

No 24.

the suspender only could be in hazard: The suspender *answered*, That the heir was not entered, but if the charger would enter, and concur for him, he would pass from that reason.

THE LORDS sustained the reason on death-bed in favours of the debtor, and found that the assignation being in the son's hands on death-bed, amongst persons so conjunct as father and son, it was not sufficient to infer the not delivery thereof; and therefore found it only probable *scripto vel juramento*, and would not sustain the tutor's concurrence, unless he entered the apparent heir.

The suspender further *alleged*, That this bond being granted for a part of the price of the land, the disposition whereof is the mutual cause of the contract, the assignee cannot urge payment of the price, till the mutual cause be performed, viz. the ratification of the heritrix, who may reduce the disposition upon minority; and if the child die unentered, Balmedie being but a liferenter, the disposition will be evacuated without any recourse upon warrandice. It was *answered*, That though the cedent were charged, yet he could not be suspended till the heritrix ratify, as being a part of the mutual cause; for though in mutual contracts, both parts should be performed alike, yet where the obligations on the other part are without delay, and upon the other part bear expressly, a term or delay, it must necessarily import a passing from that exception, as here the bond is presently payable; but the obligation to cause the heritrix ratify after her majority, is not performable till her majority.

THE LORDS found the answer relevant, that the mutual obligation having an express term not come, could not stop the execution of the bond, which is presently payable.

*Fol. Dic. v. 1. p. 595. Stair, v. 2. p. 469.*

1677. July 13.

The LADY DAIRSIE *against* The LAIRD and His CREDITORS.

No 25.  
A husband and wife being, by a contract, each entitled to an alimentary provision, that provided to the wife was found to belong to her exclusively, although the husband's, by mismanagement of the estate, had failed.

BY contract betwixt the Laird and Lady Dairsie and their eldest son, the estate was disposed to the eldest son, with the burden of the debts, and with an alimentary annuity to the Laird, and another to the Lady, who had lived for some time a-part; whereupon the son was infest, and for implement of his obligation to his mother, he procured an assignation to her in liferent to the annualrent of 17000 merks from the Earl of Southesk, and to himself in fee; whereupon Southesk gives in a bill of suspension on double pointing; and the cause being ordained to be discussed on the bill, it was *alleged* for the Laird, That this assignation being granted in favours of his wife, did accresce to him *jure mariti*. It was *answered*, *imo*, That albeit all moveable rights fall to the husband *jure mariti*, except abuilziements, yet it hath this exception, that if a third party do freely provide any thing to a wife for her aliment, excluding her

husband or his creditors, that exclusion is a quality of the donation and is effectual, otherwise the donation must cease and return to the granter, to the prejudice of both husband and wife. It was *replied, imo*, *Pactis privatorum non derogatur jure communi*; *2do*, This assignation by Southesk is no free donation, but for implement of his being cautioner for the Lord Sinclair who was debtor to the husband. It was *duplicated* for the Lady, That *hoc dato* the husband could not quarrel it, because by the contract betwixt him, his wife and son, there was an alimentary provision granted both to the husband and wife *separatim*, which contract being subscribed by husband, wife, and son, imports all their consents to every article in it, so that the husband having consented to this alimentary provision to his wife, could never come against the same. It was *triplicated*, That the husband's consent was from the whole complexly, wherein there is an aliment provided to himself and another to his wife; but his own aliment proves ineffectual by reason of the debts, and therefore he should have access to a share of his wife's aliment; *2do*, The husband did not renounce his *jus mariti*, and therefore his consent in favours of his wife returns to himself, as was found in a far stronger case betwixt the Lord and Lady Collington, No 50. p. 5828. where the Lady had assigned the half of her life-ent-right before her contract of marriage to the Laird of Ratho, who did by a back-bond declare, that that assignation was in trust for entertainment of Collington and the Lady's family; and some days thereafter, in the contract of marriage narrating the said assignation to Ratho, Collington did approve the same, and renounced his *jus mariti* as to his wife's aliment; and yet the LORDS found, "That the back-bond brought it back to Collington himself, and that he had power to dispose of it *jure mariti*."

THE LORDS found, That this assignation by Southesk being alimentary, and for implement of the foresaid contract subscribed by the husband, and being so small as did not exceed *victum et amictum* to the Lady and her two sons to maintain them, that the same was effectual, and did exclude the husband, albeit his own aliment proved ineffectual through the mismanagement of his estate, and that it was noways in the case of the Lord Collington, where the Lady by the back-bond had not a separate aliment; but that it was an aliment to the family for husband and wife, and behoved to be so employed by the order and direction of the husband as head of the family.

*Stair, v. 2. p. 539.*

1680. December 21.

ANDERSON against BRUCE.

No 26.

A PARTY having raised reduction of a decree-arbitral upon the head of iniquity, it was found, That he could not afterwards take the benefit of it in