1707, *November* 21.

GAVIN WADDEL *against* BETHIA WADDEL, and JOHN GILHAGIE Her Husband.

No 480.
A declaration by the debtor's heir, that he abstracted his father's second contract of marriage, sustained as a pregnant adminicle in a process of tenor, although that declaration stood reduced *ex capite lecti*.

ALEXANDER WADDEL having three sons of his first marriage, marries Janet Hamilton, his second wife; and Bethia Waddel is the only child of that marriage.

The said Alexander dying in the year 1654, Janet, his relict, possessed a part of his lands as liferenter, and thereafter raised a process against James Waddel, the eldest son of the first marriage, as lawfully charged to enter heir to his father, libelling upon a contract of marriage, by which she was provided to the liferent of certain lands, and also to the liferent of 3000 merks, and the fee of 4000 merks, provided to the heirs of the marriage; in which process, after litigious debate, the liferent of 3000 merks was restricted to 1800 merks, and she obtained a decreet in the year 1667, and thereupon an apprising, in the year 1668, and also a charter from the superior, and was infeft, notwithstanding she attained not to the full possession of all the apprised lands; but James, the heir of the debtor, retained a partial possession.

After the decease of the liferenter, and of James and Alexander, who were the eldest sons of the first marriage, Gavin Waddel, the grandchild, by a third son, being young, is educated by the said Bethia and her husband; but she and her husband also obtained possession of the apprised lands; and Gavin Waddel afterwards understanding that his grandfather's contract of marriage with the second wife (which was the foundation of the foresaid decreet, apprising, and possession,) was a-missing, did raise reduction and improbation of the apprising, and grounds and warrants thereof, and especially of the contract, in which it was *alleged* for Bethia Waddel, that there could be no certification against the contract, albeit it was not produced, because it was abstracted by James Waddel, the pursuer's uncle, and heir to the contractor; and for instructing thereof produced a declaration, under his hand, emitted some time before his death, for the exoneration of his conscience, acknowledging, in presence of the minister and schoolmaster of the place, that he had wrongously taken away the said contract, and therefore ratified and approved the same in all points, to which the minister, and his second brother, and the apparent heir, are subscribing witnesses.

The pursuer repeated a reduction of that ratification and declaration, *ex capite lecti*, and having proved his reason, the LORDS read the same, and granted certification.

The defender raised a proving the tenor of the contract, which the Lords admitted *incidenter*, and stopped extracting the certification.

The adminicles were, the decreet fully libelling upon the contract of marriage, and containing long debates, an act for adducing probation, whereupon the claim was restricted, and a decreet at last; and also the date of the registra-

No 480. tion stands marked in the minute-book of registrations, and the outgiving of the process, and return, is found amongst the warrants upon the back of the summons, and a receipt by the pursuer's advocate's servant remains unscored, together with the depositions of famous witnesses, who saw the contract, and knew the subscriptions of the wife and her brother, though after so long time they could not remember the whole contents, though they remembered some provisions, neither did they specially notice the subscription of the husband; and the apprising, charter, sasine, and possession, as also the foresaid declaration and ratification of the heir, which, though on death-bed, and thereby not sufficient as a ratification, yet is a most convincing and probative document and adminicle of the truth and verity of the contract; and oaths are often taken of dying persons, which are probative; and such declarations, for exoneration of their consciences, ought no less to be regarded.

To all which it was *answered*, That provings of the tenor require a most articulate and pointed probation, not only of the verity of the deed, but of the precise and full tenor, date and witnesses; and it has many times been observed, that the most undeniable documents of the existence of the deed have not been sustained to make up the tenor of it, because that one clause may qualify another, and also adminicles in writ, under the contractors' hands, have always been required; and it is observed in the case Harroway *contra* Heatly, *voce* Tenor, that the Lords refused to sustain the proving the tenor of a contract of marriage, though the marriage ensued; and the full copy of the contract, written in a stile book in the writer's chamber, was produced, and the writer and witnesses offered to be produced to make faith upon it. And as to the process, there is marked produced, an extract in the English time, a year after the husband's death, which is no better than a copy; and no regard to James Waddel's declaration being reduced as on death-bed and when he was really weak, and is also suspect as to the verity, bearing to be subscribed *ad longum*, whereas, some days before, a subscription of his is produced by initial letters; and in his deposition he condescends, that the contract was given to the Lady Parkhead, who, thereafter, being pursued in an exhibition, depones she never saw it; neither do the witnesses who saw the contract depone upon the subscription of the husband, which only could bind his heirs.

It was *replied*, That the adminicles are most convincing, as to the verity of the deed and the clause in question, which need not be resumed; and though the same was registrated in the English time, after the husband's death, it could not be the worse by that registration; for then the principal was returned, marked upon the back, and a contract of marriage is most easily presumable, especially where there were children of a former marriage, who are the lineal successors, unless burdened by contract; and the heir's declaration on death-bed is a most convincing document. And, as to the only material objection, that the full tenor, and writer and witnesses, are not adjected, it is *answered*, That there is a great difference betwixt a proving the tenor designed to be the foun-

dation of a debt, and diligence and executions thereupon, and a tenor, repeated by way of defence, for supporting a decreet *in foro*, obtained when the matter was more recent, and whereupon apprising, public infeftment, and long possession, have followed. In the first case, a probation of the full tenor, writer and witnesses, may be required, but, in the last, it is sufficient to document the verity of the deed, in so far as concerns the obligation, whereupon the diligence and possession have followed; which specialty was accurately considered by the Lords, in a process betwixt Sir David Thoirs and the Laird of Tolquhoun, No 122. p. 6694. where the LORDS found, that there being no qualification or suspicion of falsehood, that certification ought not to be granted. No 480.

"THE LORDS found that the qualifications proved were sufficient to astruct the verity of the deed, and to exclude certification."

Fol. Dic. v. 2. p. 255. Dalrymple, No 85. p. 107.

*** Fountainhall reports this case:

GAVIN WADDEL, in Bothwell, pursues a reduction and improbation against Bethia Waddel and John Gilhagie, her husband, of a comprising led of a two-merk land in Bothwell; and the whole writs called for being produced, except a contract of marriage, which was the ground and foundation of the debt apprised for, Gavin craved certification against the same. *Alleged*, There can be no certification against it, because James Waddel, his brother, had, by a declaration under his hand, before the minister and elders, acknowledged that he had abstracted the said contract out of his stepmother's, and destroyed it; and therefore, *ad levandam et exonerandam conscientiam*, he ratified the same, as if it were extant. *Answered*, That declaration, if true, can never prejudge Gavin, the heir, for it was granted on death-bed the very day he expired; and though what a man says *in articulo mortis* deserves credit, few descending to the grave with a lie in their mouth, yet, as the lawyers say, *non omnis moriens est Joannis Evangelista*; and in the paroxisms of death, they may be easily imposed upon. And this is most suspected, for it is a fair and full subscription, whereas, four days before, he signs a writ by two notaries, as unable to write himself. But death-bed being proved, Gilhagie recurs to a proving of the tenor of the contract, and for adminicles produces a decreet *in foro* in 1677 mentioning the production of it, with the apprising, charter, and sasine following thereupon, and proved by witnesses that saw and read the said contract, and that the relict, by that apprising, had possessed the lands for many years. *Answered*, Tenors are the nicest of processes, and require the clearest evidence and conviction, else false writs may be purposely shewn, and then cancelled, and so made up by the testimonies of such as have read them; and the contract, produced in the decreet, was not the principal, but only an extract, which was neither authentic nor probative, being registrated after the party's death, *et mortuo mandatore expirat mandatum*; and it was no better than a copy. And these very lands be-

No 480. ing provided in fee to the bairns of the first marriage, by his contract, it is not to be presumed he would fraudulently dispone them over again in his second contract, like the case of the three Aikmans, sisters, (*see* Appendix); and Dirleton, 14th July 1667, Harroway *contra* Haitley, *voce* Tenor, remarks, the Lords refused to make up a contract of marriage, though John Nicol, the dictator of it, and his apprentice, offered to depone upon its tenor, and that it stood recorded *verbatim*, in his stile book, seeing there was no adminicle in writ adduced. *Replied*, Though the whole tenor and clauses of the contract be not fully and mathematically proved, yet *in re tam antiqua*, as upwards of three-score years back, there was enough *ad victoriam causæ*, to infer a moral certainty of the veracity and truth; and whatever might be said against making up of bonds, yet contracts, which are mutual synallagmas, are more easily proved; and it is a demonstration there was no suspicion of falsehood, when the case was fresh in 1667, compearance was made, and a contentious debate on sundry heads, and oaths taken, and never a word of its being false, which is an evidence that it is only obtruded now because amissing, which President Spottiswood observes, the Lords did not regard in Keith of Benholm's case; and Laird of Livingston against David Wood, (*see* Appendix). And the Lords have always made a great difference between the making up of a writ, to be the ground of a future action and pursuit, and a tenor, craved only to shun and avoid a certification, in a presumptive falsehood; and therefore an extract was sustained, and certification refused against the principal, in the case of Mr David Thoirs against Sir Alexander Forbes, 14th January 1674, No 122. p. 6694.—The Lords laid hold on this distinction, and found there being no presumptions of real falsehood adduced against this contract, and the adminicles being so pregnant, though all the clauses and date were not fully proved, yet found there was sufficient to seclude that certification, and assoilzie from the reduction. See Tenor.

Fountainhall, v. 2. *p.* 395.

*** Forbes also reports this case:

In the reduction and improbation, at the instance of Gavin Waddel, as heir to James Waddel, against Bethia Waddel, and John Gilhagie her husband, for reducing an apprising of some tenements and acres of land in Bothwell, belonging to the said James Waddel, led by Janet Hamilton, Bethia's mother, upon a decreet of constitution obtained against him, as representing Alexander Waddel his father, for implement of the provisions in her contract of marriage with Alexander; the pursuer craved certification against the contract, in respect it was not produced. The defenders, to stop certification, repeated *incidenter*, a proving of the tenor, condescending upon this *casus amissionis*, that James Waddel, the pursuer's predecessor, had wrongously, by ways and means, abstracted the contract, as appeared by a declaration under James's hand, emitted for the

exoneration of his conscience, before the minister and schoolmaster of the place. For making up of the tenor, the decreets of constitution and apprising, by virtue whereof the defenders had been thirty years in possession, were produced; and in fortification two honest witnesses deponed, that they saw the contract about thirty-eight years ago, subscribed by Janet Hamilton, and by James Hamilton of Boigs, her brother, as a witness, and remembered of a liferent provision therein made to her, but did not mind the whole contents thereof, being *in re antiqua.* No. 482.

Alleged for the pursuer, No respect can be had to James Waddel's declaration, because it was reduced, as being granted on death-bed. Besides, it is suspected to be false, for that the subscriber writes his name *ad longum*, who, a few days before, had subscribed other papers by the initial letters of his name, being incapable to write more; and the Lady Parkhead, to whom, by the declaration, he says, he delivered the contract, pursued in an exhibition, denied that ever she saw the same; 2*do*, The decreet of constitution is no sufficient adminicle, being founded only upon an extract of the contract, registered in the time of the English Judges, a year after Alexander Waddel's death, which was no better than a copy; now the exactest copy, and even notorial doubles, have been rejected, as adminicles, for proving of tenors; nor can regard be had to the allegeance of long possession, because Janet's possession was only by virtue of her liferent, after whose decease James Waddel, the pursuer's predecessor, and his brethren, possessed successively; 3*tio*, As to the witnesses adduced, they are not *testes instrumentarii*, and declare nothing as to the subscription of Alexander Waddel the principal party.

Answered for the defenders, 1*mo*, The declaration, without respect to the law of death-bed, must be considered as the confession of a dying man, who is to be presumed to have been sincere. It is not of import, that a sick man, in a chronic distemper, subject to unequal paroxisms of fever and calmness, did write his name better at one time than at another. As to the circumstance of the declaration, concerning its having been delivered to a lady, who denies upon oath that ever she saw it, the declarant might have been easily mistaken, by giving it to one he thought was the lady, or to some person to deliver it to her; and she might have received it, though she never saw it, by getting it sealed, under a cover, from another hand; but whatever way it came from the declarant, he got it out of Janet Hamilton's coffer. Besides, in mutual obligations, especially contracts of marriage, where there are many parties and witnesses, the *casus amissionis* is not so nicely enquired into, as in the case of a simple bond, which may be extinguished by retiring; 2*do*, It was a principal, and not a copy of the contract, that was produced in the process of constitution, it being usual, in the English times, for the keeper of the register to mark the ingiving of the paper to be registered, and to return the same to the party, taking only a copy to record it by, which copies, after the practice was reprobated, came to be confounded and neglected; and the English were so wise as not to regard the fri-

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volous subtility of not registrating a writ after the granter's death. Again, though execution, or diligence of horning, poinding, or caption upon a writ so registered, might have been declared null; yet where nothing followed upon the registrating but what might have proceeded upon the principal contract itself, though it had never been marked registrated, by way of action, *non refert*, whether the registrating was before or after the granter's death. Again, the possession of James Waddel and his brethren was but clandestine, before the defenders adverted to their interest, who, since the other's removal, have possessed a matter of thirty years; 3*tio*, Though, in a proving the tenor of this contract, in order to pursue thereon, it were reasonable to require a nice and mathematical instruction of the whole contents of the writ, and subscriptions, yet the adminicles and documents adduced by the defender are more than sufficient to exclude certification against it, being expede *in anno* 1638, now seventy years ago; for albeit positive falsehood might be a ground to reduce a writ *quandocunque*, yet this old contract, upon which two decreets, infeftment and possession hath followed, cannot be taken away only by the presumptive falsehood of a certification.

The Lords found (there being no qualifications of falsehood insisted in) the adminicles proved, and relevant to exclude the certification.

Forbes, p. 200.

No 481.

Found, that a bond upon death-bed, bearing the cause to be for alimenting, excluded the defence of prescription.

1725. *February* 20. Ross *against* Moubray.

Agnes Ross obtained from her son, Patrick Moubray, a bond for 5000 merks when he was on death-bed, which bore to be for the education and aliment she had given him for fifteen years.

After his death, she pursued Margaret Moubray for payment of the sum in the bond, as having past by Patrick and served heir to his predecessor in certain lands which Patrick had possessed for three years as apparent heir, by which she became liable for Patrick's debts and deeds in terms of the act 1695.

It was *alleged* for the defender, That the act 1695 did not concern gratuitous bonds, and this bond being granted on death-bed, could not prove its onerous cause, but must be presumed gratuitous.

Answered for the pursuer, That she was able to support the truth of the narrative of the bond by a proof of her alimenting and educating him, which undoubtedly was an onerous cause for granting it.

Replied for the defender, That a claim for aliment prescribed in three years, and could not be proved further back, and that three years aliment could be no adequate cause for such a bond.

Duplied for the pursuer; That a regular aliment does not fall under the triennial prescription, and is nowise similar to mens' ordinaries, merchants' ac-