

1740. *December 2.*INNES *against* TARBET.

## No. 18.

A Minister's interposing with a dying person to alter a testament made in health, *mali exempli*.

A Minister may lawfully suggest proper considerations to dying persons with respect to their worldly affairs, and the more these be in favour of the right heir, the more laudable. But where a woman had, when in health, executed her will by a deliberate act, for a Minister amidst his exhortations to the dying person, to interpose with her to alter that deed, though in favour of the true heir, was thought to be *mali exempli*, and was one of the circumstances on which her testament, though made in favour of her heir, yet, as it was altering a former made by her when in health, was reduced in this case.

*Kilkerran, No. 1. p. 570.*

1741. *February 5.*DOUGLAS *against* SPRUEL.

## No. 19.

Testament reduced in part, and sustained as to the rest.

A testament was reduced in so far as concerned a legacy left to the particular person who appeared to have imposed upon the testator in making of it, but sustained in all other respects.

*Kilkerran, No. 2. p. 570.*

1742. *December 15.*ROBERTSON *against* MRS. JEAN KER.

## No. 20.

Difference between testaments made when the testator is *in extremis*, and when he is of sound judgment.

In the reduction of a testament, a proof of circumstances being admitted, the following facts came out, *1mo*, The writer of the testament got not his directions from the testator, nor had any communing with him, but had a note of the heads put into his hand by a friend of the testator's to be his direction for writing out the testament, which he immediately did in the testator's house, and delivered the testament ready for signing, to the same person from whom he got the note. *2do*, The testament was not read over by, or to the testator, in presence of the testamentary witnesses; but was signed by him without reading at the time of subscription.

Upon this proof it was objected, that there was no evidence by witnesses, either that the testator gave orders to write this testament, or that he ever perused it after it was written.

It was answered: That this would be a solid objection against a deed executed *in extremis*, where the facility of imposition makes the bare subscribing of a deed not a sufficient legal evidence of its being the deliberate act of the man. But here the testator was of perfect memory and judgment, and so continued to his death, which was about ten or twelve days after executing the testament; and upon that account, the same faith ought to be given to this deed that is given by law to deeds

*inter vivos*; which, for the most part, depend upon no other evidence, and require no other, than the bare subscription of the party before witnesses.

No. 20.

“ The Lords repelled the objection.”

*Rem. Dec. v. 2. No. 37. p. 60.*

Kilkerran reports this case :

1742. *February 4. and November 3.*

In the reduction of Major Robertson's testament, pursued at the instance of William Robertson of New Jersey, in North America, his brother, as not duly executed, the writer deponed, “ That upon the 8th April, 1723, being the date of the deed, he received a message to come to the Major's house : That when he came, Patrick Murray of Cherrytrees told him, he was sent for to write the Major's testament, and delivered him a note in writing containing the heads thereof, and desired him from thence to make out a scroll ; which accordingly, without leaving the house, he did, and delivered it to Cherrytrees, who carried it up stairs to the Major ; but that he was not called up to be witness, because, as Cherrytrees told him, Mr. Ramsay, Minister of Kelso, and Mr. Dawson surgeon, were above stairs, and that the Major did not chuse to have his room crowded ; and that the Major died about 10 or twelve days thereafter.”

Mr. Ramsay deponed, “ That he was present at the Major's signing the testament of the date it bears, and signed witness to it ; that he did not remember if any more were present than Thomas Dawson the other signing witness ; that he did not remember, that the testament was read in the deponent's presence, but apprehends it was not ; that the Major was then entire in his judgment, and distinct in his expressions, as ever the deponent had found him in his best state of health.”

Thomas Dawson, surgeon, deponed *mutatis mutandis*, conform to Mr. Ramsay ; with this only variation, “ That he was positive the testament was not read to the Major in his hearing.”

Here was a circumstantiate negative evidence, that no orders were given by the testator to the writer for writing the testament, and that it was not read over to him, while yet not a moment was lost in finishing the testament, after it was first spoke of to the writer. But whatever effect such evidence might have had, if the testator had been *in extremis*, yet it was thought to have little in the case of a testator proved to be in the full exercise of his understanding at the time, and who might himself have read the testament, though the witnesses had not observed it. Here also the proof was brought at the distance of 16 or 17 years, where the witnesses could not be so distinct upon circumstances.

Upon these considerations, the Lords “ Sustained the testament,” 4th February, and “ adhered” the 3d November 1742.

*Kilkerran, No. 3. p. 570.*