

1662. July 11.

WAUCHOPE *against* NIDDRIE.

The Laird of Niddrie writes a letter to his brother William Wauchope, some 24 years since, William being then in Stockholm, and by an unsubscribed postscript, he says, that he had sent him £5. 10s. Sterling, and that he should send him as much about Whitsunday; and if he did behave himself no otherwise than he has done, he should have as much so long as Niddrie lived; whereupon William pursues his brother for payment of all years by-gone, and in time coming during the Laird's life. It was alleged, *1mo*, The postscript is null, being unsubscribed; *2do*, The postscript bears, "So long as the said William should behave himself no otherwise than he had done," which imports no obligation, expressly obliging Niddrie: Likeas, there was no other obligation, or cause obliging Niddrie to it, this being only an expression of kindness to his brother, which cannot tie him any further, but only according to Niddrie's own discretion; and within two years thereafter, or thereby, it is well known, that William came to Scotland, and by his brother's help and mediation, he married a rich widow, and got a great deal of means; and William not being then very able himself, Niddrie became cautioner for him in his contract of marriage for £10,000; so that the postscript being *nuda pollicitatio*, without any cause except affection, not having any express obligation, and his brother having shown him so much effectual kindness thereafter, by which he was put in so good a condition; not having made use of this postscript for so long a time, till of late, the defender ought to be assoilzied. It was answered, The postscript was opposed, which had no other qualification in it, but if the pursuer's behaviour should be no other than it was before, which his brother had not reason to question, he being constantly an honest man, and of late a Bailie of Edinburgh.

The Lords sustained the allegiance relevant, and referred it to the defender's own discretion and determination, whether the pursuer's carriage had been such, as that he merits from him the sum libelled, which, if he thought not, they assoilzied him.

*Gilmour, No. 47. p. 34.*

\* \* Stair reports this case:

The said William Wauchope pursues Niddrie his brother, to pay him £11 Sterling for many years, which he promised to pay him by a missive letter produced, bearing, a postscript of that nature. The defender alleged absolvitor; first, because the postscript is not subscribed, and so no sufficient instrument to prove; Secondly, there is no ground for £11 Sterling yearly therein, because the words are, "I have sent you £5. 10s. Sterling, now, and I have sent you £5. 10s. Sterling at Whitsunday, and you shall have as much as long as you live, if you carry your self as ye do now;" which words, "as long as ye live," cannot be understood

No. 208.

Found to be no objection to a promise contained in the postscript of a holograph letter, that the postscript was not subscribed.

No. 208. termly but yearly, nor can relate to both the £5. 10s. Sterling, but only the last, to which is adjected, donations, being of strict interpretation: Thirdly, The words foresaid cannot import a promise, but only a declaration of the defender's resolution to continue the same free kindness to his brother; which resolution he may recal at any time: Fourthly, The promise is conditional; *quamdiu se bene gesserit*; whereof the defender can be the only interpreter; and declares, that, since, his brother hath not carried himself so well; the meaning of such words being only this, if so long as in my opinion you carry yourself so, and not according to the opinion of any other. The pursuer to the first defence opposed the letter which is holograph, and albeit the postscript be after the subscription, yet seeing it can have no other construction, than to be done as a part of the letter, and not as other unsubscribed papers, whereanent it is presumed, the writer changed his mind and left them imperfect, and unsubscribed, which cannot be here, seeing the letter was sent. To the second, he opposed the terms of the letter. To the third, alleged *omne verbum de ore fidei cadit in debitum*; and by these words, can be understood nothing else, but a promise, which is ordinarily made in such terms.

The Lords found not the first defence relevant *per se*, but found the remaining defences relevant, and assoilzied.

*Stair, v. 1. p. 127.*

\* \* The like found 10th July 1717, Paterson against Inglis.—(See APPENDIX.)

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No. 209. 1664. December 15. CAMPBELL against CAMPBELL.

A contract of marriage is not a privileged writ; therefore there being cautioners in a contract of marriage, for payment of the jointure, the contract was found null as to them, because subscribed only by one notary, though the subsequent marriage did homologate the contract, so as to bind the principal parties.

*Gilmour.*

\* \* This case is No. 62. p. 5684. *voce* HOMOLOGATION.

\* \* The like Campbell against M'Cullen, *IBIDEM.*

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No. 210. 1667. July 4. SCHAW against TENANTS.

A discharge by a proprietor to his tenants sustained, though without witnesses and not holograph.

Schaw pursues certain tenants for their duties, who produced several discharges, against which it was alleged, that the discharges were null, wanting witnesses, and were not written with the discharger's own hand, and so were null by the act of Parliament. It was answered, that custom had introduced several exceptions from the act, as bills of exchange, of the greatest importance, which are valid, being subscribed without witnesses, albeit not holograph; and in like manner the dis-