

ordinary action, *multo magis* ought it to be refused by way of a bill, which is most summary. Yet the reason of the difference I suppose lies here, that in the matter of bills the Lords exerce much of their *officium nobile*, by which they may certainly command the defender to exhibit these writs to the clerk of the im-probation, there to lay, &c. whereas in ordinary actions they are astricted to the ordinary forms which they may not transgress.

Advocates' MS. No. 5, folio 70.

1669. *December 24.*

SEMPLE *against* WALKER.

IN the action of suspension, Semple *against* Walker, called about that same time, my Lord Stair turned a decret of the Sheriff of Lanerk into a libel, because it bore only that the defender being twice lawfully summoned to give his oath upon the libel compeared not, and so was holden *pro confesso*; and did not bear that he was personally apprehended: whereupon we were necessitated to refer the same of new again to the suspender's oath. Whereas it might have been alleged, that this decret ought as well to be sustained as they sustain a horning bearing delivery of a copy to the party, though it bear not that he was personally apprehended.

Vide *infra* November 1676, *Findlay*, No. 504. *Dury*, 22d July 1626, *Stewart* against *Ahanay*.

Advocates' MS. No. 6, folio 70.

1670. *February.* GEORGE MOSMAN *against* ADAM and ANDREW BELLS of Belford.

IN the suspension Adam and Andrew Bells of Belford *against* George Mosman, this reason of suspension was repelled, that the charger's right being a right flowing by translation from Elizabeth Cunyghame, who had an assignation to the bond charged upon, her assignation was never intimated to the suspenders in the cedent's lifetime, and so could not produce summary action by a charge; but ought to have been pursued upon, *via ordinaria*, in regard that the assignation was intimated to James Bell, (who was principal debtor in the bond,) before the cedent's decease, which was found a sufficient intimation likewise to the cautioners. Vide *Dury*, 23d January, 1624, *Stevenson and the Laird of Craigmillar*. Vide *Cujacium, Codice, De duobus reis*. See 28th November, 1678, *Reid and Bruce of Newton*.

The second reason of suspension was found relevant, viz. that the suspenders were not *in tuto* to make payment of the sum to the charger, because the charger's author's right was questioned, and under reduction at the instance of Quintene Findlay and his wife, as nearest of kin to John Lithgow, granter of the assignation: the reason of reduction was death-bed.

Whereto it was REPLIED,—That this bond of Belford's was a bond which might lawfully be assigned on death-bed, because, in the body of it, it bears a dispensa-

tion and a power to him to assign, dispoſe, and transfer the ſaid bond, *etiam in articulo mortis*, to whom he pleaſed : and ſo this diſpenſation muſt ſave the ſaid aſſignation from reducing *ex capite lecti*.

Upon this reply, my Lord Halkerton was content to give both parties the Lords' answer. Who having very ripely canvassed the ſame, found it a point of great importance and weight, and demurred exceedingly thereon ; and being the laſt week of the winter Session, they ſuſſeded to give their judgment thereon while the 1ſt of June. And truly it was ſo : for, on the one ſide, it would ſeem that the ſaid diſpenſation ſhould ſuſtain the ſaid aſſignation, though made on death-bed, becauſe it is an act *inter vivos*, and it is uncontraverted but a man may diſpoſe upon his heritage and heritable bonds for implement and performance of acts or obligations contracted by him in his *liege pouſtie ; exempli gratia*, for payments of debts contracted before. *Hope, titulo De Testamentis et Codicillis*. Yet, on the other hand, it ſeems very hard that ſuch a diſpenſation ſhould be enough to empower a man to diſpoſe upon his heritage *in lecto ægritudinis*, the cauſe of which prohibition is moſt rational and moſt excellent, viz. becauſe the moſt part of men *in confinio mortis conſtituti* are not *sanæ mentis*, and not in that integrity of mind as is ſufficient for a man who would diſpoſe upon ſo important rights : likewise the law has wiſely conſidered how much a man, at ſuch a time, lies expoſed to the ſolicitations and importunities of friends or flatterers in whom he has no intereſt, and how eaſily a man, in that caſe, may be wrought upon to give away his means to the prejudice of his righteous heir. So then, this being the reaſon of that noble cuſtom, no diſpenſation or reſervation which a man makes in his *liege pouſtie* ſhould be ſufficient to give him a power to diſpoſe upon heritage in death-bed ; unleſs he had likewise a diſpenſation and aſſurance from God Almighty, that when he ſhould come to die, he ſhould have his wits freſh, vigorous, and rational, as may be required in a man who is to diſpoſe upon his heritage ; which aſſurance none can have.* *Item*, If ſuch diſpenſations were ſuſtained, the whole country would make uſe of the ſame ; and ſo that uſeful cuſtom would be rendered uſeleſs, where our law repeteſ diſpoſitions of heritage upon death-bed. (*Vide infra, No. 227.*) *Item*, The Lords have been loath to determine whether or no the King, under his Great Seal, can diſpenſe with the ſaid law, and give a man power *ea non obſtante* to teſt upon heritage ; if which be dubitable, much more muſt it be ſo whether every private perſon may reſerve that power to himſelf, by an act *inter vivos*.

Advocates' MS. No. 7, folio 70.

1670. *February*. SIR JOHN WHYTFORD of Milnetoun, *against* JAMES, Biſhop of Galloway, and CLAUD HAMILTON of Parkhead.

SIR JOHN WHYTFORD of Milnetoun, purſueth James Biſhop of Galloway, and Claud Hamilton of Parkhead, his brother, upon all the paſſive titles, as repreſent-

* *Vide omnino Zacchiam, Q. M. Legalium, lib. 2. tit. 1. Quaest. 19, per totum. Vide infra, 26th June, 1677, Birnies against Morray, No. 580, § 2 ; item, November, 1677, Gray of Wariston and James Cunyghame, about Doctor Cunyghame's estate.*