

1741. *June 17.*

JOHN SPOTTISWOOD of that ilk *against* The CREDITORS of PRESTONGRANGE.

A marginal note upon a back-bond, dated in the year 1679, signed by the granter, but no mention made either of the writer of said margin, or of witnesses to it, was notwithstanding found good against the user of the deed.

The Lords had formerly found the marginal note null; but that judgment being reversed on an appeal, this judgment was now given in compliance with the order of the House of Peers.

*Kilkerran, No. 6. p. 606.*

**No. 20.**

A marginal note signed by the granter, but without mention of writer's name, or witnesses, found good against the user.

1747. *November 17.*

MRS. ELEONORA, MARY, and ANN BOTHWELS, *against* WILLIAM EARL OF HOME.

Charles Earl of Home, grandfather to the present Earl, having left his younger children unprovided, Alexander Earl of Home his son, father to the present Earl, on a transaction with the Countess his mother, granted bond, to his two sisters, Ladies Marjory and Margaret, and George his brother, for 20,000 merks, viz. to each of the said Ladies 7000 merks, and to George 6000 merks, payable at the first term after their respective majorities or marriages, &c. and, by a subsequent clause in the bond, it is provided, "that, in case of the decease of any of the said Ladies Marjory and Margaret, or George their brother, before their respective majority or marriage; then, if one of them decease, the decessant's portion shall fall and accresce to the two survivors equally; and, in case of the decease of one or both of the last two survivors, the portion of the deceasing shall fall to the granter himself." The Ladies Marjory and Margaret did long survive majority, and, in the year 1718, obtained decree of adjudication against their nephew the present Earl of Home, whereby the sums due to them by said bond of provision become heritable.

In the year 1735, Lady Marjory being then dead, Lady Margaret intermarries with Mr. Bothwell, eldest son to the Lord Holyroodhouse, and, in her contract of marriage, conveyed not only her own provision of 7000 merks, and the adjudication as corresponding thereto, but also the one half of her sister Lady Marjory's provision, as devolved to her by her sister's death, by the aforesaid clause of substitution in the bond of provision.

In an action of mails and duties pursued against the tenants of the Earl's estate, at the instance of Mrs. Eleonora, Mary and Ann Bothwells, as deriving right

**No. 21.**

One subscribing only the last page, not bound by clauses in the preceding pages.

No. 6. to the said adjudication, it was objected for the Earl, that the substitution whereby Lady Margaret claimed a share of her deceased sister's provision, was at an end by her sister's having survived the years of majority, being the first event upon which the provision became payable; and, if so, then, although Lady Margaret might have been entitled to the half of her sister's portion as executrix to her, if the same had remained moveable, yet, as it had been rendered heritable by the adjudication, it belonged to the Earl as her heir:

Accordingly, the Lords found, "that the substitution was at an end, in respect that Lady Marjory Home did survive the years of majority, and remitted to the Ordinary to proceed accordingly."

As the particle OR is a disjunctive, taking the words of the substitution strictly, if either of the two did not happen, the substitution takes place; but as in such cases the intention of parties is to be considered, it was here thought plainly to have been meant, that if either the one term or the other was come, there was no place for the substitution; otherwise, suppose Lady Marjory had been married, if she had not also been past one and twenty, the substitution would have taken place; which is impossible to suppose to have been the meaning.

It was farther said for the said Ladies, pursuers, that supposing the substitution to have been at an end by the death of Lady Marjory Home, yet the Earl is barred from quarrelling the pursuers' right, in respect that he is a party in Lady Margaret's contract of marriage, wherein she conveys the subject in question to the pursuers' author, and signing as consentor to it, which imports conveyance of all right in him.

Answered for the Earl: That truly he had signed the contract only *honoris causa*, not imagining himself anywise concerned with the obligations therein, which were never communicated to him or communed on with them, and therefore was at liberty to make all legal objections to his being caught in such a snare; and the objection he made was, that his subscription was not legally attested.

The fact was, That the contract of marriage bore in the narrative to be entered into between the Master of Holyroodhouse, with consent of his father and mother on the one part, and Lady Margaret Home, with consent of the Dowager of Home, her mother, and William Earl of Home, her nephew, on the other part; and the testing clause was in these words; "In witness whereof, both parties do subscribe these presents, consisting of this and fifteen preceding pages, all marked conform to act of Parliament, written by," &c. Then follow the subscriptions of Mr. Bothwel and Lady Margaret the principals, and after them, those of Lord Holyroodhouse, his Lady, the Countess of Home and Earl of Home, who all add to their subscription "consents." But then none of the preceding 15 pages are subscribed by the Earl of Home, the Countess his mother, or the Lady Holyroodhouse, but only by the bridegroom and bride, and Lord Holyroodhouse the bridegroom's father; and this was pleaded by the Earl to be a nullity as to him upon

the act 1696, which requires all the pages to be signed as the margins were before, whereby the signing of each page is a substantial requisite.

No. 21.

Accordingly, the Lords having considered the form of the attestation, and that the Earl of Home signs only consentor on the last page, found, "That his subscription does not debar him from quarrelling the title of the pursuers to the half of Lady Marjory Home's provision, and remitted to the Ordinary to proceed accordingly."

It was urged by such of the Lords as differed from this judgment, that the act 1696, requiring the pages to be signed as margins were before, did not absolutely annul deeds as to all parties who did not sign every page; for when margins were in use to be signed, if some of the parties signed the margins, whereby *constabat* that the deed was fair, that was enough to make the deed effectual against all the parties signers of the last page, although some of them had not signed the margins. Thus, where a disposition granted by a wife with consent of her husband, was signed on the margins by the husband only, it was sustained, although the wife, who was the principal disponer, signed only the last page.

*Kilkerran, No. 13. p. 610.*

\* \* D. Falconer's report of this case is No. 44. p. 5662. *voce* HOMOLOGATION.

1748. February 11. TAYLOR against LORD BRACO.

The Lords have now in three several instances sustained a bond granted by a principal and cautioner, docquetted thus; "I have subscribed these presents before these witnesses," &c. First on February 14, 1712, Orr against Wallace, *infra, h. t.* though the witnesses might, notwithstanding of what the docquet asserts, have only seen one of them subscribe, and no matter which as to the cautioner; and afterwards, January 15, 1734, Gilmour against Black, a bond by principal and cautioner, docquetted in the same manner, was sustained in respect of the former decision. And now of this date, the bond by Geddes younger of Esset as principal, and Geddes elder of Esset as cautioner, whereof mention is made, *voce* CREDITORS OF A DEFUNCT, No. 8. p. 3128. was sustained, in respect of these two decisions, being docquetted thus, "I have written and subscribed these presents before these witnesses."

No. 22.

Bond by principal and cautioner good, though the testing clause be, "I have subscribed these presents."

*Kilkerran, No. 14. p. 612.*

\* \* D. Falconer reports this case :

In the cause between these parties, No. 8. p. 3128. it was further pleaded in a bill against the interlocutor 26th November, that it appeared by the bond, Andrew Geddes the son was principal debtor, and Archibald the father