III. C. 18. the form of the security was not specified, and the creditors sometimes contented themselves with having the minutes subscribed by the cautioner; but this practice was not uniform, and was illegal. No. 185.

The proceeding of creditors are not judicial; and, even in matters strictly of that description, a distinction is made between the steps of process, and personal obligations which occur in the course of it. The latter require the usual solemnities, as, for instance, the bond granted by the cautioner for a purchaser at a judicial sale, or for a factor *loco tutoris*.

*2do*, The plea of *rei interventus* always supposes some previous obligation, which might otherwise be resiled from; and this obligation must be proved *habili modo*. In this case, the intromissions of the trustee do not prove it, because he might have had a different cautioner from Samuel Douglas, or caution might have been dispensed with. The minutes must be thrown aside, as they are not probative; and the oath, or judicial acknowledgment, of the alleged cautioner, cannot now be obtained. The object of the oath or acknowledgment, in such cases, is not to make the informal writing probative, but to prove the obligation subject to every intrinsic quality which may be adjected to it, as that it was subscribed through force or fear, or the like; 21st July, 1772, Crichton and Dow against Syme*, Sect. 11. *h. t.*; consequently the circumstance of the heir not disputing the subscription of the deceased is not sufficient.

The Lord Ordinary, "in respect of the decisions of the Court, found that the obligation of cautioner for David Fleming in question, was valid and binding on the deceased Samuel Douglas, and that the respondent (defender) is bound to implement the same."

Upon advising a petition, with answers, the Court thought that the first plea of the pursuer was ill founded, and that the death of Samuel Douglas, for the reasons stated by the defender, distinguished the case from those of Brown and Sinclair.

The Lords altered the interlocutor, and sustained the defences.

Lord Ordinary, *Meadowbank*. Act. *Williamson*. Alt. *T. W. Baird*. Clerk, *Pringle*.

*D. D.* *Fac. Coll. No. 79. p. 184.*

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1799. *November 15.*

GEORGE DEMPSTER and Others *against* SOPHIA WILLISON and Others.

No. 186.
A person having bequeathed the

George Willison, in the year 1795, executed a trust-deed conveying his whole property, real and personal, to George Dempster and others, for the purposes mentioned in a deed executed of the same date.

* It is believed that the case, 26th May, 1790, Carlisle against Ballantine, (Not reported,) was decided on the same principle. See APPENDIX.

No. 186. residue of his fortune, (after certain special provisions to other relations,) to four natural children, two of them by a woman who then lived with him, and she having afterwards born a daughter to him, the latter was found to have no right to a share of the residue, although, from the whole circumstances of the case, his intention to give her an equal share was evident; and he had, even by an improbative jotting on the draught of a deed for that purpose, testified his approbation of it, and subscribed the first page of the formal deed, (in terms of the draught,) which consisted only of one sheet, but was unable, in consequence of the illness of which he died, to subscribe the other three pages.

These purposes were payment of debts, of annuities to his father, mother and sisters, and division of the residue among four natural children mentioned *nominatim* in the deed, (the two last of them by Agnes Dickson, who then lived with him,) "jointly and equally, and for the use and behoof of the survivors, or last survivor of them." &c.

Three of the children were in minority, and the trustees were directed to apply £100 yearly on the maintenance of each, if necessary. It was provided, that if the whole should not be required, each should be creditor for the surplus, "in order to preserve that equality which I wish to maintain among all my children." The deed reserved power to alter and declare further purposes, "by any other deed or writing under my hand; which deed or writing, if holograph, shall be binding on my said trustees, although the same may be deficient in any of the other forms prescribed by law."

In 1796, Agnes Dickson bore Sophia, whom Mr. Willison acknowledged as his daughter. He had by this time fallen into bad health, and soon after, in presence of his counsel, agent and surgeon, he gave directions for making out an accessory deed for increasing the annuities of some other relations, and putting Sophia on a footing with his other children.

A draught of the deed was made out, consisting of several sheets. On the last sheet, he reserved power to "declare further respecting the share of my means and estate, which is hereby provided to my said daughter, the said Sophia Willison," &c.; but without mentioning the amount. The additional provisions to other relations appeared from a marginal note on it.

On this sheet, an improbative docquet was subscribed by him, bearing, that he had heard the deed read over, and approved of it. The deed was extended on one sheet of stamped paper, and upon four pages; and being brought to him for subscription, he signed the first page, but in subscribing the second, he became so much indisposed, as to be incapable of proceeding, and did not afterwards recover. The page signed contained merely a recital of the former deeds.

After his death, the trustees brought an action to have the supplementary deed declared ineffectual; and a counter-action was raised in name of Sophia Willison, and the other persons favoured by it, in support of their bequests.

The Lord Ordinary conjoined the actions, and ordered informations.

In support of Sophia Willison's claim, it was

Pleaded: If Mr. Willison's children had been lawful, Sophia would have been entitled to an equal share with the rest, upon the implied condition, *Si sine liberis testator decesserit:* This would have proceeded entirely on presumed intention, which being as clear here, no additional deed was necessary to support the claim of Sophia Willison.

The reversation in the original deed removes all objections to the form of the supplementary one.

Besides, the more material sheet of the draught was duly subscribed by Mr. Willison, as was likewise the first page of the formal deed, which consisting only

of one sheet, did not require the solemnities of the act 1696, C. 15.; 14th February 1778, Macdonald against Macdonald, No. 193. p. 16956; 21st December 1780, Boyes against Hamilton, (Not reported); and being of a testamentary nature, those of the act 1681, C. 5. were not essential; Ersk. B. 3. Tit. 9. § 14. No. 186.

Mr. Willison's intentions may also be proved by the evidence of the gentlemen with whom he consulted; and reference is made to the oath of his agent, who being the acting trustee, is the proper party in the cause; Ersk. B. 3. Tit. 9. § 7.

Answered: The maxim *Si sine liberis*, &c. applies to lawful, but not to natural children, the latter, in the eye of law, having no father.

The reservation in the original deed dispensed with solemnities, only in case the further declaration of will should be holograph.

The docquet to the draught is improbative, and the subscription to the first page of the formal deed is ineffectual, both on the acts 1696 and 1681.

When a deed consists of one sheet, and the last page is subscribed by the party and witnesses, the omission to subscribe one of the prior pages, or mention their number, can have proceeded only from accident, and can give no room for inserting any thing which the granter did not intend; but it would be dangerous, and is without precedent, to support a deed when the first or prior pages of it only are subscribed.

Parole evidence is incompetent to establish a legacy beyond £100 Scots; and as Mr. Willison's agent is trustee for others, and not for his own behoof, the reference to his oath is equally so.

The Court, though fully sensible of the hardship of the case, considered the argument of the Trustees to be insuperable, and gave judgment accordingly.

Lord Ordinary, *Methven.* For the Trustees, *Hay.* Alt. *G. Ferguson.*
Clerk, *Pringle.*

*D. D.* *Fac. Coll. No.* 142. *p.* 318.

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1802. *March* 2. KEMPS *against* FERGUSON.

No. 187.
A legacy is payable where the testament is vitiated as to the nomination of the executor.

David Simpson executed a settlement of his estate, (20th July 1782), in favour of his cousin William Simpson of Pendreich, burdened, among other legacies, with £3000 to his uncle William Ferguson of Raith. Upon the death of the testator, the deed was found altered, with the apparent intention of introducing Ferguson in the room of the original heir, who had predeceased the testator. It appeared in these words: "Know all men by these presents, that I David Simpson, only son of the deceased Andrew Simpson, late merchant in Edinburgh, considering the expediency of a regular settlement of my affairs, have, for love and favour, given, granted, and disponed, and hereby give, grant, and dispone, to and in favour of my *cousin William** Simpson of Pendreich, his heirs and assig-

* The words printed in *Italics* were scored with a pen in the original.