No 216. it were otherwise evident that any other entry was appointed specially both setter and receiver living.

Act. *Present.* Alt. ——. Clerk, *Hay.*

Fol. Dic. v. 2. p. 152. Durie, p. 472.

No 217.
A bond found null, in respect, that in a material place there was about half a line so obliterated that it could not appear what had been written on it. As it might have been a material clause, it was presumed deleted *dolose* by the creditor.

1671. *November* 22. Mr George Pittillo *against* Anna Forrester.

Umquhile William Ayton of Fiddings, having no children of his own, disponed his lands to Mr George Pittillo his sister's son, reserving his own and his wife's liferent, and with this provision, that it should be leisome to him at any time during his life, *etiam in articulo mortis*, to dispone, set tacks, and to burden the lands by bonds for sums of money, or annualrent forth thereof, and also with provision, that what legacies he shall leave, or deeds he shall do at any time during his life, by writ subscribed with his hand, that the said Mr George shall be obliged to fulfil the same. Upon these clauses he did at first burden the estate with 6000 merks, and Mr George Pittillo being informed that there was a second bond of 4000 merks, and 2000 merks to two brother daughters, he pursues a reduction and improbation thereof; and for satisfying the production, Anna Forrester, his relict, produces a bond of 6000 merks, bearing to be subscribed by notaries at his command: Now Mr George insists upon these reasons of reduction, which were four; *1mo*, That this bond could not burden the land, because it imports no real right by any infeftment, and bears only that he burdens his successors with the sum, and so falls not under the first part of the clause, which is not limited by the manner of subscription, neither can it be warranted by the second part of the clause, which bears expresly, that it must be by writ subscribed under his hand; but this is only subcribed by notaries, and cannot be said to be subscribed by his hand. The *second* reason is, That the bond by ocular inspection is vitiated in the substantials thereof; for whereas it hath been the draught of a bond framed by the defunct when he lived at Kirkcaldy, and bears to be subcribed at Kirkcaldy, and was only intended for his wife, now his two nieces are adjoined, and for precipitancy the whole draught is altered and vitiated in the most substantial part thereof, for where it did bear the sum payable to her heirs, it is now made their heirs, and where it did bear, to be payable after the man and wife's decease, near half a line is so deleted and obduced, that hardly a letter of it can be seen, but it seems to have been, after the wife's decease also, for where thereafter the term is repeated, that which before was after our decease, is made after my decease, and where it did before bear, subscribed with my hand, it is now subscribed by notaries; upon all which it was *alleged*, The bond might be justly quarrelled, as false in the date, at least in the place of subscription, the defender having declared at the production of the bond, that they abode by it, as a writ truly subscribed, not at Kirkcaldy,

but at Bennachie, yet they only insisted against it as a writ vitiated, and so suspected, that it could make no faith, being vitiated in the substantials, and half line so blotted, and obduced, that it could not be known what was expressed therein before the vitiation, and therefore it must be holden as comprehending some condition that truly has happened to exist, which truly would evacuate the bond; for it is the common opinion of all lawyers *de fide instrumentorum*, that instruments make only faith when they are entire, unvitiate, or uncancelled; but if the same be vitiated *vitio visibili*, either by razure, interlineation, deletion, obduction, or alteration of the letters, the same is a null instrument, that can make no faith. The *third* reason was, that he was not *compos mentis* when he gave warrant to subscribe. And *lastly*, this being in effect a legacy in death-bed, it was procured by the wife or her friends by importunity, or insinuation, and so was null, as being no free deed of the husband. The two last reasons being *in facto*, and requiring probation, No 217.

The Lords insisted only in the first two, which might instantly end the process.

And to the *first*, the defender *alleged*, That the bond was sufficient, though subscribed but by notaries, because it being the common style of such reversions, giving power to disponers to burthen or contract by any writ subscribed with their hand, or under their hand, it did always import any legal subscription, either by themselves, or notaries, in case of their being disabilitate by sickness, or any other accident, and cannot be thought to be done of design to prevent importunity, when the disponer should become so weak, as not to be able to write, else it would have been adjected in the first part of the clause anent burthening with real rights, whereas it is only adjected to the posterior part anent legacies, and personal rights; and subscription by notaries is truly the disponers subscription, because of old the subscriber held his hand at the pen, which was led by the notary at his command, as the notaries subscription bears, and though now they use not always to lead the subscribers hand, yet their verbal command to the notary is not sufficient to subscribe, but they must touch the notaries pen, and these provisions being inserted in dispositions freely granted, not to an apparent heir, and being in favour of the disponer, his own liberty, they ought to be most favourably interpreted, and amply extended; and if subscriptions by notaries were thereby excluded any accident, as the palsy, mutilation, or the like, might frustrate the disponer of his liberty, which never can be thought his meaning, unless it had been clearly exprest. To the *second* reason anent the vitiation, it was *answered*, That it is true, where writs are vitiated in the substantials, the same become suspect, and not probative; but the most learned lawyers do acknowledge, that the same may be adminiculated by other writs, or by the witnesses inserted, and if the vitiation appear not to be in the substantials, it is either not at all regarded, or at least not till it be improved, by instructing that the vitiation was after the subscription; but here it is positively offered to be proved by tne witnesses in-

No 217. serted, that this bond was truly as it now stands when it was subscribed; and it is yet clear in the debtor, creditor, and sums, and any alteration is only in the succession and the term; whereas the Lords have formerly sustained a bond to be adminiculated by witnesses, albeit by ocular inspection, it was vitiated in the sum, being made 500 merks, whereas it appeared, that five was superinduced upon a lesser sum, as is observed by Durie. *See* Proof.

The pursuer *answered*, That dispositions of this nature being now most frequent, and bearing such heirs, or such other as the disponer should nominate by writ under his hand, any time in his life, that being against our common law, whereby deeds on death-bed prejudge not lawful heirs, they should be strictly interpreted; and it were of a dangerous consequence, if an heir to a great estate might be made by a pretended verbal command to a notary to subscribe, even when the party were *in extremis*. And to the *second* point, though a vitiation may be adminiculated by the opinion of civilians, where witnesses might prove the whole points of the bond, yet it cannot hold with us, where witnesses cannot prove above an L. 100, though they may prove the tenor of a bond, where there are adminicles in writ, *et casus omissionis*, yet they cannot prove any material article in a writ, especially where the same is so obliterated, that it cannot be known what was before the vitiation, as is in this case.

The Lords were of different judgments anent the first reason, and decided not the same, but found the second reason relevant, that the bond was so vitiated, that it did make no faith, and found it not to be adminiculated by witnesses, in respect that in a material place thereof at the term of payment, there was about half a line so obliterated, that it could not appear what had been written thereon before, and that it was thereby presumed, that it might be a clause that would evacuate the bond, and was therefore so delete by the haver thereof. *See* Proof.

Fol. Dic. v. 2. *p.* 152. *Stair, v.* 2. *p.* 6.

*** Gosford reports this case:

In a reduction at Mr George Pittillo's instance against the said Anna Forrester, relict of William Ayton, of a bond for the sum of 6000 merks, granted by the said William, whereof four were payable to his relict, and two to two daughters ——— his brother; there being several reasons of reduction libelled, the pursuer did insist upon two of them, whereupon they craved the Lords' interlocutor; 1*mo*, That the said William Ayton having disponed his lands of Fiddings to the pursuer, his sister's son, upon two provisions, *first*, That he should have power during his lifetime *etiam in articulo mortis*, to dispone or wadset, or burden the essate with bonds or debts; 2*dly*, That he might grant bonds or give legacies during his lifetime, providing they were done by writ, subscribed under his own hand; but so it is, that this bond in question was not such, being subscribed by two notaries only when he was in

extremis agens, and within 24 hours before he died. The *second* reason was, That the said bond subscribed by the notaries was, by ocular inspection, vitiated in substantialibus, and many other places which were of importance, viz. the term of payment was razed, which appeared to have been after both the defunct's and his wife's decease; and there was added thereafter to be after his own decease; as likewise the date was vitiated, being three or four months before, and the day before he died superinduced to be the date; likeas, the place was false, being at Kirkcaldy, whereas the defender confessed it was at Bennachie, where the defunct died, six or seven miles distant; as likewise, it was vitiated in the creditor's name to whom it was left, it being first her heirs, and thereafter made their heirs by superinduction. It was *answered* to the *first*, That the provision in the disposition, being to grant bonds on death-bed, *etiam in articulo mortis*, did necessarily imply, that he might subscribe by notaries, seeing ordinarily such persons in that condition cannot subscribe with their own hands; and, by act of Parliament, writs being subscribed by two notaries and four witnesses, are declared as valid in law, as if they were subscribed by the parties themselves; so that these words, being subscribed with his own hands, being only *ex stilo*, it may be supplied *per equipollens* allowed by the law; and if it were otherwise, then if the person should be mutilated or unable, the subscription could never be supplied by notaries, which were against all reason. To the *second*, anent the vitiation, it was *answered*, That none of them being in substantialibus, except that of the term of payment, the most that it could operate was, to declare the bond to be payable after the wife's decease; but for the rest of the superinductions, there not being question *de data* nor *de loco*, whereupon any action of falsehood was intended, and the true date and place being declared by the defenders the time of the production, whereat they were content to abide as true, these could be no reasons of reduction of the bond *in toto*; seeing they offered them to prove, by the notaries and witnesses inserted, and others who were present, that the defunct gave order for all these alterations of the bond, and was of perfect judgment when he did the same; likeas, by a practique *in anno* 1629, Ogilvy against the Lord Ogilvy, a bond being vitiated in the sum, and five superinduced where the sum had been less, the Lords did not reduce the whole bond, but only ordained the creditor to prove and instruct what was truly due the time of the subscribing of the bond. *See* APPENDIX. No 217.

THE LORDS, after much reasoning among themselves, if, before an answer, both parties might adduce witnesses for proving of the condition of the defunct, when the notaries did subscribe, if he was *compos mentis*, and gave warrant to the notaries for all these alterations; or if they should determine in the point of law without any such previous trial; did at last all agree, that the bond produced, having so many several vitiations and blottings and superinductions, should be declared void and null, and to be no title whereupon any action might be founded; but did wave to give their interlocutor upon the first reason, albeit the most did incline, that the provision, bearing, that all bonds

No 217. should be subscribed with his own hand that should affect his succcessors, could not be supplied with notaries, the defunct being on deathbed, and *in extremis agens*, albeit he was not altogether deprived of judgment; seeing, as to such bonds and legacies, the reservation did not bear that he might grant them *in articulo mortis*, as it did as to the burdening his lands with true debts, or making real rights thereof; as likewise, because it was presumed that that power and reservation was made of purpose to obviate practices and insinuations upon persons on deathbed; as also because it is most ordinary now, to persons to resign their estate in favour of such heirs of tailzie as they shall design, by a writ under their hand during their lifetime, which certainly is done of purpose, that when great sickness and infirmity seize upon them, they may not be induced on deathbed to alter or change, and a mandate proceed from them to notaries for subscribing their names, to alter and change what they had done so deliberately, being in perfect health and strength; so that those conditions being *stricti juris*, ought to operate so much, that they cannot be supplied *per equipollens*, but this was not decided.

Gosford, MS. No 399. *p.* 200.

1672. *February* 8. Mr Edward Wright *against* M'Loud.

No 218. Mr Edward pursuing M'Loud for payment of L. 4000, wherein his father was cautioner for another M'Loud; it was *alleged*, That the bond was vitiated *in substantialibus*, viz. the principal sum which was superinduced with a new ink, and of merks made pounds. It was *replied*, That the vitiation could not take away the bond, because the clause for payment of annualrent did evince, that the principal sum was pounds and not merks. The Lords did repel the allegeance, and sustained the bond, notwithstanding it was alleged, that neither principal nor annualrent were sought from the principal or cautioner of the bond these 30 years bygone.

Fol. Dic. v. 2. *p.* 153. *Gosford, MS. No* 468. *p.* 242.

1673. *July* 26. Mr John Bayne *against* Caivie.

No 219. The Lords found, that a tack being questioned as antedated to obviate an inhibition, was suspect, being rased in the date; so that the same seemed to be vitiated, and another year superinduced; and therefore was not a valid and probative writ in prejudice of the inhibition; unless it could be adminiculated by some adminicle before the inhibition.

Clerk, *Hay*.

Fol. Dic. v. 2. *p.* 153. *Dirleton, No* 179. *p.* 71.