

1678. June C. MARGARET COCKBURN *against* MARY ERSKINE and ——— HAIR, her Husband.

MARGARET Cockburn pursues Mary Erskine, and ——— Hair, now her husband, for payment of sundry sums contained in Robert Kennedy her former husband's bonds, and convenes her as representing him on the passive titles. ALLEGED,—*Absolvitor*, because offered to prove the relict, defender, was executrix confirmed *qua* creditrix for implement of her contract matrimonial and liferent provision. REPLIED,—*Non relevat*, unless the inventory of the testament be also proven to be exhausted by the debt owing to herself. The Lord Newton found the allegiance of confirmation not relevant *per se*, unless they also complexly said the inventory was thereby exhausted. *2do*, REPLIED for the pursuer,—The confirmation cannot liberate from the passive titles, because offers to prove superintromission beyond what was confirmed. DUPLIED,—This is *jus tertii* to the pursuer, who had no title, and it was not competent *hoc loco*. The Ordinary found the pursuer could not reply on superintromission, unless she had taken a dative *ad omissa*.

Then ALLEGED,—*Absolvitor* from the bond, because null of the law, wanting witnesses. REPLIED,—The pursuer takes instruments on the defender's proponing this, which is a peremptory defence, as a downright confession and acknowledgement of the passive titles. *2do*, *Et separatim*, The bond bears itself to be holograph, and, if need be, offers to prove it to be so by witnesses, who knew the defunct's hand-writ; the defender always first giving her oath of calumny, if she has just reason to deny the same. DUPLIED,—A peremptor of payment, compensation, or the like, cannot indeed be proponed by one who denied the passive titles: but this objection against the bond being a mere nullity of the law, and instantly verified by the writ itself, it may be proponed by any, without concession of the passive titles.

Newton repelled the defences and duply, in respect of the reply; and found the defender, if she denied the passive titles, could not quarrel the bond upon that nullity. Then compearance was made for the husband, and the nullity proponed by him. It was found, since he was husband, and called *pro interesse*, he could not either. Then it was contended, the husband was donatar to Kennedie's bastardy, and so *eo nomine* might propone it. The gift of bastardy was ordained to be produced; which, being done, I found it was granted to Erskine the defender. So that it may be contended, the donatars to bastardy, as well as last heirs, in law are obliged to pay the defunct's debt; and so no other passive title needs to be instructed against her. As for the superintromission, the pursuer might take a dative *ad omissa* from the Commissaries, and use it in the same process, to found her title. In some cases, where the fraud and dole in omitting is palpable, they use to receive superintromission by way of exception; as they did in the count and reckoning betwixt William and John Andersons this same year 1678: but I think an offer to confirm the concealed goods, and to produce a dative before extracting of sentence, should be receivable to liberate from the trouble, expense, and delay of raising a new summons, and thereby multiplying processes.

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