1677. *December* 15. NICOLSON *against* NICOLSONS.

No 502.

A MAN made a settlement of his affairs, obliging his eldest son, failing heirs of his body, to surrender the estate to other persons named, and about a year thereafter, discovering upon that son's death a defect in his settlement, that he had not brought his other sons, succeeding to the estate, under the said obligation, and to supply the defect, added a holograph postscript to the deed of settlement. THE LORDS found the holograph postscript probative of its date, being supported by the deed of settlement to which it was adjected, and so suitable thereto, that there could be no reasonable suspicion that it was antedated to avoid the objection of death-bed.

*Fol. Dic. v.* 2. *p.* 259. *Stair.*

*** This case is No 61. p. 8944. *voce* MINOR.

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1684. *January.* ANDREW BRUCE *against* ALEXANDER BUCHAN.

No 503.
Discharges granted by a tutor to his pupil's tenants, holograph without witnesses, not sustained to instruct an article of compensation against the tutor's assignee.

AN assignee to a debt pursuing, the defender proponed compensation thus, that the cedent being tutor to the defender, intromitted with his rents before the assignation, which was offered to be proved *scripto*, by the cedent's discharges to the defender's tenants; and he hath not yet counted with the defender for these his intromissions.

*Alleged* for the pursuer; That the discharges produced are null, as wanting writer's name and witnesses, and not being holograph.

*Answered* for the defender; That discharges to tenants for their rents are sustained *per consuetudinem patriæ*, without the ordinary solemnity of other writs.

*Replied*; That such discharges to tenants are only sustained against their masters, and not against third parties.

THE LORDS would not sustain the said discharges against the assignee, unless, in fortification thereof, the defender could prove the delivery of the rent to the cedent before intimation. Here the tutor was not discharged; and it was not debated, if "ought and should intromit" in the tutor could be obtruded against the assignee; which seems not unreasonable; and being competent against the cedent's tutor before assignation, the minor could not be prejudged of that benefit by the tutor's assigning.

*Fol. Dic. v.* 2. *p.* 259. *Harcarse*, (COMPENSATION.) *No* 259. *p.* 61.

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1686. *March* 25. AITON of Inchderny *against* ALEXANDER NAPIER.

No 504.
Whether a holograph testament *probat datam*?

THIS was a reduction of a holograph testament made by one Stewart, when he was 15 years old, because *non probat datam*, and so must be presumed to have been signed by him in his pupillarity, when he had not by law *testamenti*

No 504. *factionem.—Answered*, Holograph proves against the granter and his representatives; and, consequently, against this pursuer, who is the testator's nearest of kin; 2*do*, Holograph writs use to be antedated, to shun death-bed, &c. but never postdated. The Lords found it not probative, but presumed to have been done in his pupillarity, unless the contrary be proved. This was reclaimed against by a bill.

1686. *December* 11.—In the cause, Alexander Napier *contra* Aiton of Inchderny, mentioned 25th March 1686, Alexander adduced one Ferrier, a tenant of Stewart of Rossyth, as a witness on the holograph, who being drunk, deponed too liberally; but being thereafter this day re-examined, he prevaricated, and clipped off much of his deposition, and loaded Alexander; upon which he was sent to prison.

1687. *June* 7.—Aiton of Inchderny's case against Alexander Napier, mentioned 11th December 1686, was advised. The defender had fully proved Stewart's hand-writing; and that he was passed 14 at the time when the testament bore date; but had not proved, that it was actually subscribed by him after he was 14, (it being holograph, and so not proving its own date,) as the act and interlocutor required. So the Lords were clear to reduce the testament: Yet the Chancellor prevailed to have some other witnesses examined, who dictated the testament to the minor, and so knew it was after his age of pupillarity. Mr Napier was said to be one of the new proselytes to the Roman Chapel.

1687. *July* 27.—Aiton of Inchderny's case against Mr Alexander Napier, mentioned 7th June 1687, being advised; the testament is reduced, and found null, and Napier ordained to restore the goods, (though that conclusion was but lately adjected to the reduction,) and fined in 500 merks of expenses of plea to the party.

1693. *November* 30.—In the reduction pursued by Alexander Napier of Blackstone against Aiton of Inchderny, of a decreet *in foro*, reducing some testaments made by James Stewart to Catharine Drummond, his mother; the nullity for opening the decreet was, that the death of one was not proved, and so it wanted probation. The Lords remembered, that, in the 1691, they had loosed Cardross's decreet against Kincardine on that defect; therefore, they superseded to give answer to the nullity, till they heard the material justice of the cause, and if the grounds of the decreet could be still maintained *tanquam in libello*. Blackstone's reasons of reduction were, 1*mo*, That the Lords found the 4000 merks of tocher, contained in the contract of marriage, the same with the 4000 merks bond she had from her brother, Drummond of Balloch, before her marriage, though it was not so much as *petitum* or libelled; and though the Lady Inchderny had no interest to seek it, and plead on that presumption

of law, that *debitor non præsumitur donare*, and so that last provision in the contract must be in satisfaction of the first; 2*do*, That the first two testaments were reduced, because the witnesses subscribing deponed, that they saw not the defunct testator sign it, but it was brought to them into another room by his mother, and, on her assertion, they subscribed; and which witnesses, they offered to prove, were bribed to depone so; besides, it is hard, on their depositions to annul solemn writs; 3*tio*, The last disposition being holograph, was reduced by the Lords, on this ground, that it did not prove its own date; and so might have been subscribed by him in his pupillarity, when within 14, and so incapable to test or dispone; though it was *alleged*, That held only in dispositions of heritage, that heirs might not be prejudged by their predecessors' deeds done *in lecto*, and antedated; but could not be obtruded here, where the subject matter disponed was wholly moveable; and that a postdate signified nothing, seeing, when he arrived at his perfect age, he could either revoke or ratify it; and every man's holograph testament might be quarrelled on this, that, not proving its date, *non constat* it was subscribed since his pupillarity. But here the testator died before he was 15, and so had but a little interval of time. *Vide* 12th February 1629, Leslie, No 493. p. 12604. No 504.

1693. *December* 7.—THE LORDS advised the debate, mentioned 30th November last, in the reduction pursued by Alexander Napier against Alexander Aiton. THE LORDS finding there were three decreets, two of reduction, and one for repetition, and that the nullities objected were against the last, they thought, if they could not loose that decreet upon the nullities objected, there was then no access to determine the material justice of the cause; and thus shunned to decide whether a holograph, alleged to be postdated, was null, as well as an antedated holograph, and if the one proved its own date more than the other; and so fell on the consideration of the two nullities objected for opening the decreet, and turning it into a libel, viz. that Catharine Drummond's death was not proved, and that they found the 4000 merks, in the contract matrimonial, the same with the 4000 merks in the prior bond, which was *ultra petita*, and not libelled. And the LORDS found neither of these two such nullities, as to shake off the defence of *res judicata*; and, therefore, assoilzied Inchderny from the reduction: For, as to the first, they found it libelled, and the time of her death specially condescended on; and it was not so much as denied or controverted, and Inchderny had found caution to refund Mr Napier, if he paid more annualrents than he ought, and if he instructed that she lived longer; and for the second, the LORDS thought it *bene judicatum*, and remembered the solemn decision, where it was so found, between my Lord Yester and Lauderdale, No 160. p. 11479.; when they found the subsequent tocher, given by the Duke of Lauderdale with his daughter, the Lady Yester, behoved to be in satisfaction of the prior bond of provision he had given his said daughter be-

No 504. fore her marriage, though it made no express mention nor relation thereto, and found it came in properly enough to be decided; and, therefore, that it could be no nullity: *Præside solo reclamante.*

1694. *February* 22.—The Lords advised that point in Napier of Blackstone's reduction *contra* Aiton of Inchderny, (mentioned 30th November 1693,) about James Stewart's holograph, nominating his mother, Catharine Drummond, his executor, whether it proved its own date, which was at a time when he was 14 years and an half old; or if it did not, and so might be presumed to be in his pupillarity, before he was 14, and postdated, to make it fall *in tempore habili.* It was granted, that holograph deeds did not prove against heirs quarrelling them as done upon death-bed, because they might be antedated; but there was no case of postdating sustained, but only one between James Row and Grange Dick's Bairns, *voce* Witness; where a letter, written to a merchant, being dated in majority, was not found probative of its date, being *in confinio,* and so presumed to have been truly signed in minority, but designedly made of a posterior date: And if this held, a holograph testament, made by one of 40 or 60 years old, might be alleged to have been signed by him *tempore inhabili,* before he was 14 years old, unless it were otherwise astructed and adminiculated: Therefore, the Lords would not simply adhere to the interlocutor in 1687, finding such a testament not probative of its date, *in tota latitudine;* (for that might prove very iniquous;) but refused to sustain it in this circumstantiate case, unless it were proved that he truly signed it after he was past 14. The specialties that moved the Lords were, that his mother had elicited two other testaments from him, posterior in date to this; which she needed not, if this had been sincere; that these two were improved, by the witnesses deponing that they did not see the defunct subscribe them, but they had signed on the mother's assertion, that he was a sickly valetudinary boy; and she has been afraid that his weakness would incapacitate him to subscribe when he should arrive at 14; and, therefore, she would be sure; and that he died within seven months after he was 14: So that the Lords would not have rejected it, had it not been for this and the like circumstances.

*Fol. Dic. v.* 2. *p.* 259. *Fountainhall, v.* 1. *p.* 410. 436. 454. 471. 573. 576. 613.

*** Harcarse's report of this case is No 104. p. 3928. *voce* Executor.

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1699. *June* 27. Ross and Gordon *against* George Ross.

No 505. Effect of holograph as ascertaining the date, in a question of death bed.

Lord Halcraig reported Ross and Adam Gordon of Inverbervie, his Trustee, against George Ross of Morinshie.—Mr Thomas Ross having sons by two several marriages, he dispones some tenements and acres to the eldest, and his lands of Morinshie to the said George, his eldest son of the second marriage. The