

No 60.

Found in conformity with M'Adam against Lag, No 49. p. 8938.

1672. February 24.

CORSER against DEANS.

BARBARA CORSER as executrix to her husband, pursues George Deans notary for payment of bond of 137 pounds granted to the defunct, who *alleged* absolvitor, because the bond is null, being granted by him when a minor, and his father on life, without his consent, who as lawful administrator was curator to him, which was found in the case of Mackenzie against Fairholm, No 72. p. 8959. It was *answered*, that the defender was not then *in familia paterna*, but was a notary and messenger acting for himself several years. *2do*, The bond bears, that the sum was advanced for making him notary and messenger, which being so profitably employed, he is liable as *lucratus* thereby, which is effectual against any minor. It was *replied*, that the father remains as curator, whether his son continue in his family or not, in the same way as other minors, though not in the family of their curators, yet cannot act without their consent; neither does a minor's skill as notary or messenger take away the hazard of his levity in managing affairs; neither can the minor's assertion in the bond prove that the money was employed to make him notary or messenger; for *eadem facilitate*, that minors may be induced to borrow money unprofitably, they may be induced to declare what is not truth; and though this bond were null, the pursuer may pursue for any thing profitably employed for the minor, but not on this bond.

THE LORDS sustained the allegiance to validate the bond, that the sum was employed to make the defender notary and messenger, but found that it was not proven by the acknowledgment of the bond, but that it might be proven *prout de jure*. See PROOF.

Fol. Dic. v. 1. p. 576. Stair, v. 2. p. 78.

No 61.

The Lords sustained a minor's breaking his father's tailzie, and paying his debts, as rational acts, notwithstanding the minority, and though he did not adhibit thereto the consent of his curators.

1677. December 15.

NICOLSON against NICOLSONS.

UMQUHILE Sir Thomas Nicolson, the King's Advocate, by his bond ordered his affairs on this manner: ' That if the child in his lady's belly be a male-child, he should be his heir, and he resolved to make him his executor and universal legatar, so that failing the said male child by decease, without heirs procreate of his own body, his sisters-german would be his heirs and executors, and exclude his sisters by the father's side, the said Sir Thomas, his daughters of the first marriage; and seeing his daughters of the second marriage are sufficiently provided to 40,000 merks by their mother's contract, ' Therefore he the said Sir Thomas did ordain and appoint, and did oblige him the said male-child, and his heirs and executors whatsoever, not being of his own body, in case the said male child decease without heirs of his own body, ' to dispone, assign, and transfer all his estate heritable and moveable, in favours of his daughters of the first marriage. Likeas *de presenti* he doth assign

‘ and dispone the same to his said daughters of the first marriage, providing
 ‘ the daughters of the second marriage be secured in the said sum of 40,000
 ‘ merks.’ This bond was subscribed before witnesses, upon the 15th day of
 June 1655; and there is subjoined thereto a postscript, written with Sir Tho-
 mas’s own hand, bearing date the 6th day of August 1656, in these terms:
 ‘ Forasmeikleas by my codicil of testament of the 6th day of August instant.
 ‘ I have nominated and appointed the child that my wife is presently with, if
 ‘ it be a man-child, to be my heir and executor; therefore it is my will, and I
 ‘ ordain the bond above written to stand obligator against the said child where-
 ‘ with my wife is presently, he being a man-child, his heirs and executors not
 ‘ being of his own body (he dying without heirs of his own body), to fulfil the
 ‘ bond above written, and I oblige me, him, and my foresaids, to fulfil the
 ‘ same to my daughter Isobel Nicolson, she fulfilling my testament and codi-
 ‘ cils to her sisters-german Susanna and Anna Nicolson, and not to her sister
 ‘ Marion, because she is sufficiently provided by her contract of marriage.’ The
 child then conceived proved not a male child, but a posterior child did, whose
 name was Thomas, who died a few years before he attained the years of his
 majority, without heirs of his body; but a little before his death, there being a
 competition betwixt him and Janet Nicolson, only daughter to Sir James Nicol-
 son of Cockburnspath, and Mr John Hay clerk, for the succession to Sir James
 in that estate, which was provided to heirs male and of tailzie; and for preserv-
 tion of that succession the said Sir James having given a bond to the said Sir
 Thomas his brother, bearing sixty thousand pounds as borrowed money, the said
 Sir Thomas gave him a back-bond, ‘ that he should only make use of this bond
 ‘ to secure his succession to Sir James, in case his heirs-male failed;’ yet there-
 after Sir James, in his son’s contract of marriage, disponed his estate to his heir,
 and heirs whatsoever; whereby his son dying without issue, Haystoun’s wife,
 as heir of line to her brother, claimed the estate, and Thomas Nicolson raised
 a declarator, that his father’s bond was effectual to preserve the tailzie, and that
 he might affect the estate for that sum, notwithstanding of any posterior deed by
 Sir James. This competition ended by accommodation, and Haystoun’s wife
 disponed all right she had in favours of Thomas; and likewise Sir James Nicol-
 son, reserving only his own liferent of a part: In which agreement Thomas dis-
 charged Sir James of 11,000 merks, due by Sir James to the said umquhile Sir
 Thomas, and gave Haystoun and his wife 13,000 merks of composition; all
 which was made up of Sir Thomas’s estate. Thomas did also pay 21,000 merks
 further of Sir James’s debt, affecting the estate of Cockburnspath, and took as-
 signation to the bonds, in favour of himself, his heirs and assignees, or took
 blank assignations. There is now a pursuit at the instance of Isobel, Anna,
 and Susanna Nicolson, daughters to the said Sir Thomas of the first marriage,
 against Rachel and Margaret Nicolson, daughters of the second marriage, as
 heirs and executors to the said Thomas Nicolson, and not of his own body, to
 fulfil the foresaid obligation granted by Sir Thomas in favour of the pursuers,

No 61.

and specially to assign and dispoſe to them, Sir Thomas's whole eſtate, principal and annual; and againſt Sir James Nicolson, as being alſo heir male to Thomas, and not of his body; and againſt Sir John Nicolson, as he who promiſed to relieve Sir James, or at leaſt that it might affect the eſtate of Cockburnſpath, diſpoſed by Sir James to Sir John, without onerous cauſes, in prejudice of Sir Thomas's anterior bond, whereby Thomas and his heirs, not being of his body, were obliged to make payment of the ſums employed by Thomas for relief of the debts of Cockburnſpath.—It was *alleged* for the defenders, *1mo*, That Sir Thomas Nicolson's bond could have no effect, becauſe it was conditional, and the condition exiſted not, becauſe the child conceived in the time of that bond, was not a male child; and for the poſtſcript, it could not be effectual, becauſe it being holograph, it proveth not its own date, and ſo muſt be underſtood as *in lecto ægritudinis*; and therefore can only affect as a legacy of the defunct's part of the moveables, but neither the bairns part, nor any heritable ſum. *2do*, The import of the bond is only a ſubſtitution, or tailzied ſucceſſion, whereby Sir Thomas, ſubſtitute to his ſon, failing of the heirs of his body, his half-ſiſters, whereby Thomas himſelf was fiar, and ſo might, and did diſpoſe, which the purſuers, being his heirs ſubſtitute, are obliged to fulfil, and cannot quarrel. *3tio*, Though the bond could be interpreted as an obligation to reſtore Sir Thomas's eſtate to the daughters of the firſt marriage, in caſe Thomas died without heirs of his body; yet the obligation could only begin at Thomas's heirs, not being of his body; for though for formality Sir Thomas binds himſelf and the male child, and his heirs, not being of his body, yet neither Sir Thomas, nor the male child, could be obliged perſonally to do a deed that preſuppoſeth both their deaths; and it is unqueſtionable, that if the male child had had heirs of his body, theſe heirs were not obliged; therefore, neither could the male child himſelf be obliged, or otherwiſe all repreſenting him behoved to be obliged *suo ordine*; and therefore Thomas the male child not being obliged, his lifting his father's eſtate, and employing it as he pleaſed, was a warrantable deed, for which none repreſenting him could be accountable. *4to*, Though the male child were obliged, that his heirs, not of his body, ſhould reſtore and aſſign his father's eſtate to his ſiſters of the firſt marriage; yet that could never be ſo interpreted as to make him a perpetual liferenter; but it can only import, that the eſtate ſhould be reſtored as it was at the male child's death, for an eſtate is *nomen univerſitatis*, as *hereditas* is. And if Sir Thomas had ordained his heirs to reſtore a flock of ſheep, it would not impede the diſpoſal of ſuch part of the flock as his heirs for the time had uſe for; ſo that ſuch a clause can only be interpreted to ſecure againſt deeds of fraud or dilapidation, but not againſt neceſſary or rational deeds; as if the male child had married, and had given proviſion to his wife, it cannot be thought his father intended that proviſion ſhould be ineffectual if he died without iſſue; or if he had fallen in the hands of the Turks, that he might not ſecurely pay his ransom; and therefore, in ſo far as he ſpent and conſumed his father's eſtate, his heirs

male succeeding to him in Cockburnspath, could never be liable ; but, on the contrary, his transacting with Mr John Hay's wife in a dubious case, to prevent the loss of that tailzie, to which his father was formerly provided, was a rational deed, which his father, who was so earnest to preserve that tailzie, would never have opposed.—It was *answered* for the pursuers to the first, That the holograph postscript proves not its date : It is true, *holographum non probat datam contra tertium* ; as a holograph discharge by a cedent, bearing date before arrestment, will not prove against the arrester, but it will prove against the cedent and his heirs. There is also a presumption against holograph writs, that they are antedated to cover their being on death-bed, which does not universally hold but when there is a great detriment to the heir, obtained by weakness or importunity ; but where the detriment is not great or unreasonable, the presumption is far stronger, that no man will falsify a date, or that the date is true as it is expressed ; much more in this case, where this holograph is adminiculated by the defunct's bond before witnesses, to which the postscript is subjoined, and it is no more than a marginal addition, for there is no material alteration by the postscript, but only a supply of the inadvertance in the first bond ; which, if it had said, ' That if the child then conceived, or that thereafter should be conceived, ' proved a male child, their heirs not of their body should restore,' there had ' been no need of the postscript ;' and though the bond bears, ' to restore to ' the four daughters of the first marriage,' and the postscript ' to Isobel the second daughter,' there is no material alteration ; because betwixt the bond and postscript, Marion the eldest daughter was married and provided, and Isobel the second was executrix nominated and appointed to communicate to her sister. As to the second defence, it is clear by the whole stream of the bond, that it is not a substitution, but an obligation conditional, whereby the male child, and the heirs not of his body, were obliged to restore his father's estate, if he died without issue, which, therefore, does not only oblige his sister-german, as heirs of line to his brother, but Sir James Nicolson's heirs-male to perform that obligation ; and it is very consistent that a person may oblige himself, and such kind of heirs only, whereby all the rest of the heirs are free. And suppose that necessary acts fell not under the contravention of this bond, yet certainly voluntary acts do, such as application to the estate of Cockburnspath ; nor can there be any pretence, but that Sir James Nicolson should make payment of the sums due by him, whereunto Thomas Nicolson took assignation to his heirs whatsoever ; whereupon Thomas's sisters-german might distress Sir James and his estate, and which they behoved with the rest of Sir Thomas's estate, to restore to their sisters of the first marriage, reserving only 40,000 merks to themselves : And whatever might be alleged of a person being major, his power to alter his estate, and apply that to the heir male, which did befall to heirs whatsoever ; yet a minor cannot alter in prejudice of his heirs of line, for thereby he is enormly lesed.—The defender *replied*, That Thomas's taking assignation, was equivalent to a discharge ; for he was both debtor as being obliged to Sir

No 61.

James to pay his debt, and creditor, as assignee constituted by Sir James's creditors, *et confusione tollitur obligatio*.—It was *duplied*, That albeit in Thomas's own time, while he remained debtor and creditor, the debts by confusion could have no effect; yet after his death, having different heirs of line and male, the heirs of line succeeded to him *in credito*, and the heir male *in debito*, and thereby the confusion ceased. It was also remembered what the Lords had done in the case of John Dickson of Hartree, who having made assignation to his bonds for provision of his children in one writ, did by several holograph margins and additions, change the same from one child to another, and all was sustained.

THE LORDS found, That the holograph postscript being adminiculated with the bond, to which it was adjected, and so suitable thereto, that there was no ground of presumption that the date was not true, or antedated, to palliate death-bed, and therefore sustained the postscript; and found the import of Sir Thomas's provision to be a conditional obligation, That the male child dying without heirs of his body, his other heirs should assign and dispone his estate to the daughters of the first marriage, with deduction only of necessary and rational deeds, whereby the estate was consumed; and therefore decerned Sir James Nicolson, as heir male to Thomas, not of his own body, to make payment to Rachel and Margaret Nicolson, as heirs of line to Thomas, of the sums whereunto Thomas had taken assignation in his own name, or blank, and his heirs; and likewise decerned against Sir John Nicolson, as being engaged to relieve Sir James, and declared the estate of Cockburnspath might be affected by legal diligence of adjudication for the said sum, unless Sir John instruct an equivalent cause onerous of the disposition granted by Sir James to him; and also decerned the said Rachel and Margaret Nicolson, as heirs of line to Thomas, and not of his body, to grant assignations in favour of Isobel Nicolson, for herself, and to the behoof of her sisters-german, of the principal sums contained in the said assignations taken by the said Thomas, and of the remanent of Sir Thomas's estate extant, in so far as exceeded the sum of 40,000 merks, which they found the said Rachel and Isobel had a right to retain, and also to retain the annualrent of the said sum assigned, and what else was resting of Sir Thomas's estate, not discharged by Thomas, due for years or terms after Sir Thomas's death; and did assoilzie the said Sir James, and the said Sir John Nicolson, from repetition of their part of Thomas's estate that was wared out for acquiring the interest of Mr John Hay's wife, and which Thomas had discharged to Sir James; and found, that Thomas establishing the right of Cockburnspath in his person, and his heirs male, and applying the said sums for that end, were valid and rational acts, according to law, and to the tenor of his father's bond, albeit the same was done by him when he was minor. See PROOF.

Fol. Dic. v. 1. p. 577. Stair, v. 2. p. 582.

. See the sequel of this case from Fountainhall, v. 1. p. 423, 447, and 458, *voce* TAILZIE.