

No 41.

to be subject to the English laws, yet seeing the money left, was addebted in Scotland, and was a sum which could not be disponed upon by way of testament, and so came not under legacy, according to the Scottish laws, therefore that the relict had no action to pursue for the same, by the practique and laws of this realm; for *bona tam mobilia quam immobilia regubantur juxta leges regni & loci in quo bona ea jacent, & sita sunt*; for this legacy was *in corpore individuo*, of another nature than what was testable in Scotland, being of a particular heritable bond.

Act. *Stuart et Gray.*Alt. *Nicolson et Gilmour.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 320. Durie, p. 723.*1764. *January 18.* MARY BURGESS *against* ELEANOR STANTIN.

No 42.
Heritage in Scotland cannot be affected by a testament *in liege pousitie*, executed by a Scotsman abroad, according to the *lex loci*.

ROBERT HEPBURN of Barefoot died infest in some houses in Edinburgh, yielding about L. 50 Sterling of rent. He left a son, Archibald, and a daughter, Margaret, who married John Brown merchant in London, and had by him a daughter, who married Younger Burgess of the East-India house there; and of this marriage was procreated Mary Burgess the pursuer.

Archibald Hepburn, upon his father's death, entered to the possession of the houses, which he continued all his life, being much more than three years; but was never infest.

Archibald, while a lieutenant in the Royal Scots regiment of foot, married Eleanor Stantin, by whom he had a son, James Stantin-Hepburn; and, in 1741, his regiment having been ordered upon the expedition against Carthagena, he executed, according to the law and forms of Ireland, a last will and testament, by which he bequeathed to his wife, the rents, issues, and profits of his houses in Edinburgh, during the minority of his son, and the half of them after his son's majority. The will likewise provided, that, if his son predeceased his wife, without lawful issue, she should have the whole during her life; and that, after her death, the subjects should revert to his nearest heirs at law.

Lieutenant Hepburn, a considerable time after executing this settlement, died abroad; upon which his relict entered to the possession of the subjects, and uplifted the rents by her factor, till she married Colonel John Eyre of Eyrecourt, an Irish gentleman of great fortune, who allowed James Stantin-Hepburn, his son-in-law, to draw them.

Upon the death of the said James, Mrs Eyre resumed the possession of the houses; but, Margaret Burgess having got herself cognosced heir *more burgi*, to her great-grandfather Robert Hepburn, the person last infest in the houses, brought a process of mails and duties against the tenants.

Compearance was made for Mrs Eyre and her husband, who claimed a preference in virtue of Lieutenant Hepburn's testament, an extract of which, from the register of the prerogative-court of Ireland, was produced.

Objected for Mary Burgess; That, by the law of Scotland, heritage cannot be either alienated or burdened by a death-bed deed, and such every testament is held in law to be, though, in fact, it may have been executed *in liege poustie*; Stair, b. III. tit. 4. § 31. and 14th December 1664, Colvil, *voce* TESTAMENT; 4th December 1735, Brand, *IBIDEM*.

THE LORD ORDINARY found, 'The provisions made by the deceased Lieutenant Hepburn, in favour of his wife, by his latter will and testament, cannot affect heritage in Scotland;' and therefore preferred Mary Burgess.

Afterwards, his Lordship having considered a representation, 'with the answers and tenor of the deed upon which the representer claims, which not only is expressed by the defunct to be his last will and testament, but contains no clause but conform to a testament, adheres,' &c.

Pleaded for Mrs Eyre, in a reclaiming petition; 1st, Supposing the deed to be on death-bed, yet the provisions to her, contained in it, ought to be made effectual; for the law did not restrain men from granting rational provisions to their wives when on death-bed; Craig, I. 12. 36. and the Lords have, in several cases, restricted to what they thought reasonable too ample death-bed provisions to wives; February 23. 1665, Jack, No 36. p. 3213.; 18th December 1758, Agnes Logan, *voce* HUSBAND AND WIFE.

But, 2dly, The deed is not a death-bed deed; for it is not denied, and could be easily proved, that Lieutenant Hepburn, when he executed it, was in perfect health, and did not die for a year thereafter. The petitioner did not maintain, that a testament was a proper *habile* method of conveying heritage directly: That it cannot be, for want of procuratory and precept; but, when clearly expressive of the defunct's lawful will, it ought to be reckoned a sufficient foundation for obliging the heir to implement, as well as a disposition wanting procuratory and precept. There can be no doubt that a disposition without procuratory or precept, and not to take effect till after the disponent's death, would be good against his heir, if executed *in liege poustie*: Why not then a testament too? There seems to be no difference between them, except that of *stile*; but the expressions, 'I dispone,' and 'I bequeath,' differ not in sense, but in sound, and it is not the words, but the will, that should be attended to in settlements.

The petitioner admitted, that Lord Stair, and several other lawyers, have taught, that heritage could not be conveyed by testament; but the testaments on which they give their opinion, as well as those which gave rise to the decisions 1664 and 1735, were executed by Scotsmen residing in Scotland; a circumstance which materially differences them from the present case. A bequeathment of heritage in a testament, is, to be sure, by no means agreeable to the forms and stiles of this country; and it was altogether inexcusable in Scotsmen living in this country, to follow so awkward a method; for, though they themselves, perhaps, knew not how to write a feudal conveyance, yet they could be at no loss for persons of skill to do it for them. But that was not the

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case with Lieutenant Hepburn; he was a soldier, altogether unacquainted with the laws and forms of this country, and, by the law, allowed and presumed to be so, (*See WRIT.*) And, not only was he incapable of writing a formal disposition himself, but he had no access to the advice and assistance of those who could, as he resided in a foreign country, where no Scotch lawyers or writers were to be found: All he could do, therefore, was to express his will according to the laws and forms of the country in which he lived. Should the doctrine adopted by the Lord Ordinary's interlocutor be affirmed, it would bear extremely hard upon most Scotsmen who have settled abroad. Now-a-days, great numbers leave Scotland to push their fortune in countries where the proper method of conveying heritage is by testament, and where there are no Scotsmen of business to inform them of the laws and stiles used at home; so that, if their wills be set aside, because disconform to the stile of writers in Scotland, they will almost all be forfeited of the power of settling their estates and disposing of their property; for which reason alone, the ancient law should be somewhat relaxed in this particular, supposing it to have stood as the petitioner's competitor represents it to have done. And, accordingly, Lord Bankton, v. III. p. 52, and 53. expressly approves of the doctrine the petitioner has endeavoured to maintain, and quotes the case of Simpson against Barclay*, which is in point to the present.

THE LORDS adhered.

Act. Swinton, jun.

Alt. M'Laurin.

J. M.

Fol. Dic. v. 3. p. 224. Fac. Col. No 127. p. 301.

1774. January 14.

YOUNGER CHILDREN of the deceased JAMES CRAWFURD, Merchant in Rotterdam, against PATRICK CRAWFURD his eldest son.

No 43.

A deed of settlement, in testamentary form, executed in Holland, according to the law of that country, has not more effect than a deed of the same kind, executed in Scotland, would have; and, therefore, is not sufficient to convey heritable subjects situated within Scotland.

JAMES CRAWFURD, merchant in Rotterdam, some years before his death, executed a last will and testament, in the Dutch form, the translation of which is in the following words: ' On the 13th November 1760, before me, Adrian Schadee, notary public at Rotterdam, and in the presence of the witnesses herein after mentioned, appeared Mr James Crawford merchant in this city, unto me notary known, widower of Mrs Elisabeth Andrew, being willing, and in a capacity to dispose, by last will, of his worldly goods; and declaring, in the *first* place, to revoke and annul all testaments, codicils, and other deeds of last wills by him, this appearer, passed before the day and date hereof, counting all the same as if they had never been made; and now coming to dispose of anew, he, the said testator, doth hereby declare to nominate and appoint, for his whole and sole heirs and heiresses, his children, named Patrick Crawford, Elisabeth Hunter Crawford, &c. jointly, each of them in an equal

* 11th December 1751. Not reported; see APPENDIX.