

eight months after his death, brings furth a son ; and, the daughter being dead, they now refuse to pay David the 3,000 merks, because, *ex agnatione et supervenientia illius postumi, rumpitur, dissolvitur, et evanescit substitutio pupilaris, ex præsumpta defuncti patris voluntate*, that, if he had considered his wife would bring him furth a son, he would never have burdened him with this legacy. And they founded this on Papinian's conjecture, in *Lege 102 D. de Condit. Institut. l. 30 C. de Fideicom. l. 6 C. de Institut. et Subst.*, and the famed *l. 8 C. de Revoc. Don.* And though Accursius, &c. restrict that law to the precise case of *patronus et libertus*, yet Cujacius, *lib. 20, observat. c. 5*, extends it to all.

David Christy ALLEGED, The father's express will must preponder, and cannot be everted by conjectures, else you may arbitrarily make up defuncts' testaments ; and this son had no right to moveables, because he succeeds to an opulent heritable estate, and his sister excluded him *in mobilibus* ; and Mr James had good reason to leave David this legacy, because his father had got much of his means by a comprising led against David's father. And they cited for them *Leg. ult. D. de Hæred. Institut.*, and urged that the liberty of revoking a donation, *ob supervenientiam liberorum*, was, *per dict. l. 8*, only competent to the donatar himself, but not to his heir. *Vide Papon's Arrests, lib. 11, tit. 1, num. 19* ; and St Augustine's excellent verdict on this case, in the Canon law, *Caus. 17, Quæst. 4, Canone 43 seu ultimo. Vol. I. Page 204.*

1680 and 1682. ARCHIBALD WILLIAMSON *against* The BAILIES of HAMILTON.

1680. *July 28.*—ARCHIBALD Williamson pursues, by the subsidiary action, the Bailies of Hamilton to pay the sum of _____, because they suffered Mr John Baillie of Carphin to escape out of their prison.

The Lords repelled the magistrates their whole defence, *viz.* That he was incarcerated by a collusion, and merely upon a design, in so far as Carphin, the rebel, being both sheriff-depute and bailie of the regality there, he had as much power and command over the jailer and prison of Hamilton as the bailies themselves had ; and that he staid not half an hour there, but came forth with the messenger again ; and they could have apprehended him since, if the same had been intimated to them ; and he afterwards died prisoner in the tolbooth of Glasgow ; and, if it had been any thing but a mere trepan to ensnare the magistrates, and get them for debtors, they might have taken him to many surer prisons at no great distance. And found it relevant to make the magistrates liable, *in solidum*, for the debt—(but it is thought it will divide in equal halves betwixt the two magistrates,)—that the rebel was incarcerated, or delivered to them to be incarcerated ; and repelled the reasons.

This the Lords did, lest they should open too large a door for permitting the escape of prisoners. But it would appear, by the words of this interlocutor, that the Lords have not found that the messenger's execution, bearing, that he delivered such a rebel prisoner to the magistrates, and they accepted of him ; or the notary's instrument, bearing, that the prisoner was required, and was not found,—do prove the same.

And I think, as in other instruments, for astructing the truth thereof, the witnesses inserted ought to be adduced. See *23d November 1680.*

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1680. *November 23.*—The Lords found the messenger's execution, bearing, that Mr John Baillie was imprisoned, and the notary's instrument requiring him, and bearing, that he was not there, but at liberty, ought to be proven by the witnesses inserted. Though, in citations, and some other cases, messengers' executions are probative *per se*, without the witnesses adminiculating them.

Some pretended, the messenger and notary ought not to be admitted, because they had behaved themselves as partial, in giving it under their hands already.

The words of the interlocutor were :—Find the pursuer must yet prove that the debtor was incarcerated, or delivered to be incarcerated.

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1682. *December 23.*—Archibald Williamson, merchant in Edinburgh, against the Bailies of Hamilton, (*vide 23d Nov. 1680.*) for suffering Bailie of Carphin to escape out of their prison :

It being further ALLEGED, That they could not be liable for his escape, because they were only a burgh of barony, and the prison of the regality of Hamilton was kept elsewhere ; and, by decisions in Dury, *12th Feb. 1624, Lanton* against *The Bailies of Dunse*, burghs of baronies were not bound to keep prisoners ; and the *273d Act of Parliament, 1597*, does not oblige them to it.

The Lords repelled this, in respect it was offered to be proven that messengers were in use to incarcerate prisoners there, and that the bailies of Hamilton were in use to receive them.

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1682 and 1683. PATRICK REID *against* THOMAS CRAWFORD.

1682. *December 5.*—BETWEEN Mr Patrick Reid and Bailie Thomas Crawford ; the Lords having heard Saline report the debate, they sustain the reason of compensation ; and find the debts and the grounds thereof are not to be presumed paid, albeit, by a posterior back-bond, Bailie Crawford has not provided for the security of these debts, as he did for the debt of Kincaid of Warriston ; and sustain that article of the libel anent the sum of contained in the fitted account ; and refuse to sustain the five years' salary to Hugh Crawford, Thomas's brother, in respect the balance is of free profit, and these salaries use to be weekly allowed ; and repel the discharge of Hunter *adjectus solutioni*, in respect Mr Patrick offers to prove that the same was granted and impetrated since the intenting of Mr Patrick's action. *Vide 3d Jan. 1683.*

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1683. *January 3.*—Mr Patrick Reid having given in a bill against the interlocutor mentioned 5th Dec. 1682 ; the Lords, having considered the bill and answers, adhered to their former interlocutor, and declared, if he reclaimed by any new bill, they would modify large expenses against him.

His great importunity provoked them.

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