

creet against the Laird of Orkhill, at his instance, as tutor to them, for payment of the said sum as due to them; in respect whereof they *alleged*, That the heir could not pretend right to this sum, which he *sciens, prudens & major*, had acknowledged to be their moneys, and consequently that Alexander Deneston, who was made assignee by the heir to that sum, could not seek the same, as pertaining to the heir: THE LORDS, notwithstanding of the allegiance proponed for the executors, preferred the heir, and found that the sum belonged to the heir, and consequently to his assignee, seeing the same was owing by an heritable bond; and found, that the error committed by the heir in being tutor to the executors, and confirming this debt, and recovering sentence for this sum, at his instance, as tutor to the bairns, did not prejudice him of the right to that heritable bond, and that by that error the right was not acquired to the executors after such a manner; but that notwithstanding of that error, he might return and clothe himself with his own right, and consequently that the heir's assignee ought to be preferred, and that the heir by the deeds foresaid was not denuded, as if it had been a donation, except that the executor will allege that the heir had done these deeds of confirming, and pursuing as tutor, after that he knew and understood that the bond in law did pertain to himself as heir.

Act. Craig.

Alt. ———

Fol. Dic. v. 2. p. 150. Durie, p. 849.

1664. February 13. EARL OF ERROL against MOUAT.

THE Earl of Errol having right to the teinds of the parish of Turreff, dispones the teinds of the barony of Balquholly to Sir George Mouat heritor thereof; and in the disposition, and the dispositive words, the barony of Balquholly is set down, but with this addition, Comprehending the particular rooms, &c. therein enumerate: And amongst the rooms there is set down the teinds of the lands of Bomelly, which lands did never belong to Sir George; and, notwithstanding of the disposition, the teinds of Bomelly were still possessed by the heritor, the Earl, and the lands have been possessed by Sir John Urquhart and his predecessors these 100 or 80 years: Whereupon the Earl pursues a declarator against Sir George and Magnus Mouat, to whom he had disponed the foresaid barony, with the teinds mentioned in the foresaid right, to hear and see it found, that the teinds of the barony only were disponed, and that Bomelly being only by error falsely designed as a part of the barony, whereof it was no part, that therefore the teinds of Bomelly ought no ways to be holden as disponed by the Earl. It was *alleged* by the said Magnus, That he having acquired the teinds *bona fide* from Sir George, he ought to enjoy them according to the designation and enumeration. It was *answered*, That *falsa*

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No 190.

No 191.

Where a titular disponed to an heritor his whole t<sup>in</sup>'s, enumerating particular farms, having mentioned one not belonging to the heritor, this was held to be by mistake.

No 191.

*designatio nihil operatur*; and the subject-matter assigned being only the teinds of the barony, the word comprehending is only exegetic and demonstrative; which demonstration being clearly erroneous, contrary to the meaning of the bargain, it cannot prejudice the disponent. Likeas, it was offered to be proved by the comuners that made the bargain, that no more was comuned upon but the teinds of the barony, being Sir George's own lands; for if the particular enumeration had not fully comprehended the whole rooms, but that some one had been omitted, yet, if the subject-matter had been clear, of the teinds of the whole barony in question, Sir George could not have been prejudged; even so when a room is erroneously designed *quia plus valet quod agitur, quam quod per errorem concipitur*. And to evidence it was but a clear error, Sir George was never in possession, nor did he ever claim the teinds, though the disposition was made *anno 1656*.

THE LORDS repelled the allegiance, in respect of the libel and reply.

*Fol. Dic. v. 2. p. 150. Gilmour, No 98. p. 74.*

1672. June 28.

GILGOUR against MENZIES.

No 192.

Found in conformity to  
Dickson against  
Orkhill, No 190.  
P. 11514.

GILGOUR, as assignee by two sisters of Menzies of Enoch, pursues him for their shares of their father's executry; who *alleged*, Absolvitor from that part of the libel, in relation to a bond granted to his father, which was heritable, and belonged to himself as heir. The pursuer *answered*, That the heir having confirmed this sum amongst the moveables, he had thereby homologated the right of the executors, and could not come against his own deed, especially seeing he might then have known that it was moveable by a charge, and now he might have suppressed the charge; *2do*, It cannot be counted an error or mistake, because the heir, though he may claim the whole right in heritables, yet he may communicate the same, to take his share of the whole means, heritable and moveable, and his confirmation doth import so much. The defender *replied*, That the confirmation can only be interpreted an error, and no homologation of the executor's right, which cannot operate against the manifest truth appearing by the bond; for, though he had in the narrative of any writ under his hand narrated that this was a moveable bond, that would not operate against the express tenor of the bond, much less can a confirmation, which passes of course; neither ought it to be presumed, that the bond was moveable by a charge, unless it were proved; neither can the confirmation be esteemed a communication, unless it had been so expressed; and the error is the more presumable, that the defender, the time of the confirmation, was a minor. The pursuer *duplicated*; That the defender cannot pretend his minority; because he hath continued without declaring his mind or error, and without raising a reduction till now his *anni utiles* are past. The defender *triplied*;