that was only the product; but many demurred *quoad* the L. 1000 legacy left out of the stock; yet, in regard there was no prohibitory clause restraining her, they found the testament good *quoad* the whole, by a plurality of seven against six. No 64.

1697. *November* 18.—YORKSTON against Burn and Sheill, decided *supra*, 13th January 1697.—THE LORDS reconsidered their interlocutor, after a new debate, wherein the Roman law was much urged, § 8. and 9. *Instit. De pupillar. substitut.* and *l.* 7. *D. eod.* where a parent's substitution cannot reach to majority, and evanishes with their age of 12 and 14. But the Lawyers shew this was a nice scrupulosity of that law; and the recent customs sustain such, at least as a *fidecommiss.*—See Gudelin, Gronevegen, and Vinnius, on the Pupillar Substitutions. And Covarruvias, with Paponius, shew it has been so decided in the Sovereign Courts. And when either Notaries drew testaments with such clauses, or fathers subscribe them, what other meaning and design can they have, but that the minor shall do no voluntary deed to evacuate it, during his minority? On the other hand, it was *contended*, This substitution was no more but a pure destination how the succession should be regulated, in case there was no intervenient deed to cut it off; and what if a father should say, "And in case my son or daughter should die before they arrived at the age of "30 or 40, then I appoint their uncles to succeed them;" would that substitution hinder the institute's disposal on the sums? No more should it here, seeing a minor has *testamenti factio* as well as a major. THE LORDS now, by the plurality of one vote, changed the former interlocutor, and found the substitution equivalent to an implied prohibition; and, therefore, she could not, during her minority, legate upon that sum.

It might be argued, that the minor might at least dispose so far as her legitim extended, and the father's substitution could not prohibit that.

Fol. Dic. v. 1. *p.* 577. *Fountainhall, v.* 1. *p.* 753. & 795.

1708. *February* 20.

The LADY CARDROSS *against* The REPRESENTATIVES of ALEXANDER HAMILTON, Bailie to Sir WILLIAM STUART of Strathbrock.

No 65.
A tack granted by a minor, without consent of his curators, found null.

SIR WILLIAM STUART of Strathbrock having, in *anno* 1671, set a three 19 years tack of some lands in Broxburn to Alexander Hamilton, his bailie, bearing expressly with advice and consent of Sir William's curators undersubscribing, which yet no curators subscribed; the Lady Cardross, as heir to Sir William Stuart, pursued a removing from these lands against the Representa-

No 65. tives of Alexander Hamilton, who defended themselves upon the tack, as yet standing unexpired.

Alleged for the pursuer, That the tack was *ipso jure* null, being granted by Sir William when minor, without consent of his curators. For instructing the minority, and his being clothed with curators at the time, the pursuer produced the following evidences, *viz.* A suspension and a summons in *anno* 1666; a summons in the 1670; a charge in 1671; an act and commission in 1669; and a summons in the 1672; all at the instance of Sir William Stuart and his Curators, with a registered factory in the year 1672; tack and factory in *anno* 1667, set and subscribed by him and them, to which two last Alexander Hamilton himself is a subscribing witness; a certificate under the hand of Mr Mercer, Commissary Clerk-depute of Edinburgh, that Sir William's act of curatory stands in the Minute Book the 8th of May 1667, and that he could not give an extract, by reason of the warrants that year being disordered; Mr James Nasmyth's receipt of the act of curatory itself in the year 1671; and an extract of Sir William's baptism in the 1652; which documents, the pursuer contended, could not be controverted by the representatives of Alexander Hamilton, who, by subscribing the tack quarrelled as a party, and the other tack and factory as a witness, all bearing the consent of curators undersubscribing, and the two last subscribed by curators, hath acknowledged Sir William's minority and his having curators. For as a minor, *se majorem dicens*, cannot be restored; so a major acknowledging his party's minority, should be bound to the consequences of it; especially in this case, where Mr Hamilton, as Sir William's chamberlain and bailie, could not be ignorant of his circumstances.

Answered for the defenders, None of the documents adduced are sufficient proof of Sir William's having had curators lawfully chosen: Because, from the rule, *invito non dantur curatores*, the presumption that minors have no curators ariseth, which cannot be elided but by a judicial act of curatory. A third person's authorising a minor, *qua* curator, doth not infer that he was chosen curator in a legal way, but only renders the authoriser obnoxious as procurator. Again, as no private arguments or deeds are sufficient to supply the want of the legal solemnities that law requires, in the judicial establishing of curators; far less will the minor's asserting himself to have curators, alter his condition, so as to annul the deed; and a witness to a paper is only presumed to know what he sees; *i. e.* the party's subscription, and not the age or quality of the subscriber. Yea, though it were proved, that there was an act of curatory, *non constat* but the same was null and informal. Nor are the documents produced sufficient to clear when Sir William was born, so as to infer that he was minor at the making of the tack quarrelled; because, testificates of baptism are by decisions found not probative of minority, however they may prove majority: Therefore, the instructions above mentioned are in vain adduced for proving jointly the points in controversy; when all of them taken separately signify no

more to the purpose, than so many cyphers, without a figure, to the making up a number. No 65.

THE LORDS sustained the nullity of the tack, as granted by Sir William Stuart in minority, without consent of his curators; though no lesion was qualified.

Forbes, p. 247.

*** Fountainhall reports this case.

LADY CARDROSS *contra* John Hamilton of Pumpherston, and Julian Campbell, his mother, for removing from the lands of Broxburn, wherein she stands infeft, as heir to Sir William Stewart of Strathbrock, her brother. *Alleged, Absolvitor;* because Alexander Hamilton, my father, got a tack of these lands from Sir William in 1671, for three 19 years, of which there is yet more than 20 years to run. *Answered,* The tack was *ipso jure* null, being set by a minor having curators, and mentioning their concourse and consent, and yet they are not subscribing; and that he was under curatory is confessed by your own tack, and is cleared by many other documents produced, such as, summons raised at the instance of said Sir William against sundry persons, with charges to enter heir, suspensions, tacks, factories, all bearing to be with consent of his curators; and in some of them Alexander, the tacksman, is a witness to the curators their subscriptions, and so is *in mala fide* to pretend ignorance whether he had curators or not. *Replied,* Nothing can make his tack null, but an act of curatory where these persons are nominated and accept, which is not produced; for, by the want of it, I am precluded from my exceptions of nullities I might have against it, such as, that the nearest of kin, on the father's and mother's side, were not legally cited; that there was no list given in by the minor, nor their acceptance, making faith and finding caution; and the adminicles produced could not make up these solemnities in a proving of the tenor; and by law, minors were not forced to chuse curators, *invitis adolescentibus curatores non dabantur*; and, therefore, the presumption lies, that they are free, unless the contrary be proved; and if he had no curators, then he must both prove lesion, and that he revoked *intra annos utiles*; and that these Gentlemen concurred with him in some acts does not prove they were legally chosen; for they might have acted as pro-tutors, or pro-curators, which makes them liable *passive* for omissions, by the act of Sederunt 1665, but does not annul the acts of administration the minor does without them; and the documents adduced are either private deeds, or, if judicial acts, only relative writs mentioning the curatory; and *non creditur referenti, nisi constat de relato.* And Alexander, the tacksman, his subscribing witness, does nowise import his knowledge of the contents of the writ to which he is adhibited as a witness; and the naming curators in his own tack imports nothing, for it might be a wrong narrative; and if a major assert himself to be minor, he ought to reap,

No 65. no benefit thereby; and *non constat*, but he was major when he set the tack quarrelled in 1671, and the Kirk Session's testificate, bearing he was christened in 1652, is no authentic proof of his age. *Duplied*, The Lady acknowledges she has not the act of curatory, but she produces undeniable evidences of it, *viz.* a Testificate by Mercer, Depute Commissary-clerk of Edinburgh, bearing, that he finds it in the Minute-book, in May 1667, but by a fire the record and warrant of it is lost; 2*do*, There is a receipt of the act of curatory produced, under Mr James Naesmyth's hands, posterior to the tack quarrelled; 3*tio*, There is an act and commission from the Lords, proceeding on that act of curatory, for trying the condition of the tenants of these lands; all which, conjoined with the tract of writs above mentioned, do, to conviction, clear there was such an act of curatory, though now lost; and *esto* there were no lesion, (though it is very apparent here) yet the long endurance of such a tack is both by Craig and Stair reputed a lesion, by debarring me so long from the free use and disposal of mine own property.—See Durie, 19th December 1632, Maxwell against the Earl of Nithsdale, No 56. p. 8942.; and Hope, *tit. De Minoribus*, Seton against Caskieben, No 50. p. 8939.—THE LORDS thought, whatever these presumptions might operate against others, yet they were sufficient against Hamilton and his heirs, he being in the knowledge both of his minority, and being clothed with curators; and, therefore, repelled the defence against the removing, and found the tack null. There were other two points undetermined in this cause, not being fully debated, *viz.* 1*mo*, He must have allowance of the meliorations and improvements made on the land, as the building of the house, *&c.* in contemplation we were to enjoy it the whole space of the tack, *et nemo debet lucrari cum damno alieno.—Answered*, You had a lucrative possession, *et impensæ cum fructibus compensandæ, easque ipso jure minuunt;* 2*do*, You have ratified and homologated my tack, by accepting of the tack-duty these 20 or 30 years bygone, so you cannot be heard to quarrel it now, after so long silence and acquiescence. *Answered*, Lord Cardross's affairs being embroiled with the public, and being imprisoned, and at last put to flee, it was no wonder he overlooked his affairs; but, 2*do*, The accepting of a canon or tack-duty, for some years, will not hinder the reducing it for subsequent years, though not to repeat bygones, as was found in the case of a Minister, 27th February 1668, Chalmers against Wood, No 78. p. 5698.; and in the case of a superior, 6th June 1666, Earl of Cassillis against Agnew, No 3. p. 6408.; and in Spottiswood, page 49. See also 12th March 1684, Bishop of St Andrew's against Beaton, No 80. p. 5699. These two points were determined 5th February 1709.—*See voce* WITNESS.

Fountainhall, v. 2. *p.* 434.