

No. 21.

1749. November 7.

SMITH *against* TAYLOR.

Two nieces of a defunct brought an action against a nephew, the nearest of kīr, on this ground, that the defunct, while on death-bed, having made a written testament, verbally desired his nephew to divide his effects equally between the nieces and himself, which allegation they referred to the defender's oath. He acknowledged that so the defunct had signified his will, but that he had never consented to it. The Lords found that writing was essentially necessary to a settlement, and therefore sustained the defunct's appointment only as a legacy to the extent of £.100 Scots to each of the nieces.

Kilkerran.

\* \* This case is No. 9 . p. 6594. *vide* IMPLIED WILL.

1762. March 5.

KATHARINE CRAIG *against* WILLIAM LINDSAY, ISOBEL SYME, and Others.

No. 22.

The heir may challenge a legacy by a minor, if there are no free moveables after payment of the moveable debts.

John Craig, at his death, left a son William, and a daughter Katharine, both infants. To William he gave his land, worth about 400 merks yearly; to Katharine he gave a bond of provision for 3600 merks, payable by her brother.

The tutors of William, during his minority, saved out of the rents of the land estate 2200 merks.

William died in minority. He made certain settlements in favour of his tutors and their relations; (*vide* decision 14th December 1757, No. 68. p. 8956.) and, *inter alia*, made a testament while *in liege foustie*, whereby he legates to Isobel Syme 200 merks. This deed contained a power of revocation.

The sums contained in this deed, and that referred to in the decision 14th December 1757, Katharine Craig *against* Lindsay and others, exhausted the whole moveable subjects of William.

Katharine, upon her brother's death, brought a reduction of his deeds, and, *inter alia*, of this one. The ground of reduction of this deed was, that William could not legate, in respect he had no free moveables to answer the legacy, after paying the moveable debts.

Answered for Isobel Syme: There is a distinction betwixt a testament executed on death bed and one executed *in liege foustie*. With regard to the first of these, it is true, that a person when on death bed cannot make a testament to dissappoint the heir of his claim of relief to be relieved of the moveable debts out of the moveable subject: But this arises not from the incapacity to convey to the prejudice of such relief, but only from the incapacity of conveying it to the prejudice of the heir upon death bed. On the other hand, when the testament has been executed by one when *in liege foustie*, that is, when he is in good health, though in prejudice of the heir's claim of relief, it would be good; because the law of death bed does

not apply to it, and it is supported on the power inherent in every one, even a minor, to make a testament conveying moveables.

No. 22.

If this last was not true, very unjust consequences would follow: For, suppose a minor's estate devised to his collateral heirs male, he would not be allowed to legate one shilling to his own daughter out of his own moveable estate, however large, unless his land estate was left altogether free of moveable debts, to that collateral heir. The present reduction is in a peculiar manner inequitable, in respect the legacy was made by William Craig out of the savings of his estate.

Replied: The rule of law is general and without distinction, that no testament can prejudice either the heir's right of relief of the personal debt, or the relict and children's claims to their shares of moveables; for which the authority of Lord Stair, Lib. 3. Tit. 4. § 31. and Lib. 3. Tit. 8. § 39. and of Bankton, Lib. 3. Tit. 4. page 303. were quoted.

If the law stood otherwise, the worst consequences would follow: Any man would have no more to do but to borrow money equal to the value of his estate, and, by a testament, which he may keep lying by him for twenty years, make over his executory free of debts, which, according to the defender's doctrine, would have the effect to throw all the debts upon the land estate, and leave the executory free of any debts to the executor nominate.

The Lords found the legacy void, in respect that the minor had no free moveables to answer the legacy, after paying the moveable debts."

Act Lockhart, Dalrymple.

Alt. Ferguson, Burnett.

Fac. Coll. No. 89. p. 198.

1769. December 14.

WILLOCH against AUCHTERLONIE.

A person conveyed his heritable property to certain trustees, to be applied "in such way and manner as he had already, or should thereafter, think proper to give and bequeath by his last will and testament." He afterwards, *in liege poustie*, executed a testament, in which he appointed the trustees his executors, and declared the uses and purposes to which his estate, real and personal, should be applied. This settlement was challenged by the heir at law; chiefly upon the ground, that the purposes of a trust relative to heritage could not be declared by testament, any more than the heritage itself could be conveyed by such a deed. But the Court were of opinion, that the trust deed was an effectual conveyance of the heritable subjects mentioned therein, and that the after declaration was legally executed, in virtue of the reserved power in the trust.—Affirmed on appeal.

No. 23.

Fac. Coll.

\* \* This case is No. 100. p. 5539. *voce* HERITABLE and MOVEABLE.