

ANSWERED for Margaret Tod,—*1mo*, By the former testament, or general clause in the special disposition, all the children were to have an equal share of the remanent stock; and the missive-letter makes no alteration in the general partition, except giving to the oldest L2000 out of the remanent stock. And by the word *them*, he certainly meant his daughters, whom he had not spoke of expressly before, and not his son, expressly mentioned before. Besides, a dubious expression in a codicil, doth not derogate from the express words of a preceding testament, which are drawn *ad mentem testamenti*.—*Menoch de presump. Lib. 4. pres. 117. N. 3.* *2do*, The signification of *them*, in the latter clause, can have no influence on that word in the former: because, *1st*, In the latter clause, touching eternal and spiritual concerns, the children had no separate or interfering interests; whereas, in the former clause, about their temporal concerns, the interest of one derogates from that of another. *2d*, If the father had given his blessing to his son expressly, and then given it to *them*, the latter blessing had been applicable only to the daughters.

The Lords found that the son ought to have L2000 as a *præcipuum*, beside an equal share with the daughters. *MS. page 74.*

1714. *July 21.* MARGARET and ELIZABETH THOMSON, daughters to the deceased JOHN THOMSON, Merchant in Montrose, and Others, *against* JOHN NICOL, Skipper in Alloway.

IN the action of reduction and suspension, at the instance of Margaret and Elizabeth Thomson, and others, of a decret of Session at John Nicol's instance, against them,—The Lords found, that the said decret being pronounced against the said Margaret and Elizabeth Thomson, as minors, and therein so denominat-ed; and against David Skinner, Provost, and Mr. Alexander Thomson, Doctor of Medicine in Montrose, as tutors and curators to them; proved against the obtainer of the decret, that the said Margaret and Elizabeth Thomsons were minors at the time; unless the contrary, viz. that they were then majors, were proven. Because, though it be true in general, that he who offers to reduce a deed upon the head of minority, ought to prove the same, according to the rule, *actori incumbit probatio*; that needs not to be done where the deed itself, against which restitution is craved, owns the minority: *verba enim operantur contra proferentem*.

*MS. page 93.*

1714. *July 22.* EDWARD MULLIKINE, indweller in Hillsborough, in Ireland, *against* JAMES BROWN, Merchant in Edinburgh.

MARY DUMBALL came from Ireland, having married James Brown in Edinburgh, with whom she lived twelve years. After her decease, Edward Mullikine

raised, before the Commissaries of Edinburgh, a process against the said James Brown: libelling that he had been lawfully married to the said Mary Dumball, and had several children by her; and that afterwards she deserted him, and took with her upwards of L50 Sterling of his effects, with which she had traded to considerable advantage at Edinburgh; [and] had left a considerable quantity of goods intromitted with by the defender: who had also granted a bond for L100 Sterling, payable to the said Mary Dumball, and failing of her by decease, to John Mullikine, her son, procreated betwixt her and the pursuer; to which moveables and bond the pursuer had right *jure mariti*.

ALLEGED for the defender,—*1mo*, No process can be sustained at the pursuer's instance, till he prove that the said Mary Dumball in question was his wife. *2do*, Suppose the marriage were proven, yet the defender cannot be liable to give up the goods and others libelled; being his own property, acquired by his own means and industry. Whereupon the Commissaries granted commission to in Ireland, to take and receive all habile and famous witnesses, for proving the marriage and cohabitation, and that the said Mary Dumball, who was the pursuer's wife, was the same woman who cohabited with the defender; and ordained the defender to exhibit the said bond, for farther adminiculating the marriage; and superseded to consider, whether the pursuer had right to the said moveables, *jure mariti* or not, until advising of the said probation. Thereafter, the pursuer having given in a petition, craving to be allowed to clear the marriage by some witnesses, presently at Edinburgh, that were necessarily obliged shortly to leave the place; the Commissaries granted diligence to cite these witnesses, and allowed their depositions to lie *in retentis*, and the women witnesses to be taken *cum nota*.

Against this interlocutor, the defender presented a bill of advocacy upon incompetency and iniquity. In so far as, *1mo*, the Commissaries were not competent judges, whether the effects of Mary Dumball belonged to the pursuer, *jure mariti*; which is a conclusion not consistorial, but merely civil. *2do*, They committed iniquity in ordaining the bond to be exhibited, to which he produceth no title. *3tio*, They had shown themselves suspect; in granting a commission to prove the marriage, before they determined the relevancy of the defender's exception, that he could not be liable to restore the goods libelled, as being his own property. *4to*, Their partiality farther appeared in allowing the depositions of witnesses to lie *in retentis*, before determining the resolveny, and women witnesses to be taken *cum nota*. For the Lords of the Session, who are the supreme judicature, never take depositions to lie *in retentis*, but in cases of absolute necessity; where testificates are given upon soul and conscience, that the persons craved to be examined are extremely old and infirm, and thereby the mean of probation in hazard to be lost; and as women witnesses are inhabile where there is no *penuria testium*; so the taking them *cum nota*, is a part of the *nobile officium* only competent to the Lords of Session or Justiciary.

ANSWERED for the pursuer,—*1mo*, The Commissaries are most competent, the previous question being about marriage. *2do*, They did most justly ordain the bond to be exhibited; seeing it is payable to the pursuer's wife, and doth adminiculate the marriage in manner aforesaid. *3tio*, They committed no iniquity in ordaining the marriage to be first proven: Because the defender controverted the pursuer's

title; and it was *frustra* to determine whether the moveables belonged to the first or second husband, till it was made appear that the pursuer was the first lawful husband. *4to*, The Commissaries acted justly in allowing the witnesses upon the place, to be first examined; because, till they depone, it is not known but they may fully prove the marriage, and so prevent the trouble and expense of executing the commission in Ireland. And women witnesses were allowed to depone *cum nota*, because they are usually received before the Commissaries to prove marriage, at least cohabitation; and though it might be questioned if women witnesses could make up a total proof, yet their depositions are good to adminiculate the marriage and cohabitation, and to clear the procreation of children of a controverted marriage.

The Lords refused the bill, and remitted the cause to the Commissaries.