

spe numerandæ pecuniæ, which followed not, or that the defender promised her payment, and hath not done the same, without which the action ought not to be sustained; for, as a minor, past twelve years of age, might make a testament, so also she might lawfully at that age dispoñe upon that sum, or discharge it. This allegiance was repelled, and the reason found relevant.

Fol. Dic. v. I. p. 577. Durie, p. 227.

No 70.

1633. December. Sir JOHN SEATON against Sir JOHN HEPBURN.

By contract of marriage between Sir Robert Hepburn's son and Sir John Seaton's daughter, Sir Robert was bound to possess his son with 20 chalders of victual for his maintenance. Sir John having charged Sir Robert for fulfilling of this part of the contract, he suspended, upon this reason, that his son had discharged him of four chalders of the twenty, and had obliged him to content himself with sixteen. *Answered*, This bond being but a private deed and paction, *contra publicam tabularum nuptialium fidem*, was null, and ought not to be respected, as being *contra bonos mores*, especially it being given upon the day of the contract, which the youth was induced to do *amoris ardore*, and least the contract should have been dissolved.—THE LORDS found this allegiance against the reason of suspension relevant.

No 71.
Although a minor cannot discharge a debt gratuitously, yet a promise to grant such a discharge was sustained.

1634. January 15.—Afterwards the suspender offered to prove, that his son long after the marriage, came to him willingly, and promised to abide by the former condition he had tied himself to. *Answered*, He was yet minor, and revoked presently any such promise made in prejudice of the contract of marriage, especially there having nothing followed thereupon, but being *nudum pactum*. Next, his promise could not prejudge his father-in-law Sir John to seek implement of the condition, he being a contractor. *Replied*, He was *majoritati proximus*, and could not revoke a promise made in favour of his own father. Next, he prejudged none but himself during his own time; for, if he died before his wife, his promise could not bind her, but her father might seek implement of the whole in her behalf.—THE LORDS found this part of the reason of suspension relevant to be proven by his oath.

Fol. Dic. v. I. p. 577. Spottiswood, (MARRIAGE.) p. 205.

1666. December 7. Sir GEORGE M'KENZIE against FAIRHOLM.

SIR GEORGE M'KENZIE, advocate, pursues a reduction of a bond granted by him as cautioner for his father, (the bond is now assigned to John Fairholm), on these reasons, 1st, That the bond is null, as being done by a minor, being in his father's family, and not being authorised by his father as lawful adminis-

No 72.
A bond of caution was reduced, for this reason only, that it

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was granted
in behalf of a
curator, who
could not
authorise a
deed in fa-
vour of him-
self.

trator; and, therefore, in the same condition as a minor having curators, they not confirming, such deeds are null, and may be reduced at any time, though they have not been quarrelled within the minor's age of twenty-five; *2dly*, Because curators being chosen as a security to the levity of minors, they cannot authorise the minor to the curator's behoof, but such deeds are null; so neither could the pursuer's father authorise him to be cautioner for himself. The defender *answered*; *1st*, That albeit a father, as lawful administrator, and tutor to his children, excludes all other tutors, yet he is not curator after their pupillarity, because they may choose other curators; and that *fili familias*, in the civil law, could not contract without their father's consent. It was a special statute, *per Senatus-consultum Macedonianum*, and not as curator; *2dly*, The father cannot be liable for his omissions by his unprofitable authorising his children, for such actions would be *contra pietatem & obsequium*; *3dly*, There is nothing more frequent in Scotland, than sons to have a distinct estate while in their father's families, given by the father, or otherwise, whereof they have the full administration, without authority; *4thly*, Whatever may be alleged for children residing in the family of their father, yet that cannot be extended to children acting by themselves, far from their father's family; but the pursuer was so living, and acting at Edinburgh, attending the tolbooth, and was *majori ætati proximus*, being past twenty. The pursuer *answered*, That his reason stood still relevant; because, by the law of Scotland, a father is lawful administrator to his children, and is not ordinarily designed lawful tutor, but lawful administrator, which does not only endure during their pupillarity, but during their minority; but at least till they be married or forisfamiliaried; or, till they have a distinct subsistence or calling. And albeit the children be not residing in the family, yet they are *in familia* so long as they are there, and not separated from the same, as the pursuer was; and albeit the son may choose other curators if the father permit, or the Judge think fit, and is not convenable for his misauthorising and omission, that infers only that he is only curator *honorarius*. The defender did further *allege*, That the father had further authorised, in so far as he subscribed the said bond, and so consented that his son should subscribe, and neither was the deed *in rem suam*, but *in rem creditoris*.

THE LORDS found the reasons of reduction relevant, and repelled the defences; and albeit many thought, that the father subscribing with the son was sufficient to authorise, yet that it was not sufficient, being caution for himself *in rem suam*; but did not proceed to cause the parties condescend how near Sir George was to majority, and what was his way of living.

1667. July 25.—Sir George M'Kenzie, advocate, having formerly pursued reduction of a bond, granted to umquhile John Fairholm, wherein he was cautioner for his father, and Pluscardy, upon this reason, that he then being

minor, entertained by his father as in his family, his father was his administrator, and in place of a curator, so that deeds done without his father's authorising as curator were null; neither could his father authorise him to his father's own behoof, as cautioner for his father, which the Lords found relevant to annul Sir George's subscription; and now Sir George desiring the extract of the interlocutor; it was further *alleged*, That Sir George was not only cautioner for his father, but also for Pluscardy; and that his father might authorise him to subscribe cautioner for Pluscardy, and therefore the bond behoved to stand against him as cautioner for Pluscardy. It was *answered*, That albeit his father might authorise him as cautioner for Pluscardy, in a bond apart, wherein his father was not concerned, yet, if his being cautioner to Pluscardy were to the behoof of his father, he could not authorise him therein; but this bond is of that nature, for Pluscardy and the pursuer's father being bound conjunctly and severally, caution adjoined for any of the *correi debendi* could not but be to the behoof of both; because, in so far the obligation was strengthened, and the payment made by the cautioner would liberate both; and if Sir George should be decerned cautioner for Pluscardy, it would liberate his father, and so is clearly to his behoof.

In respect whereof, the LORDS repelled also this new defence, and adhered to their former interlocutor; and found Sir George's subscription for his father and for Pluscardy, to be to his father's behoof, and that he could not authorise him therein; neither did he at all directly authorise him, but in so far as they both subscribed as principal and cautioner in one bond. See TUTOR AND PUPIL.

Fol. Dic. v. 1. p. 577. Stair, v. 1. p. 409, & 480.

. Dirleton reports this case:

1666. July 24.—IN the case of M'Kenzie against Mr John Fairholm; Sir George M'Kenzie having, by way of reduction, questioned a bond granted by his father, and himself as cautioner, as null *ipso facto*; upon that ground, that he was minor when he signed the bond; and his father being administrator of the law, and in effect curator to him, had not authorised him as cautioner, and could not be author *in rem suam*, the pursuer becoming cautioner *in rem*, and at the desire and in behalf of his father;

THE LORDS did not this day decide the question; some being of opinion, that a father, though if his children be *impuberes* and pupils, be the tutor and administrator of law, yet he is not curator to his children being *puberes*; seeing a son, if he should desire other curators to be given him, his desire could not be refused; *et habenti curatorem curator non datur*.

1666. July 26.—THE LORDS found, in the case before-mentioned, that a father is *loco curatoris* to his son, being *in familia*; and that a bond granted by

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the son, without his consent, is null *ipso jure*; as if it had been granted by a minor having curators without their consent.

1666. December 7.—Sir George M'Kenzie having intented declarator and reduction of a bond subscribed by him as cautioner for his father, *ex eo capite*, that it was null *ipso jure*, in respect he was minor for the time, and his father was *loco curatoris* to him, and had not authorised him, at least could not be author to him *in rem suam*; it was *alleged*, That he had not intented reduction within the *quadriennium utile*; and as to the declarator of nullity, the reason was not relevant, in regard bonds granted by minors, having curators, without their consent, are null; they being interdicted *eo ipso* that they do chose curators, that they do nothing without them; but bonds granted, or other deeds done, by minors wanting curators, are not null in law; but the minors lesed by the same may crave to be reponed *debito tempore* by way of reduction. And that the father, though he be tutor in law for the children being pupils, he is not curator being *puberes* and of that age that they may choose their own curators.

THE LORDS, notwithstanding, found the reason relevant; and declared the bond null as to the pursuer; *quibusdam refragantibus, inter quos ego*; upon these grounds, that there is a great difference betwixt tutors and curators, pupils and *puberes*, the father having, by the law, power to name tutors, and consequently being tutor of law himself, and having that authority which may be derived, and given by him to others; whereas he has no power to name curators to his children, when they are of that age that they may choose themselves; and though he should name curators in a testament, his nomination could not bind his children; and, *2do*, If children, being *puberes*, should choose any other persons to be their curators, they would exclude and be preferred in that office to the father; whereas *habenti curatorem curator non datur*; *3tio*, If a child should have an estate *aliunde*, and the father (his son being *pubes*) should *cessare*, and be negligent in the administration of his estate, there could be no action against him for his omission, which might be competent against him and his heirs if he were curator.

For the Pursuer, *Wedderburn & Lockhart*.
Clerk, *Gibson*

For Fairholm, the Defender, *Sinclair*.

Dirleton, No 26. p. 11. No 31. p. 14. & No 55. p. 23.

No 73.

A bond of caution, granted by a minor, with consent of tutors, was sustained.

1672. February 20.

CARSTAIRS against MONCREIFF.

MR DAVID MONCREIFF being debtor to James Brown in a sum of money, he did procure William Moncreiff his son as principal, and Sir John Moncreiff as cautioner, to grant a bond to the said James Brown for the said sum; and Sir