

No 189.

continued possessors since ; and the pursuer *answering*, That whatsomever narrative be inserted in this posterior contract, that ought not to derogate the force of this obligation since, granted to John Grahame, which bears to be granted for gratitudes, and good deeds done, and so for onerous causes, and done *scienter & inter majores*, which cannot be inverted upon the alleged narration therein contained, whether true or false, this being a new security made by another party, and for onerous causes, as said is ; and whatever possession he has had of the lands, that ought not to be respected, seeing he bought the rights of the lands from divers parties, viz. one from the donatar to the liferent, and a comprising and infestment following thereon, from another party condescended on, either of which rights were of that strength which would ever in law debar him from his possession, and would have been preferred to the right acquired by that prior contract ; these rights being anterior thereto, and whereon he is content to dispute, and which, if the party can yet elide, he is content that decret be given against him. THE LORDS, notwithstanding of this reply, found the exception relevant, and that the last obligation should be no further extended, but according to the tenor of the prior contract, in respect of the narration which is inserted in the bond, which repeats a different tenor from the writ which is therein related ; and which the LORDS found ought to be ruled as the writ proported, whereto it made reference, and that the parties' bond following thereon ought to be thereby ruled and limited : And sicklike sustained the allegiance upon John Grahame's possession, albeit the rights which he acquired had been more valid in law than the wadset procured by Lethindie, seeing he was never pursued thereon by them in law, nor was ever excluded nor debarred by these rights.

Act. *Advocatus & Nicolson.*Alt. *Stuart & Lermonth.*Clerk, *Gihson.**Fol. Dic. v. 2. p. 150. Durie p. 560.*

No 190.

The heir being tutor to the executor, did, among the other goods, confirm an heritable bond in his pupil's name. This was found not to be meant a donation, but rather presumed to be an error *juris*. See No 192.

1637. July 8.

DICKSON against ORKHILL.

THE Laird of Orkhill being debtor to umquhile John Dickson, flesher, in the sum of 200 merks, by a bond bearing to pay annualrent, and the said creditor living until the said term of payment was bypast, whereby the bond was of the nature of an heritable bond, and the said Laird of Orkhill, debtor, suspending upon double poinding, being distressed by the heir and executor of the said umquhile John, who both claimed the right of the sum, viz. the heir, as belonging to him, the bond being heritable, as said is, and the executors claiming the same as due to them, in respect the heir, who was eldest brother to the executors, was their tutor, and that he had confirmed the defunct's testament, wherein he, as their tutor, had confirmed the same bond controverted, as pertaining to them as executors ; likeas, since he as their tutor had recovered de-

creet against the Laird of Orkhill, at his instance, as tutor to them, for payment of the said sum as due to them; in respect whereof they *alleged*, That the heir could not pretend right to this sum, which he *sciens, prudens & major*, had acknowledged to be their moneys, and consequently that Alexander Deneston, who was made assignee by the heir to that sum, could not seek the same, as pertaining to the heir: THE LORDS, notwithstanding of the allegiance proponed for the executors, preferred the heir, and found that the sum belonged to the heir, and consequently to his assignee, seeing the same was owing by an heritable bond; and found, that the error committed by the heir in being tutor to the executors, and confirming this debt, and recovering sentence for this sum, at his instance, as tutor to the bairns, did not prejudice him of the right to that heritable bond, and that by that error the right was not acquired to the executors after such a manner; but that notwithstanding of that error, he might return and clothe himself with his own right, and consequently that the heir's assignee ought to be preferred, and that the heir by the deeds foresaid was not denuded, as if it had been a donation, except that the executor will allege that the heir had done these deeds of confirming, and pursuing as tutor, after that he knew and understood that the bond in law did pertain to himself as heir.

Act. Craig.

Alt. ———

Fol. Dic. v. 2. p. 150. Durie, p. 849.

1664. February 13. EARL OF ERROL against MOUAT.

THE Earl of Errol having right to the teinds of the parish of Turreff, dispones the teinds of the barony of Balquholly to Sir George Mouat heritor thereof; and in the disposition, and the dispositive words, the barony of Balquholly is set down, but with this addition, Comprehending the particular rooms, &c. therein enumerate: And amongst the rooms there is set down the teinds of the lands of Bomelly, which lands did never belong to Sir George; and, notwithstanding of the disposition, the teinds of Bomelly were still possessed by the heritor, the Earl, and the lands have been possessed by Sir John Urquhart and his predecessors these 100 or 80 years: Whereupon the Earl pursues a declarator against Sir George and Magnus Mouat, to whom he had disponed the foresaid barony, with the teinds mentioned in the foresaid right, to hear and see it found, that the teinds of the barony only were disponed, and that Bomelly being only by error falsely designed as a part of the barony, whereof it was no part, that therefore the teinds of Bomelly ought no ways to be holden as disponed by the Earl. It was *alleged* by the said Magnus, That he having acquired the teinds *bona fide* from Sir George, he ought to enjoy them according to the designation and enumeration. It was *answered*, That *falsa*

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Where a titular disponed to an heritor his whole t<sup>in</sup>'s, enumerating particular farms, having mentioned one not belonging to the heritor, this was held to be by mistake.