sævitia cruelty and severity to her, and having no allowance for living apart from him, she pursues a summons of aliment; wherein it was admitted to her probation what maltreatments she met with, and what was the extent of his estate out of which the aliment was to be modified: and it was sustained to him to prove intolerable provocations, and that she had a separate estate of her own, whereof she was in possession, from which his *jus mariti* was secluded.

The probation falling to be advised, the Lords found maltreatments proven to a very high degree, and that he had only L.1000 Scots by year, the creditors possessing the rest; and he had proven no preceding provocations, except some chiding words. And the Lords thought that no provocations could excuse such usage, save only unchastity or adultery. And, as to her separate estate, it was proven, by a contract betwixt Sir Alexander Anstruther and her husband, that the result of her estate was 15,000 merks, provided to her in liferent, and her son in fee; but that she, looking on this balance as too small, had never accepted of it. Therefore, the Lords modified L.50 sterling to her of yearly aliment, with this express quality and burden, That he should have access and liberty to uplift the annuity foresaid provided to her out of the 15,000 merks of stock, aye till she think fit to accept of it, and then this aliment to cease.

The next question was, *a quo tempore* it should commence,—whether *a lite mota*, or from the date of the interlocutor, or from the act of litiscontestation? And the Lords drew it back to the date of the citation on this summons; but, in regard the separation was several years prior to the summons, they reserved the consideration how far back this aliment should go. And it being demanded for Invergelly, that some partial modifications for aliments, being given her before, in the interim, might be defaulked from the years now decerned for; the Lords refused the same, but declared they should be deduced and allowed out of the years prior to the summons, when the same came to be determined; in regard she had all that time been borrowing money, and paying annualrent for it, through his default. *Vol. II. Page* 409.

1707. *January* 3. CAMPBELL of INVERAW *against* CAMPBELL of LAWERS and CAMPBELL of BURNBANK.

THE Laird of Inveraw having married a sister of James Campbell of Lawers, he, in the contract, obliged himself for 5000 merks of tocher; and, some time after, Lawers prevailed with him to restrict it to 3000 merks, for which he gives bond; but both thir are done in his minority. Lawers being distressed on the last abated bond for 3000 merks, he granted a corroboration ratifying the same, in his majority: and, being afterwards in the messenger's hands, Campbell of Burnbank gives a bond of presentation to sist and produce him betwixt and a certain day, and that without sist of execution, or suspension: and, in case of failyie to pay the debt, Burnbank presents him at the day; but produces a passed bill of suspension, whereon the messenger is forced to dismiss him. When this suspension came to be discused, Lawers repeated a reduction against Alexander Campbell, executor-creditor to Inveraw, and otherways having right to the tocher, that the obligement in the contract matrimonial and the restricted bond ought both to be reduced, because done in minority, to his evident lesion,

without any antecedent onerous cause, she having no bond of provision from her father. *2do*, The bond of coroboration, though in majority, had no ground of equity to support it, and was granted *per vim et metum carceris*, being then in the messenger's hands; and so reducible on concussion. *3tio*, Burnbank's bond being only a cautionary accessory obligation, if the principal fall, *tollitur accessorium.*

ANSWERED for the charger,—There was a natural obligation on him to provide his sister, the sum being so moderate. *2do*, It was transacted, and an abatement given; which is the strongest of all pactions. *3tio*, It had likewise an onerous cause; for his mother having 3000 merks of a liferent-annuity out of his estate, she, at her second marriage, renounced 1600 merks of it to her son, for the behoof of the younger children, whereof the Lady Inveraw is one. *4to*, Burnbank, the cautioner, was major, and under no caption; and so cannot claim the benefit of restitution.

REPLIED,—A *debitum naturale* may indeed extend to oblige a brother to aliment his sister, not having *aliunde*, but never to give her a tocher, as was found in Edgar of Wedderlie's case. And, for her legitim, or dead's part of the moveables, there could be none, for they were all exhausted by debts; and the mother's restricting the jointure was only for defraying the debt on the estate. And, as for the transaction, it was from your being conscious that you had imposed on me, and I was still minor: and, as for the bond of corroboration, it was plainly extorted when under caption. It is true, if there had been any antecedent onerous cause, there might be some ground to plead that the being under caption would not annul it: but here his prior obligations were null, as given in minority, to his lesion, just as if he had been taken with caption for no debt, or a debt truly paid; *et nihil interest an debitum nullum sit, an perpetua exceptione elidere potest.* And of a null debt there can be no homologation, as was found *3d July* 1688, *Row* against *Houston; 9th February* 1672, *Cockburn* against *Haliburton*; and *18th February* 1680, *Burnet* against *Ewing*. And for Burnbank, the cautioner, it is known that fidejussory obligations fall under these real exceptions *vel doli vel metus causa*; so what is competent to the principal debtor does also liberate them; *l. 7, sec. 1, D. de Except. et Præscript.* and was so found *8th December* 1671, *Mackintosh* against *Spalding*; and *13th January* 1692, *Earl of Aberdeen* against *Hatton.*

DUPLIED for the charger,—The contract was entered into by him *cum consensu et in præsentia amicorum*, who would not see him imposed upon, and was both moderate and just: and, by that mutual cause and synallagma of the tocher, she presently possesses L.1000 by year of jointure, her husband being deceased; and his mother's restricting herself to the half was only for the younger children's better provision. And transactions are the most sacred and binding of all contracts; and the decisions cited noways meet the case, but *toto cælo differunt.* And as a cautioner for a wife, so a minor's cautioner stands firmly bound, though the principal be assoilyied; as has been oft found. And a caption is *vis legalis*; and there was no force on Burnbank.

The Lords repelled the reasons of reduction, in respect of the answers, and found Lawers liable, as also Burnbank; it being proven, that, when he sisted Lawers on his bond of presentation, Lawers produced a passed suspension.

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