

1765. *June 26.* EARL of HOME *against* JANET STEEL.

[Kaimes, No. 223; *Fac. Coll.*, IV. p. 199.]

IN this case the Lords were all of opinion that, in the case of a bond heritable before the Act 1661, and of which a bond of corroboration was granted, accumulating the bygone annualrents, although the principal sum remained heritable, yet the accumulated annualrents were moveable; so that of the same sum, contained in the same bond of corroboration, the succession divided betwixt the heir and executor. And the principle is this, that a moveable bond of corroboration, such as this was, alters nothing as to the nature of the subject, *quoad* the succession, but is only an additional security to the creditor.

There was another point in this cause, of more difficulty. The nearest of kin confirmed a part of the succession, and upon that title brought an action for payment of a bond due to the defunct, not confirmed. In this action the heir and executor appearing, renounced to be heir, upon which decret of constitution was pronounced, and after that decret of adjudication *cognitionis causa*, but still without any confirmation of that particular debt. Another remoter heir of this debtor objects to the payment of this bond, that the adjudger had no title in his person without a confirmation. But the Lords found, that, in respect that the adjudger, by the partial confirmation, had the whole succession so vested in him, that he could have transmitted it to his nearest of kin, and that the debtors could have safely paid him upon his discharge, and likewise, in respect that he had a title to pursue, and could have got a decret for the money, being obliged only to confirm before extract, and further, in respect that the debtor did not make the objection that the sum was not confirmed,—sustained the adjudication. *Dissent. tantum* Kaimes *et* Pitfour.

*N.B.* If the question had not been with the debtor in the bond, but a competition of creditors, it is likely the decision might have gone otherwise.

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1765. *July 9.* ROBERT ARBUTHNOTT *against* SCOTT.

THE late Bailie Arbuthnott, father of Robert, gave a verbal order to Scott, who was then going to London, to give L.10 sterling to a young lad, a friend of the Bailie's, who was then in London, to buy him a suit of clothes,—which commission, accordingly, Scott executed. The question was, Whether this order of the Bailie's could be proved by witnesses, after the bailie's death? The Sheriff of Edinburgh had found that it could not: but this day the Lords altered that judgment, and found that it could be proved, and was proved, by witnesses who had been examined by the Sheriff, *dissent. tantum* Coalston, who thought the precedent dangerous, and that it might go to L.10,000 sterling as well as L.10.

*N.B.* If the commission had been given to do any thing for the behoof of the Bailie, I think it might have been proved by witnesses as a proper mandate; but as it was singly for the behoof of the young man at London, and was a pure gratuity, I think it was the same thing as if the Bailie had directly promised the L.10 to the young man, which certainly could not have been proved by witnesses; for it is the same thing to me whether it be attempted to be proven by witnesses that I promised L.10 to A, or that I ordered B to pay him L.10 sterling. It is true such a mandate as the Bailie gave would have been a proper mandate, according to the rules of the civil law, and, as such, might have been proved by witnesses, but so might a direct promise of the L.10 sterling to the young man; and the doctrine of the Roman law concerning mandates must not be carried so far as to impinge upon that principle of our law, that no donation, even of the smallest sum, can be proved by witnesses, unless it be a legacy to the extent of L.100 Scots. To this it may be added, that it is established, by many decisions, that a cautionary obligation cannot be proved by witnesses. Suppose that in this case the Bailie had given commission to Scott to be caution for the young man to the merchant for the value of the clothes, Could that commission have been proved by witnesses?

In this case the Lords did not advocate the cause, though it came before them by a bill of advocation, as it was under L.12 sterling, but remitted it to the Sheriff with instructions to decern for the L.10 sterling, with full expenses of suit.

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1765. July 9.

MOSMAN *against* ———.

THE Lords, in this case, were all of opinion, that though a man renounced to be heir when he was sued for a debt of his predecessor's, that did not hinder him afterwards to serve himself heir to that predecessor.

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1765. July 9.

SHIAN *against* KILLIEHUNTLY.

IN this case the Lords found, unanimously, that an interlocutor of the Inner-House, having been pronounced in favour of Shian, the pursuer, and Killiehuntly having reclaimed, and during the dependance of the reclaiming bill Shian having died abroad, the second interlocutor of the Lords, affirming the first, was void and null, and the heir of Shian must take up the cause as it stood upon the first interlocutor.

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