

of the said principal sum, whereof also they have granted discharge; which they refer to the charger's oath. *3tio*, Its eiked in the margin, that the decret, whereon the said discharge did proceed, is null, in so far as the same was given without any manner of probation; there being only a registrate bond produced, which was registrate after his father's decease, and no summons of registration raised against him. *Item*, That his father was but a cautioner in the said bond. In respect of all which the letters must be suspended without all caution or consignation to be made by the suspender; at least as to personal execution.

At the calling of it, to the first it was ANSWERED,—That, being a reason of suspension, is not instantly verified. To the second, repeats the same. As to the third, ought to be repelled, because the said decret yet stands unreduced. *Item*, that the suspender's father was not a cautioner, but a principal debtor. *Igitur*, the suspender, whether major or minor, must be liable to the chargers for the sum charged for.

The Lords repelled the reasons of the suspension, in respect of the answers made thereto: only, if the suspender should produce any thing to instruct him or his co-debtors to have taken the benefit of the act of debtor and creditor, then he was to be farther heard thereanent, and the decret to be stopped. Which he failyieing to do, the Lords adhered to their former interlocutor, and found the letters orderly proceeded, ay and while the suspender and his curators should pay the sum charged for.

*Susp.* Mr. Roger Hog. *Alt.* Mr. Alexander Oswald.

*Signet MS. No. 48, folio 55.*

1665. *February 4.* Sir ALEXANDER BURNET of Leys, *against* Sir JAMES BAIRD of Auchmedden.

SIR ALEXANDER BURNET of Leys charges Gordon of Park, Gordon of Cluny, and others, as having obliged themselves by bond, in 1660, to pay to him sundry chalders of bear, sundry chalders of meal, sundry silver duties, with caynes and poultry, and that during all the days of William Couttes sometime of Auchterfoulls his lifetime. Sir James Baird of Auchmedden arrests the same victual and others in Park's hands, for some sums of money addebted to him by William Couttes. Park suspends on double poinding. *Item*, if Leys should be found to have better right of the two thereto, suspends on thir reasons: *Imo*, That there being legal debates anent the lands of Clunie, betwixt Gordon of Park and Couttes of Auchterfoull, the same were submitted to the Lord Brodie and others, who decerned Auchterfoull to dis-pone the whole rights of the lands of Cluny in favours of Park; ordained Park, for Couttes his better livelihood, to make yearly payment to him of the victual and duties charged for by Leys; for which having granted a bond blank, in the creditors' name, Leys gets his name filled up therein; whereas the same was allenaryly granted to Auchterfoull's behoof, who, by disposition at the same time, obliged himself to warrant the lands of Cluny to Park, (who grants this bond now charged on,) from his own facts and deeds. Notwithstanding whereof he has granted a

right since to Keith of Keithaskmilne; and therefore till the lands of Cluny be purged of that right, the suspender has ground of the retention of the victual, &c. contained in the said bond; the only cause of granting thereof being for the rights of the lands of Cluny. *2do*, The said victual and duties are already paid to Auchterfoulls' factors, as their discharges thereof proport. At the calling and discussing of this suspension, the Lords suspended the letters *quoad* that which was instructed paid by discharges produced; found them orderly proceeded *quoad* the rest: discharge Auchmedden from troubling the suspender for the said sum, as a person found to have no right for aught that was yet seen. Burnet of Leys charges Park again on this decret of suspension. He suspends the charge for the second time on the foresaids reasons. *Item*, That this charger can be in no better case than if Auchterfoull himself were charging, (to whose behoof the said bond was granted;) but so it is, that he would have been obliged to have premonished by the space of sixty days; *item*, To have warranted his disposition of the lands of Cluny, neither of which are done; *Igitur*. In this suspension Auchmedden compears by his procurators, and craves to be reponed against the foresaid decret of suspension, and offers to prove, by William Couttes' oath, that he intromits with the said victual and silver which he had arrested in Park's hands, and had now charged for.

Which the Lords finding relevant, they assign to the procurators for the suspender a term to produce the said William Couttes to give his oath therein.

As to the reasons of the suspension against Leys, it was ANSWERED,—*Imo*, That they could not quarrel the decret charged on; seeing they had homologated the same by partial payment since the pronouncing thereof. As to the requisition, offered to produce the instrument if need be. *2do*, That the bond charged upon was to William Couttes' behoof, is only probable by the charger Leys his oath; and if he confess it, then the conditions of the bond are probable *vel scripto vel juramento* of the said William Couttes. *3tio*, As to the warrandice, *non relevat* unless ye would say distressed; and what shall be so instructed they are content to allow, as also what shall be found discharged.

The Lords having considered the dispute, by their act of litiscontestation they find the trust probable by Leys' oath; which he granting, then they find the conditions alleged on in the suspension probable *vel scripto vel juramento* of William Couttes; ordain the suspenders to condescend what they are distressed for, that they may be relieved thereof; declare they will allow what discharges shall be produced by the suspender under the charger, or his factor's hands; ordain the charger to give his oath anent the rest of the sums and victual not found discharged, whether he has received the same; yea or no. Assign a day for producing their several clients, for giving their oaths anent the several points admitted thereto; reserving always to the charger his objections against the discharges, *et alia producenda*. Before the term assigned in the act comes, Burnet of Leys dies; whereupon his son serving himself heir to his father, pursues a transferring against the Laird of Park of the said act of litiscontestation foresaid, with all other minutes of process, &c. in his own person *activè*, and the said defenders *passivè*. The Lords transfer, reserving always to the said defenders, all their lawful defences in the principal cause, as well against the interest of parties, as others in the cause, as accords of law.

In the suspension, for the *suspender*, compear Mr. George M'Kenzie and Mr. William Strachan; the *charger*, Sir George Lochart, Mr. Robert Burnet; for Auchmedden, Sir Jo. Baird and Pat. Fraser. In the transferring, for the *pursuer*, Mr. David Falconer. *Alt.* Mr. Arthur Gordon, Thomas Baird, and George Nicolsone.

*Signet MS. No. 49, folio 56.*

1665. *February 7.* JAMES CUNNINGHAM *against* HARRY DENNISTON.

JAMES CUNNINGHAM, merchant in Edinburgh, charges Harry Denniston, merchant there, for payment of L.214, contained in a decret obtained before the Bailies. He suspends because the charger is obliged to relief for cautionary whereunto he stands engaged for the said charger, as tutor to William Wilson his bairns, now in the sum of L.60,000; till which relief be granted him, the suspender, in all law and equity, must have retention of the sums charged for.

To this its ANSWERED,—That its noways relevant, unless the suspender were distressed for the said cautionry contained in the said act of curatory; which is not instructed.

Whereunto it was REPLIED for the suspender,—That the reason of suspension stands yet relevant, notwithstanding the answer made thereto; because the suspender cannot yet be distressed by the said children, they being minors, till their majority. *2do*, There is process depending at the said children's friends, their instance, against the charger, for count and reckoning, and payment-making to them, of the goods and gear left to them by their father; and when they have discussed the charger, they will then recur upon the suspender who is cautioner: and urged the case of a cautioner for a tutor *qui vergit in pauperiem*. Its duplied, that notwithstanding of the reply, the letters must be found orderly proceeded, because the ground of this charge is a clear bond for merchant ware received by the suspender, from the charger, long after his becoming cautioner for him in the said act of curatory; and if the suspender pleases, for his relief, he may raise inhibition against this charger upon the said act of curatory: Yea more, the charger offers to find him caution for relieving him.

Notwithstanding of thir reasons of suspension, with what was alleged in fortification of them, the Lords found the letters orderly proceeded for the sum charged for; reserving always to the suspender, or to the nearest of kin of the bairns of the said William Wilson, action against the charger, for removing of him from his intromissions with the minor's gear, as being suspect; or to find new and better caution as accords of the law.

*Suspender*, Sir Thomas Wallace. *Alt.* Sir Robert Sinclair.

*Signet MS. No. 51, folio 57.*