

1758. *June 30.*

PETER FERGUSON, Dyer in Perth, *against* DONALD MACPHERSON of Breahochy.

No. 70.

Indenture signed by one notary and three witnesses, sustained, in an action of damages, only to the extent of 100% Scots.

In May 1754, indentures were entered into between Peter Ferguson on the one part, and Malcolm Macpherson, “with the special advice and consent of Donald Macpherson of Breahochy, and as taking burden upon him for the said Malcolm,” on the other part. Peter Ferguson thereby became bound to instruct Malcolm Macpherson in his business of dyeing, and to maintain him at bed and board during his apprenticeship; and Malcolm became bound to serve his said master for the space of five years:—In case of the apprentice’s absenting, “he obliged himself, either to pay 6s. 8d. Scots, or serve two days, for every such absent day, after the expiry of the indenture;” and both parties became bound in the penalty of £.10 Sterling, to be paid by the failer to the party willing to perform.

This indenture was tested by three subscribing witnesses, and was regularly signed by the master and cautioner; but a notary signed for the apprentice, as he could not write.

After serving near two years and a half, the apprentice deserted, and the master charged the cautioner for implement, and for the penalty. The cautioner suspended, on this ground, That the indenture was a writ of importance, in terms of the act 1579; and the apprentice having only signed by one notary, before three witnesses, in place of two notaries and four witnesses, required by the act, it is void and null.

Answered for the master: *1mo*, This is not a writ of importance in the sense of the act, which respects obligations for payment of sums of money: It is only an obligation *ad factum præstandum*. There is no debt or sum of money directly due by it, but only penalties or damages, which are consequential of the non-performance; *2do*, The indenture was homologated by the apprentice’s entering to the business, and continuing at it for near half the time, during which, the master was at considerable expense upon him, and could reap no profit from his work; And, *3tio*, The suspender was bound as a principal party, for himself, and as burden-taking, &c.; and the indenture being properly signed by him and the master, it must be binding upon him; and must be so, even although he had only contracted as cautioner.

Replied for the suspender: *1mo*, The act extends to all obligations requiring writ *ex sua natura*: The value of the apprentice’s absence for the remaining time of his indenture, at the rate of half a merk *per diem*, amounts to above £400 Scots, to which the penalty of £10 Sterling is to be added; so that it is evidently a writ of great importance, as being an obligation, from whence a claim arises for much more than £100 Scots; *2do*, The apprentice’s entering to service cannot supply or take off the legal nullity. Homologation has been only allowed to have such effect in the case of marriage-contracts, or where sums contracted for have been paid; and that too only in so far as respects the principal parties who homologate,

but not as to the interest of third parties or cautioners. Neither could the apprentice, by renouncing the objection competent to him, create an obligation on the cautioner, which did not before subsist. And, *3tio*, The suspender is bound expressly as cautioner : He signs the indenture as cautioner, and he is charged as such to satisfy the obligations contained in the indenture : His obligation, therefore, is merely accessory, and must fall with the principal ; and supposing he had contracted as a principal, yet in mutual contracts all parties must be bound, or else all are free.

Observed on the Bench, Objections on the heads of force or fraud may be properly taken off by acts of homologation ; but where deeds labour under a legal nullity, it is contrary to the practice of all other nations, to sustain payments as acts of homologation sufficient to support such deeds.

*2do*, If a deed or obligation for upwards of £100 Scots is restricted in its effect to that sum, it may be so far sustained, though signed only by one notary.

“ The Lords remitted the cause to the Lord Ordinary, to modify damages to the master, not exceeding £100 Scots.

*Act. Macintosh.*

*Alt. Sir Dav. Dalrymple.*

*D. R.*

*Fac. Coll. No. 113. p. 202.*

1760. *June 25.*

JAMES and MARGARET FARMERS, *against* AGNES MYLES and AGNES ANNAN.

Agnes Farmer, the sister of James and Margaret Farmers, executed a testament in favour of Agnes Myles and Agnes Annan, who were her grandnieces. This testament was signed by two notaries for the defunct, and was executed recently before her death.

It was objected against this testament by the heirs *ab intestato*, That the instrumentary witnesses did not hear the defunct give warrant to notaries, to sign, nor did they see her touch the pen : That the subjects conveyed by the testament amounted to so considerable a sum, as to make this a deed of importance, and to subject it to the regulations of the act 1579, which, as to such deeds, requires two notaries and four witnesses to attest the execution : That the execution of this testament was inconsistent with the express words of the act 5. 1681, by which it is declared, “ That no witness shall subscribe as witness to any party’s subscription, unless he then knew that party, and saw him subscribe, or saw or heard him give warrant to a notary or notaries to subscribe for him, and, in evidence thereof, touch the notary’s pen, or that the party did at the time acknowledge his subscription ; otherwise the said witnesses shall be reputed, and punished, as accessory to forgery.”

It was proved, That one of the notaries read over the disposition, and then turned about to the bed-side where Agnes Farmer was lying, and was heard by the wit-

No. 70.

No. 71:

Objection sustained to a testament signed by notaries, That the witnesses did not hear the defunct give orders for signing, nor saw her touch the pen.