

1665. *February 8.* GEORGE GRANT, Younger of Ballandalloch, *against* WILLIAM GRANT of Kerdells.

GEORGE GRANT, younger of Ballandalloch charges William Grant of Kerdells, to pay him L.2500, contained in a decret obtained the last of July 1662. *Item,* To flit and remove from the lands of Kerdells, which he had comprised; to the effect he might enter thereto himself. This charge Kerdells suspends; because, *Imo,* The decret was pronounced on the last day of the session, whereon neither the suspender's reason of suspension, nor his action of count and reckoning that he had then depending against the charger were discussed, whereby he alleged the bond charged upon satisfied. Commission was granted to the Laird of Innes, &c. to be auditors in the said count, who refused to accept, as instruments taken thereupon do testify; so that the suspender was not *in mora*, nor was it his fault that the said commission did not take effect: therefore, till that count and reckoning be closed, the letters and all execution thereon must be suspended. *2do,* The sums charged for are above L.1000, and so (the suspender having taken the benefit of the act of debtor and creditor,) no personal execution can pass therefore, and gives *cautionem juratoriam* only. At the calling of this suspension, it was farther craved for the suspender, that the Lords would grant a new commission in this matter. *2do,* Offered to prove that the debt charged for was paid to the charger's father, by his intromission with the mails of the lands of Pitcroy, as tutor to William Grant, son to the granter of the wadset, against whom the comprising was led; in respect whereof craved a new commission.

REPLIED,—That the foresaid allegiance ought not to be respected, because the same being formerly proponed, was repelled both in a reduction, a removing, and in a process for mails and duties, whereupon twice sentence has followed, whereof no reduction is yet intended.

DUPLIED,—That the foresaid reply ought to be repelled, because if count and reckoning had been first craved, it had been found most relevant, and ought now to be received, because the suspender offers to prove the said debt satisfied within the years of the legal. The charger by his procurator, craved the suspender would condescend to whom the said mails and duties, or sums comprised for, were paid; whether to the charger, or to his father by and attour his intromission, whereby he is charged as tutor. Whereupon the suspender condescended that the charger's father, by his former intromission, received satisfaction thereof, as administrator of the law to his son.

REPLIED by the charger,—*Imo,* That the charger's father being tutor to the debtor, (to whom this suspender served himself heir,) long before the comprising led by the charger, the charger's father's intromission was not as administrator of the law to his son, but continued such as when he began, *videlicet,* as tutor to the debtor: so then it cannot be said, that the comprising was satisfied by his father's intromission as administrator. *2do,* This same was formerly proponed and repelled; for it being formerly alleged, that the charger's father had acquired the right to the comprising with his own money, albeit his son's name was inserted therein, and therefore behoved to be considered as in his own name, and he having intromitted with the debtor's estate as tutor to him, he would be debtor to him in as much as would exhaust the apprising; which being repelled then, must be repelled now also, especially seeing the charger's father has found caution for payment of what shall be found due after count and reckoning. *3tio,* The

suspender has no interest to propone the foresaid allegiance, seeing the pupil does not suspend; neither any warrant produced from the pupil.

All which being considered, the Lords find the letters orderly proceeded, ay and while the charge be obeyed.

*Suspender*, Sir Thomas Wallace, and James Abernethie. *Alt.* Mr. Thomas Lermonth.

*Signet MS. No. 52, folio 57.*

1665. *February 8.* GEORGE BAYNE *against* THOMAS HAMILTON.

JAMES LORD OGILVIE obliges him in 1659, to pay to Thomas Dewar in Dundee, 1000 merks. Thomas assigns Geo. Bayne, Merchant in Edinburgh, to this bond; whose wife, Elizabeth Colvill, knowing one Thomas Hamilton to be my Lord Ogilvie's Chamberlain, writes to him as *præposita negotiis mariti* in his absence, anent the 1000 merks addebted by my Lord. He by his missive in 1664, gives her a promise and assurance of payment at the next term. Upon this her husband Mr. Bayne pursues him to pay the same.

Its ALLEGED for the defender,—That neither is the letter directed to the pursuer, nor does it promise payment of the sum libelled to the pursuer.

To the which it was ANSWERED,—That it was, though directed to the pursuer's wife; and as to the promise opposed the missive.

The Lords decerned him to pay it, conform to his faithful promise, and missive letter in all points.

*Act.* Mr. Jo. Colvill. *Alt.* Mr. Thomas Baird.

*Signet MS. No. 54, folio 57.*

1665. *February 9.* AGNES ALEXANDER, Relict of THOMAS MARK, *against* THOMAS HADDOWAY.

AGNES ALEXANDER confirms herself executrix to Thomas Mark, wright in Wolmet, her spouse; and so pursues Thomas Haddoway before the Sheriff of Edinburgh, to redeliver to her a copper cauldron of twenty-four gallons, in as good case as the same was when he got it; or to pay 1001 merks as the price of it. The Sheriff decerns him to do it; whereupon she raises a precept, and causes charge him. He suspends the precept, *1mo*, because he is most unjustly decerned, seeing that Nicoll, brother, and cedent of the said cauldron to the pursuer's husband, being addebted to the suspender in L.65, &c. he pursued him before the Baron bailie of the Canongate, for the same. They decern Nicoll to pay it; by virtue of which decret, the suspender caused lawfully poind and apprise the said cauldron, as the instrument of poinding taken thereupon proves; after which, if Nicoll assigned the said cauldron to his brother Thomas, he knows not, but there was no intimation of any assignation made to him before the poinding. *2do*, Mr. Robert Scot, Sheriff-Clerk, behaved himself most partially and maliciously in this