

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 astructured and adminiculat-ed : 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.

1699. *June 27.* ROSS and GORDON *against* GEORGE ROSS.

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Effect of ho-
lograph 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 disposes some tenements and acres to the eldest, and his lands of Morinshie to the said George, his eldest son of the second marriage. The

son of the eldest son of the first marriage raises a reduction of the disposition made to the heir of the second marriage, on this ground, that it was done by a holograph writ, wanting witnesses, so *non probat datam*, but is presumed to have been signed on death-bed. *Answered*, There is no ground for this presumption here; because, the date is two years before the granter's decease, and is written fair and accurate, of a pertinent stile, which no man on death-bed could write or frame of such a length, and with so many clauses; likeas, he died of three days sickness, during which time, it was impossible to write such a long context of a paper, and have the firmness of judgment requisite thereto; and so it must necessarily have been done before his death-bed sickness: And though law presumes against holograph writs, that they are antedated, yet it is no such presumption, but it may be elided by contrary and more pregnant presumptions, as that it was read or seen, or some public use and document taken thereon before his sickness; and that sincerity and honesty after a long tract of time unquarrelled is rather presumed than fraud and deceit of antedating; seeing *quod inesse debet inesse præsimitur, et dolus non est præsumentus*; but *ita est* here, it is 20 years since the granter's death, and the son of the second marriage possessed all that time without trouble and molestation, which is a convincing evidence of the truth and sincerity of this disposition; and the Lords have sustained such holograph writs; Durie, 12th February 1629, Leslie, No 493. p. 12604.; and 22d January 1630, No 494. p. 12605. And seeing it bears a reservation of the father's liferent, this adminiculates it *quoad* the date; and the eldest son giving his father a discharge, on receiving his portion, can never quarrel this. *Vide* 28th June 1662, Seaton of Barns, No 61. p. 3246.; and Stair's Institutes, tit. Succession, p. 446. (465) where holograph writs, by a father to his children, are not subject to this suspicion of antedating, where they bear a faculty to alter, and a reservation of the liferent. *Replied*, If there be any uncontroverted principle, incorporated into the body and constitution of our law, this of holographs not being probative of their own dates is one, and this not by single decisions, but a constant tract in all the parts of our law. Thus a holograph discharge, bearing date before the denunciation, will not be credited to reduce the horning; 14th January 1662, Dickie *contra* Montgomery, No 497. p. 12606.; nay, it will not so much as prove against the heir; 14th November 1668, Calderwood, No 499. p. 12607.; albeit these be in favour of children; 22d June 1678, Birnies, No 58. p. 3242.; 24th June 1681, Dows, No 158. p. 11477.; and 21st June 1675, Braidie *contra* L. of Fernie, No 498. p. 12607.—Neither was it sustained to elide death-bed, that the party's disease was not an *impedimentum rebus agendis*, but made bargains, and acted rationally, living an year after, &c. as in the cases of Cleland of Faskin, No 87. p. 3305. and of Coupar and Balmerino, No 77. p. 3292. &c.—THE LORDS found they could not alter that fixed principle, that holograph proves not its own date; and, therefore, reduced; but allowed the Ordinary to hear them on the presumptions for eliding it, that it was read or seen by any in his *liege pou-*

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stie, or that he was so short a while sick, that he could not write it in that time, and anent the long peaceable possession the defender has had, without being ever questioned by his eldest brother, or his nephew, thereanent, and such like presumptions, to fortify and adminiculate the date of the disposition.

Fol. Dic. v. 2. p. 258. Fountainhall, v. 2. p. 54.

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1702. December 25.

GORDON against ROSS.

A MAN having granted a holograph disposition of some lands to a second son, with the burden of two liferents, and some other debts; in a reduction of the disposition, at the instance of the eldest son, as being holograph, the LORDS sustained the disposition only for a security of the onerous cause for which it was granted.

Fol. Dic. v. 2. p. 258. Fountainhall.

*** This case is No 32. p. 5050. *voce* GENERAL DISCHARGE, &c.

1703. February 19.

JAMES GRAHAM against The CREDITORS of Sir JAMES STANFIELD.

No 507.
Effect of holograph as to reduction *ex capite lecti*, when the person has died suddenly.

IN the ranking of the Creditors of Sir James Stanfield of Newmilns, Bailie James Graham produced a bond, all written and subscribed by the said Sir James; against which it was *objected* by the other Creditors, That they repeated a reduction *ex capite lecti* against it; for, being holograph, *non probat suam datam*; and so is presumed to have been on death-bed. *Answered*, That brocard is founded on a presumption, *quæ cedit veritati*; but so it is, he was never on death-bed, nor did any sickness or infirmity precede his death, seeing he was found murdered in his bed, for which his son was executed, as is notour by the process, and otherwise. THE LORDS sustained the answer; and found death-bed could not take place here; and assoilzied. Craig, De Feudis, Lib. I. Dieg. 12. debates, how far deeds, granted by one going straight to fight a duel, or where the plague is raging in a town, or by one going to be cut for the stone, are reputed to be done on death-bed; and he thinks from the time the infection entered his house, though it cannot be precisely proved he was then touched with it, that he can make no valid right to affect his heir, &c.

Fol. Dic. v. 2. p. 260. Fountainhall, v. 2. p. 181.

*** A similar case was decided, January 1730, Ross against Ross.—*See* APPENDIX.