

1610. *January 10.*SPENCE *against* REID.

No 3.
Found as
above.

SPENCE pursued the Executors of umquhile John Reid to pay the annualrent of eleven merks yearly, of all years since the year 1595, conform to a bond, by the which the said umquhile John Reid, as cautioner for his bother, was bound to have paid to Spence's mother, the sum of 110 merks, before Martinmass 1595; and, failing thereof, to infest her and her heirs in an annualrent of eleven merks yearly, and to pay as well not infest as infest. In the which cause, the LORDS found, that a party bound by an heritable bond, not having any heir, and not being of that quality that he might have any heir, that the party, to whom he was bound, had sufficient action against the defunct's executors, for fulfilling of the said heritable bond. Next, it was excepted, that the bond was null; because it was for an heritable annualrent, and was not subscribed by two notaries and four witnesses, but only by Stephen Ballentine notary, and John Moscrop co-notary, and three witnesses, it being true that Moscrop was no notary, but was hanged for behaving himself as a notary, he not being a notary; albeit, it being provided by act of Parliament 1579, that all writs, importing heritable infestment, shall be subscribed by two notaries, in presence of four famous witnesses, otherwise to be null. Notwithstanding whereof, my Lord Chancellor, President, and the most part of the Lords, sustained the bond, in respect of the smallness of the matter, and that Moscrop, co-notary, was *tentus habitus et reputatus*, albeit there were but three witnesses inserted.

Fol. Dic. v. 1. p. 201. Haddington, MS. No 1739.

No 4.

A sasine within burgh was sustained tho' granted by one who was not town-clerk, and though there was another, in regard the giver was habite and repute town-clerk, and was in use to give sasines.

1615. *July 15.*DOUGLAS *against* CHEESLIE.

IN an action pursued by Geo. Douglas of Bonjedburgh *contra* Marion Cheeslie, the LORDS repelled the exception founded upon the act of Parliament 1567, anent sasines to be given within burgh by the town-clerk, in respect of the reply, that it was offered to be proven that Mr George Douglas was repute and holden to be town-clerk, and in use to give sasines; and that, notwithstanding, they offered them to prove, that there was another town-clerk.

Fol. Dic. v. 1. p. 201. Kerse, MS. fol. 77.

1676. *November 10.*STUART *against* HAY.

No 5.
An execution by a deposed messenger was sustained, he being

THE deceast Francis Hay of Gourdie grants a bond in these terms, ' that his estate being very ancient in the name of Hay, and burdened with debt, for the preservation thereof, he obliges himself not to contract debt, nor to dis-

‘ pone without the consent of two of three persons named, or their heirs being ‘ majors for the time,’ which bond is dated in anno 1650: Thereafter in anno 1664, William Stuart takes a wadset of a part of his lands, and thereafter buys the reversion, the communing betwixt them having begun ten months before the bargain. Inhibition is raised upon this bond, and registration also about ten months before the disposition. Stuart raises reduction and declarator, that this bond should not be prejudicial to this bargain, on these reasons; *1mo*, Because the only legal remedy against weakness or levity is, that the Judge Ordinary *causa cognita* gives interdictors, who are *curatores prodigo*, which being published and registrate, all deeds done without their consent are null, except in so far as *in rem versam*; and though by our custom, interdictions have been sustained *sine causa cognita*, because it is presumed, the Lords, by granting of the publication, had evidence of the weakness, yet they have always been reduced, unless the levity were proven; but here there is no mention of levity, but a design to perpetuate lands in the same family; neither is there any interdiction or publication, but only a private bond and inhibition thereon; and albeit such inhibitions are effectual upon clauses restrictive in favour of third parties, or heirs of tailzie, yet when they terminate upon the person restricted, and his heirs of line, he becomes both debtor and creditor in the obligation, *et confusione tollitur*. *2do*, Though this was a formal interdiction, published and registrate, yet *deceptis non decipientibus jura subveniunt*, against which minors are not restored; but here there was fraud, in that this bond was kept up 14 years, and after the pursuer had made his bargain, and searched the registers, the inhibition was execute and registrate, and one of the interdictors, procurer of the inhibition, is witness to the bargain, and receiver of a part of the price. *3tio*, The messenger, executor of the inhibition, was exauctorate by the Lyon, and his deposition published. It was *answered*, That our custom hath justly and constantly allowed voluntary interdictions upon just grounds, such as the preservation of a family; and though here levity be not exprest in plain terms, yet it is sufficiently insinuate, that that person needed the help and advice of friends to preserve his family, and the weakest or wilfullest persons will not be willing to declare themselves expressly such, but must be dealt with upon gentler narratives, and there is nothing more ordinary than that instead of publication, to use inhibition. And as to the matter of fraud, or the interdictor’s consent, there is nothing relevantly alleged; but it is most rational that the interdictors should forbear to publish the interdiction till they have need; but when they saw the communing begin, it was fit that they should have interrupted it, and therefore the interdiction was registrate ten months before the subscription of the bargain, neither could the fraud or consent of one of the interdictors prejudice the weak person, who could only be authorised by the express consent of two; and for the messenger, he was holden and repute such, and was in the actual exercise of his office at that time, and the lieges are not obliged to notice Lyons’ sentences,

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holden and repute, at that time, a messenger, and officiating as such.

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even though published, but he should effectually hinder any to exercise that office who are not authorised.

THE LORDS found the defence relevant to sustain this inhibition as an interdiction, that the person interdicted was commonly known to be insufficient to manage his own affairs through weakness or prodigality, *ad hunc effectum* only to preserve him against deeds done to his enorm lesion; but admitted to the pursuer's probation, that his bargain was profitable to the behoof of the interdicted person, and allowed all witnesses and other evidences to be adduced for proving thereof, and would not restrict the pursuer to a full and regular probation thereof; and found it sufficient that the messenger was officiating at that time, and holden and repute as a messenger. See INTERDICTION.

Fol. Dic. v. 1. p. 201. Stair, v. 2. p. 461.

* * * Gosford reports the same case :

IN a reduction at the instance of William Stewart against John Hay of Gourdie, who was heir to Francis Hay who had granted a bond in anno 1650, bearing, For as much as he was a person of weak judgment and ready to be imposed upon, and that he and his predecessors had been heritors of the lands of Gourdie for many years; and being resolved not to contract debts, nor burden the same, but by the special advice of Mr David Kinloch, John Kinloch, his brother, and George Nairne, therefore he did oblige himself not to contract debt, but by their special consent, or any two of them, the said John being *sine quo non*, whereupon they raised letters of inhibition, and execute the same 14 years thereafter, at the market-cross of the head burgh of the shire; after which, the said William Stewart having obtained a wadset of the said lands for sums of money, he caused the said bond and inhibition to be reduced, so that it should not affect his wadset, upon these reasons: That the said Francis being major, *sciens, et prudens*, no private bond granted to his own friends who were not creditors, could hinder him to contract debts and grant wadsets for security, they having no interest and there being no mention of heirs in the bond. *2do*, The letters of inhibition raised and execute, not bearing the special terms of an interdiction, declaring him incapable, either as a prodigal or as a person that had no judgment or wit, could not be sustained in our law to incapacitate him from contracting debt, or granting real rights for security to the creditors, without which they were in *bond fide* to contract with him and accept of a real security. It was *answered* to the *first*, That the narrative of the bond was opposed, bearing, for as much as he was unfit to manage that estate, which was ancient; and that it might be transmitted without burden, it necessarily imported, that it should be preserved to his heirs, that they might succeed thereto; and so he ought to be preferred upon that ground of law, *qui sibi providet etiam et hæredibus*, who shall represent him. It was *answered* to the *second*, That

the letters of inhibition and executions were opposed, which bearing that they were raised upon the said bond, and thereupon did publicly inhibit him from doing of any deed which might affect the estate, was in effect a clear interdiction; and albeit, they did not bear that word *interdicts*, yet, bearing, that they did inhibit, was as binding as letters of inhibition and interdiction, bearing, *parest termini et univoci*; and, if this were not sustained, it would open a door to many persons to prey upon successors to ancient estates to destroy the same; the taking the advantage of the weakness of the present successor, who was known to be unfit for management, it was clear in this case. THE LORDS did much reason among themselves upon the relevancy of the reason of reduction, and answers made thereto; some being moved, whereof I was one, not to extend this case to a formal interdiction, which is by the civil law only sustained *causa cognita*; and upon probation and decret given by the Judge, finding the person incapable; and, by our law, albeit interdictions without a process or decret be sustained, yet it is upon express bond, bearing, that the persons to be interdicted confess and acknowledge their insufficiency to manage their estate for want of prudence, and as being subject to be preyed upon, by any who should take advantage thereof, and so consented and gave warrant, that, publicly at the market cross, they may be interdicted and declared such in express terms; which not being done here, it was hard to extend it to a solemn interdiction; seeing it was of public concernment as to lawful creditors, who, *bona fide*, might lend their money as being in security, except as to all prior creditors who had served inhibition, which was not in this case. But at last it being urged, that this pursuer had taken advantage of the said Francis Hay, and that the money lent was not profitably employed, they did all agree, that there should be an act in the process, ordaining both parties to prove the true condition of the said Francis, as to his weakness and inability to manage his estate, as likewise as to the employment of the money. It was truly *in rem versam*, by payment of debts prior to the inhibition, as for his necessary use and subsistence, as to which they did declare that they would sustain his wadsets, notwithstanding of the inhibition, which seems consonant to law and reason. Thereafter, it being urged, that the publication of the inhibition could not be sustained, because the messenger who execute the same, was deprived of his office by an act of the Lord Lyon's court. THE LORDS did consider this as a general case, and found, that, that being but a private deed against the messenger, and never made public at the market cross, it did not hinder private subjects to employ him who did continue to exercise his office.

Gosford, MS. No 899. & 900. p. 578.

* * * Dirleton also reports this case :

THE LORDS sustained the interdiction, (*voce* INTERDICTION) the defender's offering to prove, that the person interdicted was not *res suæ providus*; and FOUND,

No 5. That the person interdicted was thereby in the condition of minors ; and that he and his heirs could not question any disposition or other deed done by him, upon the naked head of interdiction, unless they allege and qualify lesion ; and that the pursuer of the reduction may prove that the bargain was profitably made, and that the price was *in rem versam* : And the Lords declared, they would not be nice as to probation, but reserved the consideration of it to themselves.

It was further *replied*, That the interdiction is null, being execute by a person that was not a messenger, being deprived ; which was repelled, in respect of the answer, that it was offered to be proven, that notwithstanding of the sentence of deprivation, he was holden and *tentus et reputatus* to be a messenger ; notwithstanding it was *triplied*, that the pursuer, in fortification of the sentence of deprivation, and his own deposition, offered to prove, that it was the common opinion of the country, that the executor was not a messenger, then being deprived ; which was thought hard by some of the Lords ; being of the opinion, that at least *habitus* and *tentus et opinio* ought to have been allowed to both parties to prove ; reserving to the Lords to consider the probation, and to judge according to that which should be found most pregnant.

{Dirleton, No 382. p. 186.

1699. July 11.

No 6.

MR MARK LERMONT, Advocate, *against* The HEIRS of LERMONT of Balcomy, and MR WILLIAM GORDON, Advocate.

A messenger's execution being quarrelled, because he was deprived, and the deprivation published at the market cross of Edinburgh, it being for no malversation, but deficiency in pointing the Lyon's dues, and he being still habite and repute a messenger ; the Lords repelled the objection.

MR MARK LERMONT, advocate, against the Heirs of Lermont of Balcomy, and Mr William Gordon Advocate, was reported by me.—It was a process of roup and sale of these lands as being bankrupt.—*Alleged*, The execution of the summons was null, being by one Sibbald a messenger deprived, and his sentence published at the market-cross of Edinburgh.—*Answered*, His deprivation not being for malversation in his office, but only for not payment of some annual dues they owe the Lord Lyon, this cannot infer any incapacity to serve the lieges ; *2do*, Whatever was the cause of his deprivation, it is enough to sustain his execution, that he continued notwithstanding to act, and was *tentus, habitus et reputatus* a messenger, according to the decision in the case of Barbarius Philippus, *L. 3. D. de officio prætor.*—THE LORDS repelled this objection, and sustained the execution notwithstanding thereof.—*2do, Alleged*, It is still null, because it is offered to be proven, that the messenger, at the time of delivering the copy, wanted the summons, the warrant thereof ; and being required by Mr William Hogg, the defender's advocate, to show his warrant, he refused the same.—*Answered, imo*, The messenger's oath anent his having the warrant amongst with him cannot prejudice the party, unless they offered to im-