

to have retention of what he paid to persons who had poindings of the ground whereof he was tenant. So that a naked infestment of annualrent, without a decreet of poinding, was no sufficient warrant to him at his own hand to dispose upon the master's rent, who was able to pay his own debt. *Vide Haddington, 4th June 1611, Hamilton.* *Vol. I. Page 132.*

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1681. *February 25.* WILLIAM EWING, Vintner, *against* GRISSEL MALLOCH his Servant.

THE probation between William Ewing, messenger and vintner, and Grissel Malloch, once his servant taverner, being advised; the Lords found, by the oaths of the witnesses, that the said Grissel's reason of suspension and reduction was not proven, *viz.*:—That the bond charged upon was extorted by unjust or illegal force or fear.

Yet it was proven, that Ewing's wife, her mistress, did hold her in within the house, and threatened to send for an officer to put her in the tolbooth, if she would not subscribe the said bond; only, they had counted and reckoned before, and the Lords thought this a *metus licitus* to get a bond for the balance ere she deserted the service; likeas the threats were only *verba jactantia*, and were not put in execution. Yet less dread will serve to a woman than to a man, and to a minor than to one who is come to age.

But the Lords found the other reason proven, *viz.* that the suspender, at the time of granting the bond, was minor, and therefore sustained the bond only in so far as the account for which it was granted can be instructed.—This is very hard; because the servant who takes in all the money as the price of the wines is minor, therefore she shall be reponed without instructing lesion; only it may be said, vintners should not commit this trust to minors, as being a consequential breach of the *Senatus-Consultum Macedonianum*, intrusting your persons with money which they may prodigally waste. But they should count weekly with their servants.

Then ALLEGED, for William Ewing,—Though the suspender, as minor, could not be liable by the bond, yet the same was valid and obligatory against the cautioner, who, in law, had not the benefit of the principal's minority.

The Lords found the cautioner in the bond charged on liable, albeit the minor be not obliged thereby; and find the letters orderly proceeded against the cautioner; reserving action against the minor, on the account and grounds of debt whereupon the bond charged for is founded, as accords of the law.

*Nota.*—The cautioner is only in her bond of lawty and fidelity, but not in the bond for the liquid sum charged on. See Dury, *28th Nov. 1623, Shaw.*

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1681. *February 25.* DEBATES before the COMMISSION for PLANTATION of KIRKS.

At the Commission for Plantation of Kirks, it was debated, *1mo*, If they could grant protection to witnesses under caption to come and depone, seeing,

in the Act 1663, Against Protections, that court is not mentioned. Yet I think they may, for they are a sovereign court, and a committee of Parliament, and it is inherent in every judicatory to have a power to explicate their own jurisdiction, and make it effectual.—*2do*, It was debated,—seeing the Act 1672 requires two officers of state, two prelates, two barons, &c. to be a *quorum*,—if there be three officers of state present, and but one baron, if one of the officers of state may be computed a baron, (being likewise of that rank and degree, though not so named in the Act of Parliament,) to make up and supply a *quorum*.—*3tio*, A disposition to lands and teinds has been sustained in that court as sufficient to pursue a valuation of teinds, they producing a seisine *cum processu*. But I speaking with the King's advocate anent this custom, he condemned it as illegal, seeing a real right should be produced *in initio, ad fundandam litem* for valuing of teinds. Vol. I. Page 133.

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1681. February 26. RIDDEL of HAINING against ELLIOT.

THE case of Riddel of Haining and Elliot was much agitated. One accused of theft had found caution, under the pain of 5,000 merks, to answer at the court kept by the Commissioners of the Borders; and he not appearing, and thereupon they having found by their decret that the bond was forfeited:—of this decret there was a suspension passed by the Lords of Session. Whereupon a complaint was given in to the Lords of Privy Council by the Commissioners of the Borders, that their commission, flowing upon the broad seals of both kingdoms, conform to the 2d Act, Parl. 1612, they were not accountable to the Scotch Council.

The Lords of Council found not themselves judges competent to the decreets of these Commissioners, but found their determinations ultimate, and not to be revised by any but by his Majesty and the Parliaments of the two nations.

Then, against the Lords of Session, it was ALLEGED, for the Commissioners, That the matter was no ways civil but criminal, and so fell not within the compass of the Session's cognizance.

The President and other Lords, waving that question anent the interfering of jurisdictions, found the letters orderly proceeded in Haining's favours, and repelled the reasons of suspension. Which was tacitly to assume a power of judging these decreets. See 3d October 1677, *Rutherford*. Vol. I. Page 134.

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1681. The POOR of the WEST KIRK, or St Cuthbert's, against JANET WILLIAMSON.

February 22.—THE Poor of the West Kirk parish against Janet Williamson being heard in presence; the Lords found the discharge of the same date with the bond, declaring the sum in that bond was the Poor's money, (though it was blank in the creditor's name,) to be of the nature of a back-bond, and so *pars obligationis*; and therefore preferred the Poor (Mr James Elies, their treasurer's name, being now filled up therein,) to the said Janet, the arrester for Alexander Sked's debt: to which Alexander the said bond was delivered blank; and he, being then treasurer to the said Poor, and their debtor, filled up the name