No 25.

to prove their accounts now, *post tantum tempus*; and the Lords thought not; but they giving their oaths upon the verity of the furnishing, and that the prices set down are ordinary, the Lords sustained the bonds, and repelled the reasons of reduction founded on the interdiction, and found they could not hinder the party interdicted to contract debt for so just and necessary a cause; and such bonds and accounts were neither quarrellable nor null upon the want of the friends, to whom he was interdicted, their subscription and consent. See Proof.

Fol. Dic. v. 1. *p.* 479. *Fountainhall, v.* 1. *p.* 779.

No 26.
A person interdicted, granted with consent of his interdictors bond for a sum to his brother's children, with which sum, by disposition of an estate to him, he was allowed to burden that estate. The bond, though gratuitous, was sustained.

1711. *July* 26. Rae *against* Maxwell.

The deceased Maxwell of Tinwall being interdicted to friends because of his notour weakness, he grants a bond to his brother's children for the sum of 5000 merks with consent of his interdictors. Mr Peter Rae, minister, having married one of the daughters, pursues for payment of her share. Maxwell of Munches, the heir of tailzie, objects to the bond as null, bearing no onerous cause, but merely for love and favour; and though the interdictors are consenting with him, yet that can never support the bond, because that would empower interdictors to ruin the best families in the kingdom, when they fall in weak hands; for they will readily consent to gratuitous deeds, and extravagant donations in favours of their friends, which wholly evacuates the good design of interdictions for preserving the heritage from squandering and dilapidation; interdiction being a mutual compromise and paction, the weak person must do nothing without their consent, and they, from the principles of common sense and equity, are reciprocally bound to consent to no deed to his lesion, hurt, and prejudice, as all gratuitous gifts are; and if 5000 merks be sustained, why not 50,000? for *majus et minus non variant speciem*; and there is no way for trimming here. Once lay down this position, then if he can prevail with his interdictors to concur with him by consenting to gratuitous deeds, they may soon ruin the best families. And Craig is very clear on this, L. 1. D. 15. § 24. that he can do nothing to his prejudice, even with their consent: And the common law *de prodigis* (which is the like with interdicted persons) is the same, § 8. *Instit. de inutil. stipulat. l.* 40. *D. de reg. jur. l.* 26. *D. de contrah. empt.* And the French law is as clear, that they have no power to dilapidate, yea not so much as to do a single deed *in detrimentum prodigi*; else, instead of protection, it would be a snare to such unhappy people. *Answered*, Tinwall was fiar of the estate, and so might do every thing with consent of his interdictors that he could have done if he had not been interdicted; their consent redintegrating his person, and putting him in a full capacity to do all rational deeds, (as this truly was.) And *esto* they should malverse and exceed in their trust, the deed is valid, but he has relief against the interdictors who

Fountainhall, in his report of this case, says the bond was sustained, because it was rational, having an antecedent cause, but that the Lords did not determine the point whether a gratuitous bond granted with consent of interdictors, is valid; but Forbes says the bond was sustained, because it was granted with consent of the interdictors.

consented. But to yield that they cannot squander and dilapidate the estate (for here the point needs not to be pleaded so high) this was a most rational and onerous deed; for the very disposition conveying the estate to the person interdicted empowered him to burden it with 5000 merks in favours of these his near relations; and he did no more but exercise the faculty left him, which they might very well do. *Replied*, Cases must not be taken on specialities, else the best laws may be frustrated; and the power left did not oblige him to use it; and it had been more the interdictor's duty to have refused it than to have burdened the estate unnecessarily with this sum. It was *urged*, That though an inhibition hinders alienation, yet if the inhibiter consent, the inhibited party may freely dispone: But there the prohibition is not universal, but only with regard to the inhibiter's interest, which he may dispense with. THE LORDS found the deed, having an antecedent cause, was rational, and sustained the bond; but had no need to determine the general case, how far interdictors may legally consent to gratuitous deeds, which in the general was thought to be a very dangerous preparative. No 26.

Fol. Dic. v. 1. p. 479. Fountainhall, v. 2. p. 665.

*** Forbes reports this case:

July 19.—AGNES MAXWELL Lady Tinwall in January 1669, disponed the lands of Dinwoodie and others to Robert Maxwell her grand-child, and the heirs-male of his body; which failing, to George Maxwell of Munshes, &c. with this express provision, That it should not be in the power of Robert Maxwell, to burden or affect the lands with more than 6000 merks of debt. Robert Maxwell, in *anno* 1695, interdicted himself to certain friends; and thereafter finding that he had no children, nor prospect of any, he, with consent of the interdictors, granted a gratuitous heritable bond for L. 1000 to each of Agnes and Margaret Corsans his sister's children, upon which they were infeft. Mr Peter Rae, husband to Agnes Corsan having right to the said L. 2000, pursued a poinding of the ground against Munshes after he succeeded to the estate.

Alleged for the defender; The bond is null; because the interdictors could not authorise the interdicted person to grant deeds for love and favour in prejudice of his heir, which is a dilapidation in law; more than curators could authorise their minors, to gift away their substances, and so ruin *cum privilegio* that which they were appointed to preserve.

Replied for the pursuer; A person interdicted can do every thing with consent of his interdictors, that he could do were he not interdicted; and Tinwall, had he not been interdicted, could have granted the heritable bond quarrelled, or could alienate gratuitously, as well as for onerous causes. Interdictors are not like curators; for the former are not, as the latter, liable to diligence. And a minor being prohibited by law to alienate even though he had no curators,

No 26. there are legal rules restraining the administration of his curators; whereas since nothing restrains an interdicted person's disposal, but his own consent, that restraint can go no further than his consent hath limited him; which is, that he shall not have power to dispose without concurrence of the interdictors. Again, as a person inhibited may delapidate with consent of the inhibiter, what should hinder an interdicted person to do the like with consent of his interdictors? 2*do*, Granting the heritable bond was but only an exercise of the faculty of disposing of the 6000 merks in favours of his own nearest of kin.

Duplied for the defender; An interdicted person cannot do, with consent of his interdictors, whatever he could do were he not interdicted; for a person not interdicted is at perfect liberty; whereas after interdiction, neither he nor his interdictors are so. And though interdictors are not liable for omissions, they are liable for commissions; and what they do unwarrantably to the prejudice of those they are bound to preserve from hurt, is reducible, *Negotiorum gestores* are liable for malversations; and interdictors who are chosen and accept, are less favourable, when they counteract their trust. An interdicted person cannot do with consent of his interdictors, what an inhibited person could do with the consent of the inhibiter; because, the prohibition in an interdiction is universal; whereas the prohibition in an inhibition, hath a special regard to the inhibiter's interest. Therefore as one inhibited cannot prejudice the inhibiter, so a person interdicted cannot even with consent of the interdictors prejudice his heritage. 2*do*, The faculty to burden is not positive, but only negative, that he should not be able to burden the estate with more than 6000 merks. Besides, it could not put him in a better condition than if he had had the full and free administration; in which case he could neither burden nor alienate without an onerous cause; the faculty could only be understood *in terminis habilibus*, as accords of the law. Again, this faculty being given when Tinwall was not interdicted, it could not be given *eo intuitu* to capacitate him when interdicted. And as Tinwall could have renounced this faculty; so he effectually renounced it by interdicting himself.

THE LORDS sustained the bond, though gratuitous, being granted with consent of the interdictors, and repelled the defence.

Forbes, *p.* 528.

1749. *July* 12. DINGWALL *against* MONRO.

No 27. Interdiction strikes not against ordinary acts of administration.

A VOLUNTARY interdiction, so far as it goes, has the same effect with a judicial interdiction; but it goes no farther than it expresses; and therefore, where by the letters of publication, which is the act that gives effect to the bond of interdiction, the will was, 'That the lieges be inhibited to take any right to the 'pursuer's lands, &c. or to lend him sums of money,' that was not thought to