

S E C T. V.

Acting in one Capacity, whether it infers consent necessary to be given in another Capacity.

1623. *March* II.L. BARGENIE *against* HIS BAIRNS.

WHERE a curator's subscription, who is not designed in the contract curator, but upon the contrary, is a principal distinct party contracter with the minor, on the other part, is holden as no subscription of a curator.

Alleged, Josias, who is curator, once having subscribed, that imports his consent to the obligations therein contained, and one subscription may serve, both for his consent to the minor's obligation, and also for fulfilling the obligations to the minor, *et in dubiis interpretatio fieri debet ut actus valeat, non ut pereat*. *Replied*, The subscription must be ruled according to the contracting of the parties, and only be relative thereto.

Repell the allegiance.

Clerk, *Durie*.

Fol. Dic. v. 1. p. 379. Nicolson, MS. No 553. p. 381.

1633. *February* 12.FORBES *against* FORBES.

A BOND being desired to be reduced at the instance of a person interdicted, because it was subscribed by him then interdicted, without consent of the interdictors, there being two, whose consent by the interdiction is declared to be requisite to all deeds done by him, and the bond quarrelled was not consented to by any two, nor by none of the interdictors;—and the defender *alleged*, That this bond was subscribed by one of the interdictors as cautioner for the person interdicted, which was to be reputed, likeas if he had consented; likeas ———, who is another of the interdictors, promised to subscribe the bond; and so the bond must be as valid as if two had consented thereto. THE LORDS repelled this allegiance, and found the subscribing of the interdictor as cautioner (he not consenting *eo nomine* as interdictor) and the promise made by the other to subscribe, he not having subscribed conform to his alleged promise, not sufficient to sustain the bond, which as it was produced, and is now quarrelled, wanted the consent and subscription of two of the pursuer's interdictors. In this process it was thought by the Lords (albeit the process ran not upon this ground, neither was it then questioned or decided) that the creditor contracting after interdiction, without consent of the interdictors, where the per-

No 49.

Subscription of a curator as party, and not as curator, is no consent as curator.

No 50.

An interdictor having subscribed a bond as cautioner only, not as interdictor, the bond was reduced as wanting his consent.

No 50.

son interdicted was known to be *rei sue providus*, and was in use to contract in the country, and the cause of interdiction was not tried, nor allowed by the Judge, might reduce that interdiction, and his bond might stand, albeit neither the person interdicted nor his interdictors should assist the pursuit, even as a creditor may reduce an inhibition, which is but the Judge's interdiction, as the other is the party's voluntary deed. See INTERDICTION.

Act. Baird.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 1. p. 379. Durie, p. 670.

1663. June 25.

STEWART against STEWART.

No 51.

Reduction of a deed on death-bed not sustained where the pursuer was subscribing witness to it.

NINIAN STEWART, as heir to his father Ascog, pursues reduction of a translation of a tack, which tack was assigned to him by his wife, and by him transferred to John Stewart, heir of a former marriage. The reason of reduction was, because the translation was on death-bed, in prejudice of the heir. The defender *alleged* absolvitor, because the pursuer is witness in the translation, which imports his consent. The pursuer *answered*, That subscribing as witness could import no more, but that the witness saw the party subscribe, but did not oblige to take inspection of the contents of the writ. *2do*, The pursuer when he subscribed was minor. The defender *answered*, That in this case the subscribing as witness behoved to import consent, because that very subscription itself by the father, being sick, did import a deed done on death-bed; especially it not being a testament but a writ *inter vivos*; and for the minority, the pursuer was *in confinio majoris ætatis*, and suffered the defender to possess twenty years, long after his *anni utiles* were past.

THE LORDS found the subscription as witness in this case to import consent, and being quarrelled *inter annos utiles*, they found sufficient to a minor, though in confirmation.

Fol. Dic. v. 1. p. 380. Stair, v. 1. p. 195.

* * Gilmour reports the same case:

NINIAN STEWART of Ascog, as heir to John his father, pursues the reduction of a right made by him to John Stewart of Arnhome, as being done on death-bed. It was *alleged* by the defender, That he should be assoilzied, because the pursuer is witness to the right in question. It was *answered*, That he was only witness to the subscription, and not to the deed itself, and was not obliged to know the tenor of it. It was *replied*, That he being then the apparent heir, and his father sick and on death-bed, as is acknowledged, he is presumed to have known what was in the right, at least considering his father's condition, he ought to have examined the tenor of the writ, and considered