

1715. February 17.

SINCLAIR of Freswick *against* Sir JAMES SINCLAIR of Dumbeth.

No 36.

A bond wanting statutable solemnities, was found capable of homologation, by partial payments.

IN the action at the instance of Sinclair of Freswick, against Sir James Sinclair, for payment of a debt owing to David Sinclair, from whom Freswick had right, the defender *pleaded* compensation for 500 merks, as yet resting of a bond of 1000 merks granted by the said David Sinclair to him.

Answered for the pursuer; That the bond founded on was null by act 5th, Parliament 1681, one of the witnesses not being designed.

Replied for the defender; That David Sinclair had homologated the bond, by making payment of the one half of the principal sum, and all the annualrents, and raising a suspension of the bond, in so far as concerned the other half; where his reasons of suspension were the payments above-mentioned, and an offer to prove compensation or payment of the other half by Sir James's oath.

Duplied for the pursuer; That when deeds are null *ipso jure*, and by positive statute, there can be no place for homologation; which can only take place where the deed is not null *ipso jure* but only reducible and quarrellable; such as a deed on death-bed, or a deed after publication of an inhibition, &c. But in the present case and others like it, it is even *pars judicis* not to sustain process upon such a writ, though no objection were made by the party; and the form of the writs being *juris publici*, private parties cannot by an express, far less by a tacit consent, make that a formal deed, which law has declared informal and null.

THE LORDS sustained the acts of homologation by payment of the annualrents, and the half of the principal sum, and by raising a suspension for the rest, and founding upon reasons for further payment, to support the bond as a valid and probative writ.

Act. Ro. Dundas.

[Alt. Dun. Forbes.

Clerk, Alexander.

*Bruce, v. 1. No 71. p. 86.*1715. July 20. BENJAMIN ALLAN *against* HAMILTON of Little Earnock.

No 37.

The procurator for a minor granted a discharge to which the minor himself subscribed as witness. Found that the minor did not there-by consent to the discharge.

BENJAMIN ALLAN having right by progress to 500 merks, as a part of 1000 merks contained in a bond granted by the deceased Little Earnock to Alexander Orr, and his tutors and curators, in his name and for his behoof, pursues the present Little Earnock upon the passive titles; who at calling produced a discharge granted by James Henderson step-father to Orr, granting the receipt of 500 merks, with L. 20 as a year's annualrent in part payment of a greater sum borrowed by Little Earnock from him, conform to the bond, and discharges him *pro tanto*, to which discharge Orr is a subscribing witness. And this

discharge the defender alleged did cut off the said bond, (the other half thereof having been paid to William Douglas vintner, who had right thereto by progress). And that

Because, *imo*, The bond bearing the money to have been received from the relict (Orr's mother) and her second husband Henderson, in name of her son, and being payable to him, his heirs, &c. and his tutors and curators in his name; the payment was lawfully made to Henderson as tutor or pro-tutor to him, because *bona fide* payment is still by law sustained to dissolve an obligation, and here was *fides uberrima*, for the money was borrowed from Orr's mother and her husband, for her son's behoof while he was minor, and while she and her husband acted for him as curators; *2do*, Because Orr by signing witness to the discharge did homologate the same; for certainly, where a witness is principally concerned in the subject matter of a writ, his knowledge of its contents is presumed; as was found in June 1663, Stewart *contra* Stewart, No. 51. p. 5674, where the LORDS found, "That an apparent heir's witnessing to a writ on death-bed, was equivalent to a consent, in regard he was in law presumed to have known, or ought to have known the nature of the right, because of his obvious concern in the subject matter; which the LORDS found made a great difference betwixt him subscribing as witness, and a stranger not interested." As also in *anno* 1710, in the case betwixt Home of Whitefield and the Laird of Castlestewart,* the LORDS found, "That the Viscount of Kenmure's subscription as witness to Castlestewart's fitted accompt with his father, did so homologate the said accompt, that the Viscount could not afterwards impugn the same, but that it stood probativa against him, because of his subscribing witness thereto, and obvious concern in the subject matter.

Replied for the pursuer; *imo*, That by comparing the conception of the bond itself with the discharge, it clearly appears that they do not meet; because James Henderson is neither the person to whom the bond is made payable, neither is he tutor or curator to Orr; and though he were, yet the minor must discharge, and the curator only consents. *2do*, Nor will the signing witness help the matter, since witnesses may sign papers without knowing the contents, nor are they guilty of any fault in so doing. And that consent is not inferred by one's signing witness to a writ, is evident by the decisions, Veitch *contra* Ker and Pallat, No 28. p. 5646.; Gordon *contra* Menzies, No 26. p. 5646.

THE LORDS repelled the defences, unless the defender would allege, that the money was applied to the minor's behoof.

Act. Ja. Hamilton Olivestop. Akt. Sir James Nasmith, Clerk, Gibson.

Fol. Dic. v. 1. p. 378. Bruce, v. 1. No 122. p. 158.

* Examine General List of Names.