaring his preference in his right.

Act. *Nicolson.*

Alt. —

Clerk, *Gibson.*

The like was done December 20. 1642, in a double poinding betwixt Lady Cowfield and the Lady Bancriff, where Stuart was for the one party, and Oliphant for the other.

Clerk, *Hay.**Fol. Dic. v. 1. p. 593. Durie, p. 480.*

No 3. 1632. December 12. BROWN against LOTHIAN.

WHEN a suspension of double poinding is raised by any, the suspender thereof may not pass therefrom in prejudice of any of the parties by whom he allegeth himself to be troubled; and though he would do it, yet the parties may crave their rights to be discussed, which the LORDS will grant.

*Fol. Dic. v. 1. p. 593. Spottiswood, (SUSPENSION.) p. 325.*

No 4.

By act 3d, Parl. 1584, the preferable creditor who neglects to appear in a multiple-poinding when lawfully cited, and allows a degree of preference to go out in favour of others, shall, in a reduction, have no claim for rents, &c. intromitted with *medio tempore* by the other party, but only for the *res*; at the same time, if any rents or annualrents remain unapprehended, these will belong to the prefer-

1678. February 27. CAMPBELL, &c. against BAIN, &c.

ONE M'Millan, a drover, having bought cattle from Sir James M'Donald, and his son Donald M'Donald, he did grant two bonds for the price, one to Sir James, and the other to Donald, in both which, the name of Mr John Bain of Pitcairly being contained as creditor, he charged M'Millan, who suspended on double poinding; and in discussing of the suspension, compearance was made for some creditors of Sir James and Donald M'Donald, who arrested the sums in M'Millan's hands, as being due to Sir James and Donald M'Donald their debtors, and did offer to prove by Mr John Bain's oath, that the bond was blank *ab initio*, in the hands and power of Sir James and Donald M'Donalds, and before his name was filled up, they did arrest; whereupon he did depone, that the bond granted to Donald M'Donald was blank in the creditor's name *ab initio*, and that his name was not filled up till such a day, which was after the arrestments. But as to Sir James M'Donald's bond, he deponed, that he had reason to believe his name was filled up in it *ab initio*, in satisfaction of a debt due to him by Sir James, and that Sir James had so written to him.—  
“THE LORDS having advised the oath, found that it proved the reason as to Donald's bond, and therefore preferred the arresters; but found, that it proved not the reason as to Sir James's bond, and therefore preferred Pitcairly, albeit the bond was not delivered to him till after the arrestments; and found, that

bonds taken by debtors, in the names of their creditors, were effectual against posterior diligences, and that the debtor could not alter nor affect the same, though only delivered to him, and not to his creditor, and that thereupon the creditor, whose name was filled up *ab initio*, had action of exhibition, to compel the debtor to deliver the bond, and against the granter of the bond, to make payment, which may be proved, either by the bond, or by the granter's oath." In the said suspension, there was a multiplepoinding at M'Millan's instance against Sir James and Donald M'Donalds, Mr John Bain, and several arresters, whereupon M'Millan *alleged*, that he had made payment to Mr James James Cunningham, one of the arresters, by Sir James M'Donald's warrant, and had obtained from Mr James an assignation to Sir James's bond, and the arrestment thereon, which he produced in process. " Yet the LORDS did not sustain the same, and found, that M'Millan could not safely pay upon Sir James's warrant, his bond being in Pitcairly's name to his own behoof;" whereupon decret being extracted, M'Millan presented a second bill of suspension, as being troubled by James Campbell, Mr James Cunningham, and other arresters, who did not compear in the first decret, though they were called in the double poinding; and the cause being ordained to be heard upon the bill, it was *alleged* for Campbell and Cunningham, that they ought to be preferred to Pitcairly, as to Sir James M'Donald's bond, because they offered them to prove, that the bond was blank *ab initio*, and before filling up of Pitcairly's name, and intimation thereof, they did arrest. It was *answered* for Pitcairly, that the bond being in his name, the same could not be taken from him, but *scripto vel juramento*, and that he had already deponed and denied that the bond was blank *ab initio*. It was *replied* for the arresters, that those who compeared had referred their reason of preference to Pitcairly's oath, who accordingly was preferred; but these arreser's now compearing, will not refer the same to his oath, but offered to prove their allegiance thus, by inspection of the principal bond, wheroby it would appear, that the creditor's name was filled up with another hand and ink, than either the body, date, or witnesses, and by the oath of Sir James M'Donald, and his servants, to whom the bond was delivered, and by M'Millan's oath, and the witnesses inserted, and by other famous witnesses who saw the bond blank; and though it be a common brocard, that writ cannot be taken away by witnesses, yet it hath many limitations, and none more necessary than in blank bonds, whereby creditors are disappointed, and cannot know, nor reach their debtor's goods or means, which is thereby fraudulently kept secret, and in all matters of fraud, witnesses and other evidences are competent. It was *duplied* for Pitcairly, that he having deponed, it were hard by another probation to controul his oath. And as for Cunningham, his right was produced, and Pitcairly preferred in the former process. It was *triplied* for the arresters, that they could not be prejudged by the voluntary deed of other arresters referring it to Pitcairly's oath; for if they could instruct their reason by writ, it would not be repelled, though con-

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able creditor,  
bringing  
reduction.

No 4.

rary to Pitcairly's oath, so neither can any other probation; but here Pitcairly's oath is not positive, but only an oath of calumny, or credulity, "That he has reason to believe his name was filled up *ab initio*, Sir James M'Donald having so written to him;" and therefore if Sir James M'Donald's oath had been craved, to whom Pitcairly's oath refers, it would not have been refused; and if he had deponed contrary to his letter, his oath would have been effectual, and therefore cannot be refused now to these parties, who did not compear in the first decret; for though M'Millan compeared, and produced Cunningham's right, as being assigned to him with warrandice, albeit it was not sustained, because he referred the matter to Pitcairly's oath, which proved not for him, yet M'Millan having now charged Cunningham upon the warrandice of his assignation, he has thereby good interest to compear, and crave preference upon his arrestment.

THE LORDS found, that Pitcairly's oath was not positive, and found that these parties now compearing, not having compeared before, might prove their allegiance by inspection of the bond, and by the oaths of the witnesses inserted, and of M'Millan, Sir James M'Donald, and his servant.

It was further *alleged* for Pitcairly, That these arresters now competing, being cited in the double-poinding, whereupon the former decret proceeded, and not compearing, could not be heard in the second instance by the act of Parliament 1584, cap. 3. It was *answered*, That the said act did only secure parties, having obtained payment of by-run profits, against those who were called, and compeared not; but here the matter is entire, the sums being all in M'Millan's hand.

THE LORDS found the arrester's now compearing not to be excluded, though cited in the former double-poinding, and not compearing, seeing nothing was uplifted from M'Millan the common debtor; at least in so far as concerns what remained in his hand unpaid. See No 5.

*Fol. Dic. v. 1. p. 593. Stair, v. 2. p. 618.*

\*\*\* Fountainhall reports this case.

1678. February 8.—M'MILLAN suspends a charge on two bonds, on this reason, that he granted them blank to Sir James M'Donald, and that some of his creditors had arrested it, and obtained decreets, and whereon being distressed, he had paid; and that Pitcairly's name was now filled up in them, and had charged him. THE LORDS ordained Pitcairly to depone at what time his name was filled up in these bonds, who declared he had reason, and believed the one was filled up from the beginning, and the other was delivered to him blank, and they were given him for most onerous causes which he instructed *scripto*. THE LORDS having advised this oath on the 17th July last, found as to the first bond wherein his name was filled up *ab initio, in quantum* it had an onerous cause, it was not arrestable for Sir James's debt, though it remained in Sir

James's custody till after the arrestment. As to the *second*, found the sums in it were still arrestable for Sir James M'Donald's debt, to whom it was delivered, at any time before the filling up Pitcairly's was intimated by a charge of horning, or otherways; and this the LORDS declared they would make a rule for time coming in all such cases. Then other creditors compeared for their interest, and *alleged*, Pitcairly's oath being only an oath of credulity, it was compatible with a contrary probation, and they positively offered them to prove by witnesses who saw and read the said bond in Sir James M'Donald's hands blank, after the subscribing, yea after the arrestment. THE LORDS considering Pitcairly's oath was not positive, therefore they admitted the foresaid allegiance relevant to be proved by witnesses who saw and read it blank after the arrestments. Pitcairly *alleged* they could not be received *in hoc statu processus* now in double poinding, because they had been called in the suspension whereon it proceeded, and did not compear by the third act, Parl. 9th, James VI., and 19th act, Parl. 10th, James VI.; but this was not noticed, because, *imo*, He condescended on a necessary cause of absence; *2do*, He was content to insist only against Pitcairly, who uplifted the money, which is a case excepted in the said acts.

No 4.

Fountainhall, MS.

\*\*\* The case following is the sequel of the above.

1679. November 29. BAIN against M'MILLAN, &c.

PITCAIRLY having charged M'Millan, drover, upon a bond of 3700 merks, he suspends on double-poinding, as being troubled by several arresters arresting the sum, as belonging to Sir James M'Donald their debtor, who *alleged*, that the bond was granted by M'Millan to Sir James for the price of cattle bought from him, and that it was granted blank in the creditor's name, so that being arrested by them before Pitcairly's name was inserted and intimated, it cannot belong to Pitcairly, but to the arresters, which being referred to Pitcairly's oath, he deponed, that he believed it was filled up in his name *ab initio*, and so his oath proved not the arvester's allegiance, and therefore Pitcairly was preferred, and recovered payment of 1400 merks from M'Millan, upon the LORDS' decret; but there was raised a second suspension of multiplepoinding by M'Millan against Cunningham and Hamilton, who were in the first suspension, but did not compear; and in this suspension, it was found relevant, that Pitcairly's oath was but an oath of credulity, that he believed his name was filled up *ab initio*, expressing the reason of his belief, because Sir James had written to him, which letter he did not produce; and now they offer to prove positively that this bond was blank *ab initio*, and so delivered to Sir James M'Donald, whereby he was the true creditor, and therefore the sum being ar-

No 5.

A creditor preferred in a multiple-poinding getting payment, was decerned to repeat to a preferable creditor who was not called, nor compeared in that process.