

No 220.

the husband (specially in civil matters, and pursued civilly before the civil Judge) should not be answerable therefor; whereas in contraventions the master is answerable for the fact done by the servant, after his knowledge of the fact, if he received the servant, albeit he was never accessory to the fact, nor ever knew of the same, but after the committing thereof, which hath not such grounds of equity, as pursuits for restitution of goods, unjustly taken away by the wife, which must be reputed to be allowed by the husband, and by his ratihabition, in respect of the facts above written; all which were not respected, but the exception sustained, and no action found against the husband for any fact done by the wife, albeit civilly pursued, no more than he could be convened for a debt, contracted by her, or for bonds or obligations made by her without his consent.

Act. ———

Alt. *Miller.*Clerk, *Scot.*

In the cause of spuilzie betwixt Scot and Katharine Banks, whereof mention is made, February 2. 1628, the messenger who pointed, being convened as one of the spuilziers; the LORDS found the allegiance proponed for him relevant to liberate him both from spuilzie and wrongous intromission, bearing, that he pointed by virtue of the Lords letters, directed for pointing of the pursuers goods, for the debt therein contained: albeit the pursuer replied, that these letters could not be warrant to the messenger, seeing the decret whereupon these letters of pointing were raised, was not given against the pursuer, and so he had not a warrant to point, and therefore he was not excusable; yet, THE LORDS found the messenger in *bona fide et in probabili ignorantia* to have pointed, seeing the Lords letters bore warrant to the officer, to point from this same pursuer, and it was not his part to search the decret and warrant thereof; for albeit the letters were evil directed, yet that was not his fault: But the LORDS found, that he ought to allege, that he had delivered the gear pointed to the party at whose instance he had pointed; which being done, it was a liberation to him, otherways his retention of the same would enforce resitution against him, notwithstanding of the pointing. See REPARATION.—SPUILZIE.

Act. *Belshes.*Alt. *Nicolson.*Clerk, *Gibson.**Fol. Die. v. I. p. 403. Durie, p. 339. & 353.*

No 221.

1680. June 3. ROBERT NAIRN against WILLIAM BUCHANNAN.

ROBERT NAIRN charges William Buchanan on a bond for payment of 220 merks. The reason of suspension is, This bond was blank in the creditor's name, in the custody and hands of the charger's uncle, to whose wife I paid the money; and she was *præposita negotiis*, in so far as she was wont and in use to uplift other sums of her husband's; which was offered to be proved by

her oath, or by famous witnesses, and so he was *in tuto* to pay her. This being reported, the LORDS found her husband's approving of her intromission by once or twice uplifting is not a sufficient ground, neither is use and wont enough, whereupon his payment to her may assoilzie him, unless she had been a shop-keeper or a taverner. And, *zdo*, Find that a wife's preposition in a matter of this concern must not be proved by her oath, but must be only proven *scripto*; and that she behoved to have had a written factory.'

Fol. Dic. v. 1. p. 403. Fountainball, v. 1. p. 99.

* * * This case is reported by Stair, No 14. p. 1669.

1698. November 19. ARNOT against STEVENSON.

IN a pursuit at the instance of Archibald Arnot, apothecary in Kirkcaldy, against one Stevenson, for payment of 100 merks yet resting of his son's apprentice-fee, and for damages through his running away and deserting his service; there being no written indentures, he offered to prove by the defender's oath, that though he did not bind his son apprentice to the pursuer, yet his wife, who did, was *præposita negotiis mariti*, which was sufficient to bind him to fulfil. He depones, That his wife did indeed buy and sell and take in the money, but he never gave her the power of binding or loosing; and particularly, he was dissatisfied with her putting his son apprentice to this pursuer. When this oath came to be advised, it was *alleged*, That the boy had staid two years with his master in his father's view, who never reclaimed; which taciturnity must imply an acquiescence and homologation of his wife's bargain; and there was 100 merks of the apprentice-fee paid.—THE LORDS considered it was not the husband but the wife who had paid that 100 merks; and that a man may be silent at the management and actings of an imperious wife, and yet must not be construed to approve of the same, else she may bring him into inconveniences enough; and therefore they found her præposition *quoad* the power of binding her son apprentice not proved, and assoilzied the husband; seeing it was easy for the master to have entered into a written contract with his apprentice's father; and since he did not, *sibi imputet* that he has followed only the mother's faith, who should not dispose of their children's callings and educations without the father's consent.

December 1.—A BILL having been given in against the interlocutor mentioned 19th November 1698, between Arnot and Stevenson, *alleging*, That he had alimanted the apprentice for two years, for which he had only received 100 merks, and this being *in rem versum* to the father, who was bound *jure natura* to entertain his son, he must be liable for the remanent apprentice-fee.—It was answered, He had the boy's service, which might compensate the aliment.—

No 222.

An apprentice, who was bound, not by his father, but by his mother, deserted after two years service. In a pursuit against the father, for the remainder of the apprentice-fee, (the mother having paid part of it,) it was found that the *præpositura* could not be extended to such deeds, and that the father's knowledge and silence could not infer consent.