

1731. *January 29.* M'CULLOCH *against* M'CULLOCH.

A MAN, in his second contract of marriage, obliged himself 'to lay out a certain sum upon good security, in lands, to himself and his future spouse, and to the children to be procreated betwixt them; which failing, the same to accresce, pertain, and belong to the husband's nearest heirs and assignees.' In a pursuit at the instance of the heir of this marriage, being minor, for the above sum, against the heir of the first marriage, it was found that the pursuer might uplift the sums pursued for, but that he could not, in his minority, gratuitously defeat the substitution; but found no necessity at present to determine what might be competent to him after his majority. *See APPENDIX.*

Fol. Dic. v. I. p. 578.

No 77.

1739. *January 6.* WADDEL *against* WADDEL.

A FATHER having made a settlement of his estate, consisting all of moveables, in favour of his son and daughter, equally between them; and failing any one of them by decease before marriage or majority, to the survivor, their heirs, executors, or assignees; after the father's death, the son died while minor and unmarried, after having by testament conveyed his half to his sister in liferent, and her children in fee; which being quarrelled by his sister, as to her prejudice, it was found, 'That the pursuer's brother having died minor and unmarried, could not, by deed of his, disappoint the father's destination.'

N B. It was admitted, that notwithstanding a substitution in moveables, the institute might thereupon test in his minority; but in respect the substitution was here limited to the event of the person's dying before majority or marriage, it was considered not as a simple substitution, but to imply a prohibition to alter before majority or marriage.

Fol. Dic. v. I. p. 578. Kilkerran, (MINOR.) No I. p. 345.

No 78.
Whether a minor can test upon moveables, notwithstanding a substitution.

1739. *December.* WILLIAMSON *against* FRASER.

FOUND, that a minor, who had submitted with consent of his curators, in a case, which of its nature was pretty much involved in fact, *utebatur jure communi*, and could not be heard to quarrel the decret arbitral upon iniquity; and in the reasoning, taken for granted, that he might with their consent have transacted.

It might be very prejudicial to minors, if in such cases especially as are proper subjects of transaction, yet they could not terminate them by submission.

No 79.

No 79.

or transaction; yet, if an enorm lesion should appear, it is not doubted but the minor would be reponed.

Fol Dic. v. 4. p. 3. Kilkerran, (MINOR.) No 3. p. 347.

* * Clerk Home's report of this case is No 68. p. 665. *voce* ARBITRATION.

1797. *March 8.*

FRANCIS CUNYNGHAME *against* Sir JOHN WHITEFOORD, and Others.

No 80.

A minor cannot dispone his heritage *mortis causa*, even with consent of his curators.

MR WHITEFOORD disponed his estate of Dinduff, failing heirs of his own body, to the two younger sons of Sir John Whitefoord *nominatim*, and the heirs of their bodies; whom failing, to Francis Cunyngham; and named tutors and curators to the substitutes, in case of their succeeding in minority.

Mr Whitefoord having died without issue, he was succeeded by James Whitefoord, the son of Sir John, first called by the disposition, who, in his 17th year, with consent of the curators named by Mr Whitefoord, and after the death of his brother without issue, disponed Dinduff, failing heirs of his own body, to his father and his heirs male; whom failing, to his own five sisters, and their children, and the other heirs-female of Sir John in their order.

James Whitefoord died in minority, and unmarried, and Sir John made up titles to Dinduff.

Francis Cunynghame afterwards brought a reduction of his right, and

Pleaded; It is perfectly settled, that a minor cannot alter the destination of his heritage *mortis causa*, even with consent of his curators; Stewart's Answer, *versus* Minor; 30th November 1680, Stevenson, No 63. p. 8949.; Marquis of Clydesdale *against* Earl of Dundonald, No 3. p. 1265.; Bankton, b. 1. tit. 7. § 54.; Erskine, b. 1. tit. 7. § 33. And the rule is in itself reasonable, as it is fair to presume, that it is for the minor's interest, that the heirs under the subsisting investitures should succeed to him, and, besides, it would give room for much arbitrary proceeding, if the validity of the deed were, in each case, to depend on its supposed rationality.

It is true, a minor may sell his lands with consent of his curators, and may make a testament without it. But a sale may frequently be necessary; the price received affords a good criterion of the fairness of the transaction; and if the judgment of his curators does not protect a minor from an unfavourable bargain, he can be restored against it. But there is no necessity for his executing deeds *mortis causa*; and in the execution of them, he exerts merely an act of volition, where the judgment of others cannot so well supply his own defects. The minor's power of making a testament has probably arisen from the small value of moveable property, at the time the point of law was so fixed.

Answered; The rule contended for by the pursuer did not exist in the Ro-