

case they will sustain them, being done by them who are *sui juris*. *Vide Ann Robertum Rer. Judicat. lib. 1, c. 2, et lib. 4, c. 1.* Durie, 29th November 1626, Scot. Vol. I. Page 73.

I HEAR that in 1678 the following case was decided :—A father, in his son's contract of marriage, disposes the fee of lands to him, with the burden of 4000 merks ; but, during the ceremony and treating of the marriage, he takes a bond privately from his son, to pay him 6000 merks towards the provision of his younger children. This bond being thereafter quarrelled as *contra pactum dotalitium*, the Lords reduced and annulled the said bond *quoad excessum* of the 2000 merks. Vol. I. Page 74.

1680. January 8.

IT was debated in a case, where a woman grants a bond betwixt her contract and her marriage ; it is clear the bond does not oblige her husband ; but *quæritur* if she become a free woman afterwards, if she will be liable for the sum therein contained, as being granted by her *ante matrimonium consummatum* ; or if the bond will be simply null, as if it were granted by her *stante matrimonio*. This is a very dubious case. Vol. I. Page 74.

---

1677, 1679, and 1680. JAMES DOUGLAS, Master of Mordington, against JAMES CURRY.

1677. June 26.—IN a competition between a tack and a wadset of the lands of Nether-Mordington and Edrington, betwixt James Curry, late Provost of Edinburgh, and Charles Oliphant, one of the under-clerks of Session, this case fell to be debated :—Where a minor grants a deed to his lesion, and the creditor, to secure himself against revocation, causes him, either in the bond or otherwise, swear solemnly he shall never come in the contrary of that deed ; *quæritur* whether he should be reponed, and get leave to revoke, notwithstanding of his oath. The canon law is for observing the oath,—*Omne juramentum est servandum quod non tendit in dispendium animæ* ; and the religion of it is so great, that none can dispense with it but God, especially *in materia licita*, as here. On the other hand, if the oath be sustained as binding, then adieu to the privilege of minority : *actum est* with all poor minors : they are exposed to the rapacity of every crafty cheat, who has no more to do but to cause his bubble, upon oath, renounce the fence the law has put about him, which he for the present advantage will not fail to do ; *eadem enim facilitate juratur qua contrahitur*. And thus, in the most of all the sovereign courts of justice abroad, the oath is relaxed, and the poor minor protected. Yet the priest-ridden Emperor, Fridericus, in the Authentic *Sacramenta Puberum, C. Si adversus Venditionem* (for it is no part of the Roman law, but one of his extravagants,) commands the oath to be kept ; and conform to this Authentic have our Lords decided. See Dury, 15th January 1634, *Hepburne and Seton* ; last of February 1637.

See Sir G. M'Keinzie's Thirteenth Pleading for *John Johnston* against *James Hamilton*, p. 155 *et seq.* where he cites another decision on it, 10th February 1672, *Wauch*. That authentic is repudiated in France; so Mercier, in his *Remarques du Droit Francois, titulo, De Autoritate Tutorum*, page 56. See Buguion's *Loix Abrogées et Inusitées en France*, pag. And {they give this reason of it,—*Ne juramentum sit vinculum iniquitatis*. This point would deserve a Parliamentary decision. However, it seems most consonant to the honour, gravity, and seriousness of our Christian profession that the oath be kept: but, to deter the covetousness of creditors from exacting of it, thereby to prey on minors, the civil sanction should appoint him who takes the oath to be liable in the double of the value, the one to the minor, the other half *nomine pænæ* to the public; which compensation being introduced for the damage, would obviate that unlawful sort of merchandise, and fully secure minors. This overture is hinted at by the President, in his *System*, tit. 10, Of Conventional Obligations, § *ultimo*. *Vide supra*, numero 579, § 6; *vide infra*, this same parties.

*Advocates' MS. No. 582, folio 289.*

1677. December 11.—The Lords this day advised the debate betwixt Charles Oliphant and James Curry, late Provost of Edinburgh, and the Master of Mordington, which *vide supra*, 26th of June 1677, [*supra*.] The Lords sustained the tack, set by the Master of Mordington to James Curry for thirteen years, and aye and while he should be paid of such a sum, as a valid tack against Charles Oliphant the compriser and singular successor: albeit he alleged, it was to an indefinite ish, and so only personal; as the Lords' decisions had oft found: see Dury, 13th July 1621, *Maccall*.

Yet the Lords found this tack real, since it mentioned thirteen years; and had this specialty likewise, that it burdened the tacksman with the public burdens and the minister's stipends.

Charles Oliphant, after pronouncing of this interlocutor, desired the Lords would advise the other point under debate, Whether the minor's oath validated the deed that was null in law, (of which *vide infra*, this same leaf.) And they waving to do it, in regard this decision seemed to determine the whole cause, he offered to take instruments on the state of the process, and that the second point was not yet advised; for which irreverent insolency and impertinence, (as it was judged,) the Lords commanded him to prison, where he lay till next day; and, on his craving pardon, was liberated and re-admitted. See this also in my MS. of the Session affairs, p. 21.

The precise words of this interlocutor, *in terminis* as the clerk wrote it, were thus:—The Lords having considered the debate anent the tack, they sustain the tack, it having a definite ish and a definite duty; a part whereof contained in the tack remains due, after the retention against the singular successor who has right to the tack-duty: and therefore decern in favours of Charles for the dozen of capons, and the other dozen of hens, and for the relief. *Vide more infra*, this same page.

*Advocates' MS. No. 676, folio 311.*

1677. December 13.—This day the other point of the debate, between Provost Curry and Charles Oliphant, anent the Master of Mordington's oath, given in his minority, was advised; see the head of this page. And the Lords found, an oath given by a minor, past pupillarity, did so bind him, as he, nor any singular successor (who had no right nor *melius jus* than he,) could ever

quarrel it in a reduction or otherwise. But, as to that allegiance, that the deed was *ipso jure* null, he not being authorised therein by his father, who was administrator to him of the law, the Lords, before answer, desired to be informed whether or no he was *in familia* with his father at that time, yea or not.

The terms of this interlocutor, as they were written by Mr John Hay the clerk, run thus:—The Lords find the exception founded upon the oath, relevant against the revocation and reduction founded on the minority; as also find, the minor being debarred from insisting by that oath, and the privilege being personal, Charles Oliphant, who is a singular successor, can have no benefit nor interest to insist upon the said reason of minority. And it having been urged amongst the Lords, that an oath could not confirm an invalid obligation, according to the civil law; and that the obligation granted by the minor to Charles Oliphant, was *ipso jure* invalid, because the father, who authorises the minor, could not be author *in rem suam*, it being for payment of the father's debt:

The Lords, before answer to this nullity, for want of authorising, and the effect of the oath and relation thereto, allow both parties to adduce all witnesses and such evidences as they can, for proving whether the son was in the father's family the time of this right, or lived apart and had a separate estate which he managed apart.

*Note.*—*Grotius* is for keeping the oath, *libro 2, de Jure Belli et Pacis, cap. 13, num. 16.* See the books of Sederunt, 7th of April 1538, *Naper of Merchiston.* See the other MS. 12th July 1679, *Mordington and Curry*, p. 74. *Vide supra*, [No. 582,] 26th June 1677, betwixt thir same parties; where this from the Canon law, the authentic *Sacramenta Puberum*, and the 15th psalm, where it is the character of him that shall dwell in Zion, that he swears to his hurt, and changes not, is prettily cleared. They say there are four other decisions besides these, in Dury, conform to this, and sustaining the oath. See *Perezus ad Tit. C. Si adversus venditionem.* See *Elberti Leonini Concilii tertium*; see the other lawyers on the authentic *Sacramenta Puberum.* *Vide supra*, 13th February 1672, folio 131.

See Provost Curry's information in this cause beside me, urged from *Covarruvias, Garzias, Craig, Gudelin, Gronwegen, Vinnius, &c.*

*Advocates' MS. No. 679, folio 311.*

1679. July 12.—James Douglass, Master of Mordington, being infeft in the lands of Nether-Mordington, and which, though bought in his father's lifetime, yet were acquired with some money left by his grandfather, and so in reason should not pay his father's debt to his prejudice, this being all the Master has left for a livelihood to him, and his lady and family; and, having granted a ratification of a tack of these lands, set by his father to James Currie, late Provost of Edinburgh, aye till he were paid of the sum of —, the Master raises a reduction of that ratification, as done by him in his minority, to his lesion.

ALLEGED,—He was major the time of the subscribing.—The Lords appointed a conjunct probation, the one to prove he was major, and the other for proving minority. The probation being about to be advised, I alleged, that the probation adduced for the Master was much more convincing and pregnant than Provost Currie's, being more numerous, famous, and positive; whereas his probation was principally made up of three women and my Lord's oath.

Against the feminine testimonies, I represented, from Cavalcanus *de Test.* and others, the several reasons lawyers give why it was reprobated in law, and the difference of the cases of *puerperium et partus suppositus* and lese-majesty, wherein women were habile witnesses, from this. As for his father's oath, no respect ought to be had thereto; 1<sup>mo</sup>, Because ultroneous, and taken without any warrant for it. 2<sup>do</sup>, *Extra territorium*, being taken in Alnwick in England. 3<sup>io</sup>, A father is not *idoneus testis contra filium*. 4<sup>to</sup>, He may lose or win in the cause, because, if the Master prevail in his reduction, Provost Currie will recur against my Lord upon the warrandice. 5<sup>to</sup>, If it were proper betwixt so near relations, the Master could show most unnatural usage of his father to him. *Item*, Provost Currie's witnesses have deponed upon a son's age, elder than the Master near two years, who was likewise called James; which has given rise to their mistake; and it is credibly informed, that some of them were bribed. As his minority is proven, so his lesion is more palpable than needs to be instructed.

It was ALLEGED for Provost Currie,—That the Master could never pretend minority; because they offered to prove, that, at or before the date of the ratification quarrelled, he had judicially sworn that he was major; which, albeit *res inter alios acta*, yet he can never come against it. *Vide Tit. C. Si minor se major. dix.*

The Lords ordained the said judicial oath to be produced, whereby he had asserted himself major.

If Provost Currie count for the rent which these lands paid when he entered first and got his tack, he will be found paid by his possession; but he hath suffered the rent to diminish and fall exceedingly. See 11<sup>th</sup> and 13<sup>th</sup> December 1677, *Oliphant*. See thir parties, 10<sup>th</sup> January 1680.

*Vol. I. Page 51.*

1680. January 10.—The affair betwixt Provost Currie and the Master of Mordington was this day decided, (*Vide* 12<sup>th</sup> July 1679,) and the majority was found proven.

*Vol. I. Page 74.*

1677 and 1680. DAVID MOREIS against ORROCK of BALRAM.

1677. June 20.—IN a competition between real rights betwixt David Moreis, merchant in Kirkcaldie, and Orrock of Balram, a comprising was quarrelled as null and unformal; because the bond whereupon the apprising was led, bore, that the one half of the sum should not be payable till after the debtor's decease: now the apprising was led for all, and no previous trial taken that the debtor was dead.

ANSWERS,—Offers to prove yet, that the debtor was dead ere the comprising was led, and so the term of payment of the second moiety was come.

The Lords, on Gosfoord's report, found that enough, without a previous cognition, to sustain the apprising as a real right, and give it preference so far as concerned principal sum and annualrents, and necessary expenses, but not as to sheriff-fees or penalties, or the elapsing of a legal; and so restricted it. See 31<sup>st</sup> January 1679, *Irving of Drum*.

*Advocates' MS. No. 577, folio 286.*