

John being minor, the bond is granted with consent of Mr David as his curator; and being now assigned to Robert Carstairs, he charges Sir John, who suspends, upon this reason, that the bond is null, as being done by a minor having curators, without their consent; and as to the consent adhibited by Mr David Moncreiff, it is null, because no curator can authorise his minor *in rem suam* to the curator's own behoof; and it is offered to be proven that this curator was debtor in the same sum before, and caused his own son grant this bond, and his minor as cautioner in place thereof, whereby the curator himself was liberated of the prior bond. It was *answered*, That albeit a curator cannot authorise his minor to any deed done directly in favours of the curator, as if the minor should grant a bond to his curator, or should be cautioner for his curator; yet, where the curators behoof is but indirect and consequential, neither our custom, nor the Roman law, from whence it is drawn, prohibits or annuls such consents of curators, as is clear in the case of a tutor or curators authorising a pupil to enter heir to a person who was debtor to the tutor, that yet his consent was valid, *l. i. quanquam D. De autoritate & consensu tutorum*; and if this were drawn in consequence to every remote advantage of curators, neither could creditors be secured, nor minors authorized. It was *replied*, That the behoof of the curator is not remote in this case, neither could the creditor pretend to be *in bona fide*, as not knowing the curator's interest or behoof, the curator being debtor to him in the same sum before; and this being a fraudulent unwarrantable act of the curator, unnecessarily to engage his minor as cautioner, the creditor was *particeps fraudis*, and did collude with the curator in engaging his minor.

THE LORDS considering, that the charger did not plead his interest as a singular successor, but was content that his cedent Brown should depone, they found only the knowledge and collusion of the creditor of importance to annul the curator's consent to a deed not directly to his own behoof; and therefore, before answer, ordained Brown's oath to be taken *ex officio*, that it might appear whether there was any collusion or not. See TUTOR and PUPIL.

Fol. Dic. v. i. p. 577. Stair, v. 2. p. 73.

1706. January 24.

Mrs MARGARET SHAW against Sir JOHN SHAW of Greenock.

Mrs MARGARET SHAW and her curator *ad litem*, having pursued Sir John her brother, for payment of the principal sum and annualrents contained in her bond of provision; the defender *non fecit vim* as to the annualrents, but *alleged* he could not be obliged to pay the principal sum, being a debt fairly acknowledged and secured beyond exception, to a curator *ad litem*, where there was

No 74.
A bond of provision in favour of a daughter was so qualified, that she should

No 75.
 ' not assign
 ' gratuitously,
 ' and dying
 ' without
 ' heirs of her
 ' body, or
 ' without dis-
 ' posing for
 ' onerous
 ' causes, the
 ' same should
 ' return to the
 ' granter's
 ' heir. She
 pursuing a
 constitution
 of the debt
 against the
 heir, was
 found entitled
 to uplift in
 her minority
 only the an-
 nualrents,
 and not the
 principal sum,
 unless for an
 onerous
 cause.

no *lis*, or necessary action; especially considering, that the bond is so qualified, that it was not in the creditor's power to assign without an onerous cause; and she dying without lawful heirs of her body, or without disposing for onerous causes, the portion should return to the defender; whereby he has an evident interest to retain, at least to elide any process intented in minority without consent of curators having an universal authority.

Replied for the pursuer; The defender is only a substitute in certain events; and albeit the pursuer cannot assign but for onerous causes, she may exact payment, at least with a quality that the principal sum shall be re-employed in the terms of the substitution; as was decided betwixt the Lord Ballenden and the Earl of Roxburgh; and in the case of Mrs Margaret Douglas, against Douglass of Bridgefoord.

Duplied for the defender, Neither is the pursuer a simple fiar, nor the defender a naked substitute, nor is the caution offered sufficient to hinder the alteration of the destination. For the money being uplifted and discharged, although once re-employed in the same terms, it were easy by a new remove to evacuate the conditions of the bond to the prejudice of the defender; *2do*, It was found, 25th February 1663, betwixt James and Marjory Aikenheads, that a sum assigned to James Aikenhead and his heirs, which failing, to the said Marjory and her heirs, could not be uplifted by him in his minority; *voce* WRIT.

THE LORDS found the defender liable for the sums in the bond of provision; but that the pursuer could not uplift the principal, but only the annualrents, in her minority, unless for an onerous cause; and therefore decerned in the constitution of the debt against the defender, superceding execution as to the principal during the minority except for onerous causes.

Fol. Dic. v. I. p. 577. Forbes, p. 85.

1726. *January 26.* MARQUIS of CLYDSDALE *against* EARL of DUNDONALD.

No 75.

A MINOR, even with consent of his curators, cannot gratuitously alter the settlements of his estate.

Fol. Dic. v. I. p. 577. Rem. Dec.

* * * This case is No 3. p. 1265. *voce* BASE INFESTMENT.

1728. *December 24.* HUNTER *against* —

No 76.

A REMUNERATORY donation of two small tenements in the town of Ayr granted by William Hamilton, a minor, above twenty years of age, to his brother uterine, was reduced at the instance of the heir upon this *medium*, that a minor, though he has power to test upon moveables, can do no gratuitous deed in prejudice of his heir. See APPENDIX.

Fol. Dic. v. I. p. 577.