

1664. *January 16.* JAMES BANNATYNE *against* THOMAS ROOME.

SIR JO. CHARTERS of Amesfield, as principal, Robert Charters of Bodisbey, Jo. Charters of Auchinstrowan, and George Roome of Kirkpatrick Irongray, as cautioners, by their bond in 1637, oblige [them] to pay to Ja. Bannatyne, sometime in Leith, now in Musselburgh, the sum of 5000 merks, payable the Lambmas after; with this provision, that if the said Ja. were content to supersede and continue the said payment after the term above mentioned that then the principal and cautioners, conjunctly and severally, shall be obliged to infest him in an annualrent, effeiring to the sum of 5000 merks, to be uplifted out of any of their lands. This bond is registred in 1644. Ja. Bannatyne, in 1657, charges Thomas Roome, son to the deceased Thomas Roome of Cenden, and oy to the said George Roome of Kirkpatrick, one of the cautioners in the bond, to enter heir to his father and goodsire; and then raises summons against him, warning him to compear and hear himself decerned to pay that 5000 merks, for which his goodsire was caution. He compears, and produces a renunciation to be heir to his father and goodsire. It was objected against the same, that it was not subscribed by his tutors or curators, though he was a minor. Whereupon the then commissioners gave forth decret against him, decerning him to pay the said sum. Yet if he or his procurators should produce a valid renunciation betwixt and June 1658, that then the same should be received. Which they failyied to do. In 1663, James Bannatyne raises a summons of wakening anent the same cause; wherein there was produced a renunciation of the said Thomas Roome: but, beside that, the same was not subscribed by his curators, it was not a renunciation to be heir both to his father and goodsire, but only to his father.

For which reasons the Lords rejected the renunciation, and adhered to the decret in 1657; only provided that if the defender's procurators should produce a valid renunciation, subscribed by him and his curators, and wherein he renounces to be heir both to father and goodsire, betwixt and the 5th of February next the same should be received, and this their decret *condemnatory* turned into a decret *cognitionis tantum causa*.

*Act.* Mr. Samuel Gray. *Alt.* Mr. Walter Cant.

*Signet MS. No. 83, folio 31.*

---

1664. *January 16.* HELEN HUGGANE *against* WALTER SCOT of Briershaws.

MR. HEW ELPHINSTON in Galasheills, by his latter will and testament, nominates Walter Scot of Briershaws, his sole executor and universal legatar. Mr. Thomas Lowes, minister at Galasheills, is notary thereto. This testament Briershaws confirms. Whereafter Helen Huggane, daughter lawful to Andrew Huggane in Hadhope, procreated by him on Janet Elphinston, sister to the said Mr. Hew, as nearest of kin to the said Mr. Hew, and so founding right to his executry, thereon intents a summons of reduction of the said testament and confirmation; summoning Briershaws to compear; as also the commissary, and commissary clerks of Peebles for their interests in confirming the same, to hear and see the same declared null; on this reason, because the said nomination or testament was

subscribed by the said minister without a warrant from the defunct, Mr. Hew; at least after Mr. Hew's decease, which in law he could not do; which they offered them to prove by the oaths of the witnesses inserted; and, therefore, the same must be reduced. At the calling of the cause there is produced for the pursuer an extract of the said testament craved to be reduced: then both parties, of consent, hold the production satisfied; and to the reason of reduction, its replied for the defenders that the same is noways relevant, in respect the pursuer has produced nothing to instruct her nearest of kin, which is her active title, and so ought to be verified in *ingressu litis*. *2do*, She can never quarrel the said testament, because she has ratified the same in so far as, the defunct having left her a legacy, what the said Scot of Briershaws, his executor, should think fit to give her, she, since the defunct's decease, has demanded the same, and accordingly received both clothes and money for this defender; and so has homologated and acknowledged the validity of the said testament, by taking benefit thereby. *3tio*, *Nulla modo relevat*, to say that this testament is null in the law, and so reducible because subscribed by the said Mr. Thomas Lowes, minister, after the defunct's decease. In law its not respected at what time the notary subscribes the writ, but at what time the command was given; for a notary may perform a deed of notary, as in taking a seasine, and yet for some days thereafter may delay the subscribing or extending thereof, because the notarie's words are, *hæc fieri vidi scivi audivi et in notam cæpi*; so that the minister being here in place of a notary, there was no necessity of a present subscribing. But *4to*, To take away all controversy, offers to prove by the oath of the minister and witnesses inserted, that the same was subscribed before the defunct's decease. To which it was duplied for the pursuer, *Imo*, That she shall prove that she is nearest of kin, which is her active title, *cum processu*. To the second its not relevant, *Imo*, Because no mention of the pursuer's name in the testament produced. *2do*, What goods she received from the defender were not in relation to that clause in the testament, leaving her something; but she being nearest of kin, poor and illiterate; and he being a stranger, (though nominated executor to her uncle,) and knowing of no such nomination, accepted some things of him, which can never infer a homologation of the said testament. To the last, *non relevat*; neither is the simile taken from a notary to a seasine good; for a testament is not legal except it be drawn up in the defunct's name, *in prima persona*, and not by way of instrument, where a notary speaks in *tertia persona*; so then a testament being a direct deed of the defunct himself, he speaking therein and not the minister or notary, if the said testament, *ex ejus mandato*, be not subscribed in his lifetime, but after his decease, the same is noways legal, but is null, seeing *mortuo mandatore expirat mandatum*. *Item*, The pursuer being in *libello*, and offering to prove her reason of reduction by the oath of the minister and witnesses inserted; *item*, This pursuit being in favours of the nearest of kin *contra* a stranger; the pursuer ought to have the preference of probation, she being more pregnant, and offering to prove *positive* that the said testament was subscribed after the defunct's decease.

All which the Lords having considered, they noways found the said testament homologated. Found that part or member of the defender's reply relevant, whereby he offered him to prove that the said testament was subscribed before the defunct's decease; to which effect the minister and witnesses therein inserted are summoned to give their oaths; which they having done, the Lords found their depositions proved the said member referred thereto sufficiently. Whereupon the Lords assoilyed the

defender foresaid from the summons of reduction intended against him, and declared him free therefrom in all time coming.

*Act.* Mr. Geo. Norvell. *Alt.* Sir George Lockhart, Mr. Alexander Spottiswood.  
*Signet MS. No. 84, folio 32.*

---

1664. *January 20.* JOHN SIMPSONE *against* JAMES HALYBURTON, HELEN STIRLING, JAS. WEIMES, SIR JO. TOURS, WILLIAM TOURS, &c.

SIR ALEXANDER TOURS of Innerleith, as principal, Alexander Simpstone in Innerleith, and Alexander Steill in the Mains thereof, as cautioners, oblige them, by their bond in 1644, to pay to Jo. Simpstone, merchant in Edinburgh, the sum of 4000 merks. This bond Jo. registers in 1645; and inhibits him; which letters and their executions are also duly registered. Then assigns in 1645 the said bond, with the diligence done thereupon, to Robert Urie, writer in Edinburgh; who summons Jo. Tours, son and heir to the said Sir Alexander, granter of the bond, before the bailies of Edinburgh, where he obtains decret against him; as also before the sheriff of Edinburgh. Then by his retrocession he disposes over the same bond, with the letters of inhibition, and decret obtained by him, to the same John Simpstone, his cedent; who thereupon comprises the lands of Innerleith; and upon his comprising gets himself infest. In 1659 Jo. Tours, notwithstanding of this inhibition served against him, by his bond of alienation, sells the lands and barony of Innerleith to Alex. Halyburton, merchant in Edinburgh. Alexander dies. John Simpstone now raises a summons of reduction against Ja. Halyburton, his son and heir, Helen Stirling, his mother, and liferenter of the lands, Mr. James Weimes, parson of Kirkliston, her spouse, for his interest, Sir Jo. Tours, lately of Innerleith, William Tours, father brother, and so uncle to the said Sir Jo. and their tutors and curators, &c. charging them to compear, and exhibit before the Lords the foresaid letter of alienation, or disposition, made by the said Sir Jo. with consent of his said uncle, and dame Jean Ker old Lady Innerleith, to the said Alexander Halyburton, containing the lands under mentioned; Vindeston, the six acres of land called the Slucker-acres, Glegmensie, Wairdiemuire, Hirds-hill Coukepill, Cumlebank, Doucot's-croft, Easter and Wester Waltinshots, Easter and Wester Stanks, Easter and Wester Hoggitsheill, Foulfidus and Lovingrass meadows, Pyetshots, Eastern Lugsid, the Buts, the four Broom Parks, Wardie-toune and lands, and Craig of Innerleith; to hear and see the same reduced, and declared null *ex capite inhibitionis*. For instructing the summons there is produced the bond; the letters of inhibition duely executed and registered; the decret obtained against them at Robert Urie's instance; his translation thereof; the decret of apprising, &c. For satisfying the production there is produced the disposition called for; and it is alleged by the defenders that there could be no process of reduction sustained upon the foresaid inhibition, because the same was only raised upon a dependence. Whereunto it was answered by the pursuer, that he opposed the state of the process, wherein was produced not only the inhibition, but also the decret that followed on that dependence; so that there is no dependence now.

All which reasons the Lords having considered, they rescinded the said contract of alienation; declared the same to be null; and so reponed and repone the