

the debtor to pay the cedent, any time before intimation, (though he thereby incurs the warrandice, but the debtor is secure;) much less will this gratuitous assignation, never intimated in his lifetime, but only to take effect after his death, hinder Saughton to pay their father any part of the debt when he called for it. But the truth is, all the payments were long before their assignation; and the father acts more ingenuously than they, for he assigns only to what is due.

The Lords repelled the objections against the discharges; and found the payment *bona fide* made; and that thir assignees could not quarrel the same; and that Stanhop-Milns, (though he had been on deathbed, which did not appear,) might have uplifted the sum in whole or in part. What influenced the decision very much was, That the payments had been truly and fairly made; and it was both unreasonable and unjust in thir daughters to seek payment over again, because the receipts and tickets wanted writer's name and witnesses; though they knew them to be their father's hand-writs. And, though they shunned to be heirs, as unsafe, yet they claimed the privilege belonging to heirs, that law presumed such writs to be done *in lecto*; and yet the title they founded on was an assignation visibly made on death-bed, he not being so much as able to sit up then, and sign his name; but forced to cause it be done by two notaries, because of his prevalent sickness and bodily weakness; which behoved to be great when he could not so much as put his name to a writ. And the Lords looked upon this objection as a mere catch, to take advantage of one whose father had paid a part of the debt already.

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1712. *February 9.* JAMES GRIERSON of CAPINOCHE *against* ALEXANDER CLARK.

GRIERSON *against* Clark. Carruthers of Warranby assigns a bond of 1000 merks, due to him by the Lord Stormont, in favours of James Murray, son to Hydewood, bearing love and favour; and, in respect he was a pupil, he appoints the said James's father and mother, and the longest liver of them two, to be his tutors in the management of the sum assigned. James Grierson of Capinoch being creditor to Murray the child's father, and he being deceased, Capinoch confirms himself executor-creditor to him in that sum, as being *in ejus bonis*, and presumed to be acquired by the father's means, the infant having no effects of his own to make any such purchase. Alexander Clark being likewise creditor to the father, he applies to the mother, as the longest liver, and gets an assignation from her, *qua* tutrix, to the sum. Whereupon a competition arises betwixt Capinoch the executor-creditor, and Clark the assignee; who contended that the sum was unquestionably the pupil's; and he having obtained a right thereto from the tutrix, he was clearly preferable to Capinoch, whose confirmation presupposed the sum to be the father's. But if that foundation were overthrown, then his right fell in consequence; for though lands taken in the name of a pupil presumed the acquisition to be by the father's means, yet it was not so in rights flowing from third parties, which may be pure donatives, without any respect to the parents. The *peculium adventitium* in the Roman law was the child's own property *quoad* the fee; and if it were otherwise, it might discour-

age friends and relations to settle gratuities on their blood-relations' posterity, who noways design to put it in the parents' power to dissipate or disappoint their gift, but design it wholly to go to the pupil's behoof.

The Lords found there was no evidence here of its being acquired by the father's means, and so Capinoch could not claim it as executor-creditor to him. It is true some have taken right to lands and sums in their children's names *in familia*, to cover them from being affected by their creditors ; but that is not the case here.

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1712. *February* 13. JOHN FORFAR and ROBERT MOYES *against* ALEXANDER STARK.

JOHN Forfar and Robert Moyes, sailors in Aberdour, having a small bark belonging to them, which they had loaded with coals to Dumbar ; Alexander Stark, skipper in Borrowstounness, being in company with sundry ships that were sailing for Holland, in November 1710, did chance to run down the said bark, and with great difficulty the two men were saved from drowning. Whereon they pursue the said Stark before the High Court of Admiralty, for their damage ; and obtain a decret for £337 Scots, as the price of the cargo and bark : Which he suspends on thir reasons, *1mo*, That the only relevancy in the pursuer's libel was, that their bark was run down through his fault ; and yet no fault proven, but a mere accidental rencounter through the violence of the wind, which they could not prevent ; *et nemo tenetur de casu fortuito*. And thir parties were the only occasion of the loss, and had none to blame but themselves, having too few hands to navigate and manage the boat, being only two in number, and one of them an old infirm body, who could not go out of the way though cried to. *2do*, Stark appeared in court at the first calling, and offered either to depone himself on his innocence, or to adduce his crew ; which was refused, though he was freighted and under charter to sail, and could not lose the opportunity of a convoy and voyage, to attend the event of that process ; which might have been more prejudicial to him than all their claim amounted to. So he sailed for Holland, and they proceeded to take the affidavits of one Duck his ship's crew ; who, to free themselves, (being as near the bark as he,) laid the blame on Stark. *3tio*, The common rule, where one ship damnifies another at sea, [is,] the owners of both the vessels bear equal share of the loss : and it is made up by contribution, as our learned countryman, Wallwood, in his Abridgment of the Sea Laws, tells us ; and Molloy, *de Jure Maritimo et Navali*, *tit. Of Average and Contributions*, says,—If two ships cross each other, and the crew swear their innocence, a mutual contribution must be made by a just equality : but if one of the ships be lost, then no contribution ; for this would tempt one who had an old leaky ship to set it against a strong one, of purpose to be run down, so to hedge himself into a contribution, and get an upset and recompense for his crazy ship.

ANSWERED,—They opponed the probation taken before the Admiral, who depone, that the storm was not so great but Stark might easily have steered by the poor men, but most inhumanly and carelessly run them down. And, as to the necessity of his going abroad, they were not bound to sist their process, and wait