

1748. February 11. BOTHWELLS *against* The EARL of HOME.

No 44.

A nephew having signed as consenting to his aunt's contract of marriage, by which she assigned her tocher, was found not to be precluded from defending himself, on just grounds, from paying part of the tocher.

THE contract of marriage, mentioned in the decision No 41. p. 2989, between these parties, bore to be between the Master of Holyroodhouse on the one part, with consent of my Lord and Lady, and Lady Margaret Home on the other, with consent of her mother, and the Earl her nephew; and was tested thus, 'In witness whereof, both parties have subscribed these presents before ' these witnesses,' signed by the Bridegroom and Bride, and Lord Holyroodhouse, on all the pages, which made several sheets, and by Lord Home and the other consenters on the last page, with the word ' consents' adjected, and then by the witnesses.

There was at the same time executed, a separate assignation by the Lady, in these terms, ' Me Lady Margaret Home,' with consent of her mother, the Earl, and her future husband, which proceeded all along in the singular of number of I, and concluded, ' I have subscribed before these witnesses,' and all the pages but one were subscribed only by the Lady.

THE LORD ORDINARY, 21st June 1745, ' repelled the objection (to the claim ' of the pursuers for the half of Lady Marjory's portion, as fallen to Lady Margaret by her decease, and conveyed by her in her contract of marriage and ' assignation) in respect of the Earl's consent to the conveyance thereof to the ' present pursuers, so far as the same had accresced to Lady Margaret.' But, upon representation and answers, 16th July 1745, ' found the defender's consent to the contract of marriage, and assignation founded on by the pursuers, ' could not hurt nor prejudice him; his subscriptions to these deeds not being ' properly witnessed, and consequently void; and therefore to be presumed to ' have been adhibited merely out of decency.'

Pleaded in a reclaiming bill; That, by the contract, the settlements upon the Lady and her children were in consideration of the assignation of her portion, to which the Earl signed consent, so that he could not pretend he consented only for form, and evict the onerous cause of the said settlements: that his subscription was sufficiently attested, since there were only two parties in the contract, to wit, the bridegroom, with advice and consent of his friends, and the bride with hers; and the contrary interpretation would unhinge the whole settlement, as Lord Holyroodhouse, unless he were comprehended under one of the parties, had not his subscription attested either; that, in like manner, in the assignation, ' I have subscribed,' referred to the whole party, to wit, the Lady with her consenters.

Answered, That the Earl, being desired to be present at his aunt's marriage, had paid her that compliment, and had subscribed as consent, to the marriage out of respect to her; but had no knowledge of the terms of the contract, much less any intention of giving away his own right: That the substitution being vacated, and the debt made heritable by adjudication, it was really extinct by

confusion; and it were incongruous a consent should rear up again a claim which was satisfied: That it was plain he was not considered as having any concern, more than the Lady Home and the Lady Holyroodhouse, since they all signed their consent only to the last page; whereas Lord Holyroodhouse, who concurred in the settlements, signed the whole; but supposing that his signing as consenter, which he meant to be only to the marriage, would have the effect to bind him if validly adhibited, he could not in that case be blamed for taking advantage of the defect in the execution, that he neither signed the whole pages, nor was his subscription attested by the witnesses, since it was only said that both parties, to wit, the bridegroom and bride, signed before them, whereas there were several other parties who adhibited, out of respect to them, a ceremonial but useless consent.

No 44.

The assignation was part of the same transaction, and the Earl's subscription to it of the same kind; and there also the attestation was only of the Lady's subscription, the terms of the clause being, 'I have subscribed.'

THE LORDS, 18th November 1747, 'having considered the nature and circumstances of the debt assigned, with the form of the attestation of the parties' subscription, and that my Lord Home signed only as consenter on the last page, found that his subscription, in the manner that it stood to the contract of assignation, did not bar him from quarrelling the title of the pursuers to the half of Lady Marjory Home's provision.'

On bill and answers,

THE LORDS adhered.

Act. R. Craigie & Ferguson.

Alt. Lockhart.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 271. D. Falconer, v. 1. No 239. p. 323.

* * * This case is reported by Kilkerran, *voce* WRIT.

1755. December 5. Sir THOMAS HAY of Alderston against JAMES KILGOUR.

SIR JOHN HAY died in the 1706, leaving his eldest son and heir Sir Thomas, then an infant, under the tuition of his mother and two uncles.

A few months after the death of Sir John, these tutors entered into a feued contract with James Kilgour; wherein, upon the narrative that Sir John intended to have executed this contract had not death prevented, 'they sold to Kilgour, his heirs and assignees, certain lands for the sum of 2500 merks. *Pro viso*, That Sir Thomas may redeem at any time before his age of 25, upon payment of that sum. And the tutors bind and oblige them, their heirs and successors, to move and cause their said pupil, and his foresaids, at his attaining the age of 25 years complete, either to ratify this present contract in favour of Kilgour, or to repay to him the said sum of 2500 merks.'

No 45.

Acts of homologation after majority, of a deed done by tutors, sustained to bar the minor from reducing that deed.