because it affords no evidence that the granter gave authority for adding the testing clause; and therefore this fact must be proved, without which the deed is not effectual in law. No. 175.

"It carried by the narrowest plurality to repel the objection."

Sel. Dec. No. 62. *p.* 81.

1706. *March* 5. JEAN LOCKHART *against* DR. ARCHIBALD HAMILTON.

No. 176.
Vitiation of a writ, what effect it ought to have?

Margaret Pringle, *anno* 1717, executed a disposition of some tenements near the Bristo-port of Edinburgh, to Margaret Monteith her daughter, in liferent, and to William Hamilton, Margaret Monteith's eldest son in fee, and to his heirs and successors. This disposition contains procuratory and precept; and a sasine upon the precept was produced in process, bearing date 1st August 1717, in favour of Margaret in liferent, and her son William in fee.

William Hamilton the fiar having gone to the West Indies with the sasine in his pocket, and having died there without issue *anno* 1742, the succession devolved upon Thomas Hamilton his immediate younger brother, who finding Margaret Pringle's disposition without any sasine upon it, as far as appeared, made up titles as heir to his brother William by a general service, and made a gratuitous disposition of all his effects, including the subjects contained in Margaret Pringle's disposition, to his wife Jean Lockhart.

Thomas Hamilton having died in the year 1744, also without issue, the succession again opened to Dr. Archibald Hamilton the next brother; and the sasine in favours of William being now discovered, he made up titles accordingly as his heir, passing by Thomas, who, as said above, was never infeft.

Jean Lockhart unwilling to give up her right, inquired into the history of William's sasine, which was her only obstacle. Examining Margaret Pringle's disposition in the record, a notandum was discovered on the back of it in the following words: "1st March 1717, Betwixt one and two afternoon, sasine given by Walter Ferrier within designed, bailie in that part, to Margaret Monteith in liferent, and William Hamilton in fee. Witnesses John Reid and William Cleland writers in Edinburgh, James Cunningham freeman weaver in Portsburgh, and John Couts stocking-weaver in Bristo. Whereupon instruments taken in the hands of William Chalmer notary-public." As this notandum gave satisfactory evidence that a sasine was taken on the 1st of March, Jean Lockhart's doer upon searching the record, found the sasine above-mentioned, dated 1st of August 1717, in every article agreeable to the said notandum, the date only excepted. And as there was some slight appearance of a manufacture upon the word *August* in the sasine, it was conjectured, that this was the same sasine which was *de facto* taken on the 1st of March, and that being neglected to be recorded within the 60 days, the notary, to cover his own neglect, had falsified the date, by turning *March* into *August*, in order to qualify it for being recorded.

No. 176. Upon this discovery, Jean Lockhart brought a process against the above-mentioned Dr. Archibald Hamilton, setting forth, "That the sasine to Margaret Monteith in liferent, and William Hamilton in fee, is of a false date, the word *August* being superinduced in place of the word *March*; and concluding, that the titles made up by the defender, are improper, and that she has the only good right to the subjects under controversy, as disponee from her husband, who was *in titulo* by his general service to his brother William." The Court struck with the danger of falsifying solemn writs, especially the title-deeds of land, pronounced at first the following interlocutor: "Find, that the sasine in question is vitiated and falsified in its date, and is therefore void and null."

This was an unexpected stroke upon the Doctor, who was thereby cut out of his property by voiding his predecessor's sasine after it had stood unchallenged more than 40 years. And it was not a little alarming to every disinterested bystander, as it tended evidently to weaken the security of our land purchasers; for against such latent defects the record can give no security. And accordingly when the matter was again brought before the Court, the interlocutor was altered, and Dr. Hamilton's title sustained to carry the property. The grounds upon which this last interlocutor proceeded were as follow: In the first place, it does not appear that there was any falsehood. For admitting sasine to have been taken 1st March, and the same instrument extended upon it that we now see, it is possible that sasine might have been taken over again 1st of August by the same notary and before the same witnesses; upon which supposition the former instrument would answer, obliterating only the word *March*, and superinducing the word *August*. And it was urged, that the law converts this supposition into a reality, because what ought to have been done will always be presumed to be done. *2dly*, Supposing a falsehood, it follows not that William Hamilton had any hand in it. It is more natural to suppose, that the falsehood was committed by his doer, to hide his omission of recording within the 60 days. *3dly*, Supposing William Hamilton guilty, his supposed guilt can have no consequence in a civil Court, but to bar him from taking any benefit by the vitiation. Now as by the supposition the vitiation of the date was to entitle the sasine to be put upon record, all that can follow is to hold the sasine as not recorded; which will not hurt the doctor; because a sasine, though not recorded, is a good title of property, and requires a special service in the heir. *4to*, It is a point not controverted, that William Hamilton was regularly infeft upon the 1st of March; and if so, the property of the tenements was regularly vested in him. Now, laying the greatest weight upon the falsehood he afterwards committed, according to the present supposition, this *mala praxis*, could not forfeit him of his property *ipso facto*. A forfeiting process surely was necessary. And as his right was not challenged during his life, he died proprietor, and his heir must connect with him by a special service or a precept of *clare*. His brother Thomas, therefore, who only had a general service, died in apparency, and the gratuitous disposition made by him, is ineffectual as *a non habente potestatem*.

No. 176.

As the chief instruction that can be got from this decision concerns the vitiation of writs in appearance legally completed, I take this opportunity to illustrate a doctrine of some importance. It is laid down in the Doctor's reasoning, that in a civil court the vitiation of a writ cannot produce any further effect than to deprive the wrong doer of the benefit he proposed to himself by the vitiation. The proposition, for the reasons assigned by the Doctor, appears to hold true universally at common law. And it also holds true in equity, where, as in the present case, a right, once fairly established, cannot be taken out of the way otherwise than by a reduction. For it is not in the power of a Court of equity, more than of a civil Court of common law, to forfeit a man of his right because of any transgression. But in a matter of obligation, which requires to be made effectual by a process, a Court of equity can and ought to extend its power further. Thus, a bond which was made the foundation of a process for payment, being found vitiated in the sum by superinduction of pounds for merks, was refused to be sustained even for the original sum. 26th November 1723, M'Dowal of Garthland *contra* Kennedy of Glenour, Sect. 12. *h. t.* For a Court of equity may justly refuse its interposition for making a bond effectual to a pursuer who has falsified the same, leaving it upon the debtor's conscience to pay what is justly due. And the like decision was given 10th of February 1636, Edmonston *contra* Syme, Sect. 12. *h. t.* with respect to a bond antedated in order to save from inhibition; for the Court denied action upon this bond.

Sel. Dec. No. 163. *p.* 223.

1760. *November* 19. SHEPHERD *against* INNES.

No. 177.

In a reduction of bills granted for an apprentice fee, the objection that the original indenture had never been stamped, was repelled.

Fac. Coll.

*** This case is No. 8. p. 589. *voce* APPRENTICE.

1774. *August* 3. THOMAS LAIDLAW *against* MUNGO PARK.

No. 178.
Whether the superinduction in a bill, of a less sum than what the original still legibly was, vitiates the

Park being sued, as representing the deceased John Park, for payment of a bill which John had accepted for £50 Sterling, payable to Laidlaw, pleaded, That the bill was not actionable, as being vitiated *in substantialibus*.

It was admitted, that the sum of the bill, as originally drawn by the pursuer, was £60, and in that shape having been sent to John Park, by the pursuer's wife, to get it accepted, the account given of the superinduction that now appears in it