

of one sheet, did not require the solemnities of the act 1696, C. 15. ; 14th February 1778, Macdonald against Macdonald, No. 193. p. 16956 ; 21st December 1780, Boyes against Hamilton, (Not reported) ; and being of a testamentary nature, those of the act 1681, C. 5. were not essential ; Ersk. B. 3. Tit. 9. § 14.

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Mr. Willison's intentions may also be proved by the evidence of the gentlemen with whom he consulted ; and reference is made to the oath of his agent, who being the acting trustee, is the proper party in the cause ; Ersk. B. 3. Tit. 9. § 7.

Answered : The maxim *Si sine liberis*, &c. applies to lawful, but not to natural children, the latter, in the eye of law, having no father.

The reservation in the original deed dispensed with solemnities, only in case the further declaration of will should be holograph.

The docquet to the draught is improbable, and the subscription to the first page of the formal deed is ineffectual, both on the acts 1696 and 1681.

When a deed consists of one sheet, and the last page is subscribed by the party and witnesses, the omission to subscribe one of the prior pages, or mention their number, can have proceeded only from accident, and can give no room for inserting any thing which the granter did not intend ; but it would be dangerous, and is without precedent, to support a deed when the first or prior pages of it only are subscribed.

Parole evidence is incompetent to establish a legacy beyond £100 Scots ; and as Mr. Willison's agent is trustee for others, and not for his own behoof, the reference to his oath is equally so.

The Court, though fully sensible of the hardship of the case, considered the argument of the Trustees to be insuperable, and gave judgment accordingly.

Lord Ordinary, *Methven*.
Clerk, *Pringle*.

For the Trustees, *Hay*.

Alt. *G. Ferguson*.

D. D.

Fac. Coll. No. 142. p. 318.

1802. March 2.

KEMPS against FERGUSON.

David Simpson executed a settlement of his estate, (20th July 1782), in favour of his cousin William Simpson of Pendreich, burdened, among other legacies, with £3000 to his uncle William Ferguson of Raith. Upon the death of the testator, the deed was found altered, with the apparent intention of introducing Ferguson in the room of the original heir, who had predeceased the testator. It appeared in these words : " Know all men by these presents, that I David Simpson, only son of the deceased Andrew Simpson, late merchant in Edinburgh, considering the expediency of a regular settlement of my affairs, have, for love and favour, given, granted, and disposed, and hereby give, grant, and dispo, to and in favour of my *cousin William** Simpson of Pendreich, his heirs and assign-

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A legacy is payable where the testament is vitiated as to the nomination of the executor.

* The words printed in *Italics* were scored with a pen in the original.

No. 187. nees, my whole estate, heritable and moveable, real and personal, at present belonging to me, or which may belong to me at the time of my death; and I nomi-

Ferguson, Esq. of Raith,

nate and appoint the said *William Simpson* to be my sole executor and intromitter with my said estate, reserving my liferent of the premises and power to alter, revoke and cancel this deed; and providing that the said *William Simpson* and his foresaids, shall be bound and obliged to pay my whole just and lawful debts, and perform all my deeds, whether onerous or gratuitous; and provided also, that the said *William Simpson* shall be bound, and he by acceptation hereof binds and obliges himself, and his heirs, and executors and successors, to make payment to my uncle *William Ferguson of Raith, Esq.* and his heirs, executors, and assignees, to the sum of £3000 Sterling, and to *James Spence* treasurer of the Bank of Scotland, his heirs,

D. S.

executors and assignees, the sum of £100 Sterling; and to *Beatrix Simpson* my sister, her heirs, executors, and assignees, the sum of £20 Sterling; and to *Robert Berry* my uncle, his heirs, executors and assignees, the sum of £100 Sterling; and to *Catharine Spiers*, wife of *Alexander Spiers*, minister at *Kirkaldy*, the sum of £100 Sterling; and to *James Berry* my uncle, his heirs and assignees, the sum of £100 Sterling; which several legacies shall "be due and payable to the several legatees, and their heirs, executors, and assignees, at the first term of Whitsunday or Martinmas next and immediately following my death, and bear interest from the term of payment: And in corroboration of the above, I bind and oblige me, my heirs and executors, to make payment to the several legatees above mentioned, and their foresaids, of the respective legacies bequeathed as aforesaid, at the term, and with interest as above: And I dispense with the not-delivery hereof in my lifetime; and consent to the registration of these presents in the books of Council and Session, or others competent, for preservation, and to receive execution, as accords: And thereto constitute my procurators. In witness whereof, I have subscribed these presents, wrote on stamped paper by *James Rutherford*, writer to the signet, at *Edinburgh* the 20th day of June 1782 years, before these witnesses, the said *James Rutherford* writer hereof, and *John Peers* his clerk.

" DAVID SIMPSON.

" JOHN PEERS, Witness.

" JAMES RUTHERFOORD, Witness."

This deed is titled on the back, "Disposition and settlement, David Simpson, Esq. to William Simpson, Esq."

Simpson's heirs at law, the children of his sister *Beatrix*, who had been married to the Reverend Mr. *John Kemp*, confirmed as his executors, as if he had died intestate, and, conceiving the deed to be too much vitiated to be held as the *ultima*.

voluntas testatoris, brought an action against William Ferguson of Raith, for payment of £3000, left by Robert Ferguson his father, in his last will and settlement, (17th November, 1768,) to the late David Simpson, and for which sum he had granted bond.

Ferguson pleaded compensation upon the legacy bequeathed to him by David Simpson, which seemed intended to be a *legatum liberatorium*.

The Lord Ordinary reported the cause to the Court.

The pursuers

Pleaded: Whatever may have been the testator's intention, the question is, How far it has been carried into effect by a probative deed? The testing clause of the deed is in these words, "In witness whereof, I have subscribed these presents, wrote on stamped paper by James Rutherford, writer to the signet, at Edinburgh the 20th day of June, 1782 years, before these witnesses, the said James Rutherford, writer hereof, and John Peers his clerk."

Here the subscription of the party, the name of the writer, and the designation and subscription of the instrumentary witnesses, are all relative "to these presents." It was this deed, as it originally stood, which, by consequence was probative in terms of 1681, C. 5.; but the deed, as it now stands, is not the deed which was thus written, subscribed and attested. If, before signing, these alterations had been made, the deed might have been executed in this form, because "these presents," refer to the deed as it originally stood, but it can never apply to the altered one, written partly by a different person. If the whole deed had been altered by Simpson himself, preserving the testing clause; would this clause have authenticated the nomination of an executor, and the burdens to which he was made liable? But *majus et minus non variant speciem*; and the testing clause must either authenticate the whole alterations, or no part of the altered deed.

The rules of evidence applicable to holograph writings, and to those which are not, are so totally different, that it seems impossible that the same deed should, at the same time, partake of both characters; should be in part considered as holograph, and judged of as such, and in part have the rules of the act 1681 applied, to determine its authenticity. A holograph codicil may be annexed to a deed executed with the solemnities prescribed by the statute; but then it is no constituent part of the original deed; it is a separate, though relative writing. Had the deed been at the time of the execution, blank in the name of the donee, by 1696, C. 25. it could not have been made effectual by this blank being afterwards filled up even by Simpson himself; it is the same thing if, after signing, he take out one name and insert another. The privileges annexed to holograph deeds are declared by Erskine, B. 3. Tit. 2. § 22. to be, because one's hand-writing through a whole deed is hard to be counterfeited; but it would be very easy to counterfeit one or two words, such as those here.

How far the erasures affect the validity of the deed, depends entirely upon how far these erasures are *in substantialibus*; Stair, B. 4. Tit. 42. § 19.; Bankton, B. 1. Tit. 11. § 34.; Erskine, B. 3. Tit. 2. § 20. The nomination of the exe-

No. 187. cutor or general donee is altered by erasure and interlineation. This is not only *in substantialibus*, but is the fundamental and essential part of a testament. It has rendered the whole so inextricable, that no person as executor nominate has been able to confirm subject to the burdens imposed by the deed. The general rule is, that a deed vitiated *in substantialibus* shall be set aside *in toto*; and there is no authority for distinguishing one part of a deed from another in this question, though, in every vitiated deed, clauses may be found free from this defect; Earl Bute against Haliburton, 18th July, 1712, No. 225. p. 11545.; the vitiation was occasioned by the hand of time, and yet the bond was not sustained; Pittillo against Forrester, 22d November, 1671, No. 217. p. 11536.; Livingston, 19th February, 1702, No. 37. p. 12282. The succession has been taken up by the pursuers as nearest of kin *ab intestato*. They take it up, not in virtue of any nomination by the defunct, but as being called to it by the act of the law; and can they be bound to pay any legacy which the testator has imposed as a burden, not upon them, but upon an executor, whose nomination has failed by the act of the testator himself? The clause, “and in corroboration of the above, I bind and oblige me, my heirs and executors,” &c. does not strengthen the case. This is an accessory and relative clause; it is not of itself distinct and unconnected; it relates to a previous deed of settlement, which the testator has rendered null; and it is in corroboration of legacies laid specially upon his cousin William Simpson, whom he intended to be his heir; but when he altered this intention, the burden, and all the relative obligations as to their payment, were consequently extinguished.

The payment of the legacies, and the nomination of executors, are inseparably connected; as upon the last is made to depend the other. When that nomination is recalled, the burden cannot exist; they stand or fall together.

In the English case, White against White, in Brown's Rep. p. 131. the question was only, How the trust shall be carried into execution? By striking out the name of the trustee, the testator evidently had no intention of vacating the trust, so as to disappoint the substantial interest already vested in the residuary legatee. Upon these principles was decided, Campbell against Campbell, 26th June, 1752, See APPENDIX. The cases quoted from the Roman law, are either where there is an error in the name or surname of an heir or legatee, *Nec tamen de quo senserit incertum sit*; or about the striking out of one of many heirs or legatees. These are totally different from this case, where there is but one heir, and his name is not only struck out, but another attempted to be superinduced.

The defender

Answered: The deed, as it originally stood, was duly tested, in terms of 1681, and the scorings and interlineations were the work of the testator himself. It does not appear, that it was his intention to destroy or revoke it; and if he wished it as a memorandum for a new deed which he never executed, he would at least have deleted or torn off his subscription. But entire as it is in the subscription, and in its most material clauses, and the few alterations authenticated by his hand.

writing and initials, it seems to have been his intention to make it stand as his settlement, varied only as to his general dispositive. But intention, however plain, cannot regulate this question. If the alteration render the writing improvable, no effect can be given to it. No. 187.

When a deed not holograph requires to be attested by witnesses, if any thing be added afterwards, that must be ineffectual; for, as the whole deed would have been null, if not attested in terms of the act 1681, so that part must be null to which the subscription of the witnesses cannot apply. But if the additions were holograph of the testator, it would be valid, though it were not mentioned in the testing clause, or even if it were done at some distance of time from the execution of the deed; for, as the whole deed, had it been holograph, would have been effectual, though without witnesses, it does not appear why the same privilege should not be extended to an addition to a regular deed.

Every word of a duly attested deed, is equally probative, and the scoring of one word or one clause cannot affect the rest. Of a number of legacies, one being cancelled, the rest are still effectual. No person can maintain, that altering the legacy to Spence, by scoring *heirs and executors*, could have the effect of annulling the deed *in toto*. The only other alteration is with regard to the nomination of the executor. The law does not render null a deed bequeathing particular legacies, though it should contain no nomination of executors. The Roman law held legacies still to be payable by the heir at law, where the testator had expunged the *institutio hæredis*. In this case, the executor is expressly bound to pay the legacies; but it could not be the intention of the testator, that if the executor nominated failed, the nearest of kin should not come exactly in his place; and besides burdening the heir succeeding with payment of these legacies, the testator also obliges himself expressly, his heirs and executors, to pay them; which is a clause plainly calculated for the event of the executor not taking up the succession. This gave the legacies a constitution entirely independent of any particular person succeeding to him.

The rule of law, that a deed raised and vitiated *in substantialibus* cannot be effectual, can only apply to such erasures as are not made by the testator himself. It was intended to deny the benefit of the deed to one who has thus fraudulently altered it in his own favour. Again, if by the alteration the sense of the writing becomes inexplicable, there too the rule of law will apply; Erskine, B. 3, Tit. 2. § 20.; Stair, B. 4. Tit. 42. § 19. See Erskine, B. 3. Tit. 9. § 14.; Voet, L. 28. T. 4. § 3.; and Blackstone's Comment. vol. 2. p. 308. The decisions do not apply to the case where the alteration was made by the granter himself on a gratuitous or revocable deed over which he had full power; White against White, in Brown's Reports, p. 131. See Nairne against Sutor, 14th March 1579, No. 17. p. 12270; 19th February 1702, Livingston, No. 37. p. 12282.

“ Upon the report of the Lord Justice-Clerk, the Lords (26th November 1800) repel the defences, and decern against the defender for payment of the £3000 con-

No. 187. tained in his bond to the late David Simpson, conform to the conclusions of the libel."

Against this judgment, a petition was presented by Ferguson, (26th May 1801), which was advised with answers, and counsel were also heard in presence, when the Court " found the disposition and settlement executed by the late David Simpson in 1782, a valid and subsisting settlement, so far as it concerns the legacy of £3000 thereby bequeathed to the defender; they do therefore alter the interlocutor reclaimed against, and sustain the plea of compensation pleaded for the defender."

The Kemps now reclaimed, and upon advising their petition, with answers, the Court (17th November 1801) altered the interlocutor reclaimed against.

Ferguson, again, in his turn, reclaimed; and on advising his petition, with answers, the Lords (2d March 1802) altered the last interlocutor, and returned to that pronounced on 26th May 1801.

Lord Ordinary, *Justice-Clerk.* For Ferguson, *H. Erskine, Hay, Gillies, C. Ross.*
 Agent, *J. Dundas, C. S.* Alt. Lord Advocate *Hope, Robertson, A. Campbell junior.*
 Agent, *A. Duncan, W. S.* Clerk, *Sinclair.*

F.

Fac. Coll. No. 28. p. 54.

1804. July 6. MACARTHUR *against* SIMPSON.

No. 188.

A missive letter, not altogether formal, sustained as a lease of an urban tenement for two liferents.

Fac. Coll.

* * This case is No. 31. p. 15181. *voce* TACK.

SECT. VII.

Solemnities of Deeds written Bookwise.

No. 189.

1716. June. EARL of FINLATOR *against* LADY BOYNE.

It was objected against a sasine, That the witnesses did not sign every leaf, as required by the act 17, Parl. 1686. It was answered, That the act was repealed by