

to afford time for due reflection and deliberation." Now, testaments are the effects of mature and deliberate consideration; and our law agrees with the law of other countries in giving an indulgence to such writings in the omission of the statutory solemnities; Ersk. B. 3. Tit. 2. § 23.; Norval *contra* Ramsay, No. 46. p. 12290.; Drummond *contra* Brown, 1798, (Not reported; see APPENDIX.) See WRIT, (privileged.)

Observed on the Bench: An improbativ writing has never been sustained as a conveyance of moveable succession, unless where there has been a *penuria peritorum*, as in the case of military testaments made abroad.

The Lord Ordinary (19th November, 1801,) assoilzied the defender; and the Court "adhered," by refusing a petition, without answers."

Lord Ordinary, Methven.  
Clerk, Pringle.

For the Petitioner, Corbet.

Agent, A. Douglas.

F.

Fac. Coll. No. 14. p. 29.

1803. January 18. HENDERSON *against* WILSON and MELVILLES.

In the competition which arose upon the death of Walter Bowman of Logie, relative to his succession, No. 49. p. 15444. the parties then appearing were Robert Henderson, the substitute under the procuratory 1763; George Melville, the heir called by the deed 1757; and Catharine and Christian Melvilles, two of the heirs-at-law. The Court finally decided in favour of Henderson, so far as concerned the heritable property; but "found it unnecessary, *hoc statu*, to decide as to the residue of the personal estate of the said Walter Bowman."

The cause having been carried to the House of Lords by appeal, the judgment complained of was reversed, (29th March, 1802,) and the succession to the estate of Logie was found to be governed by the deed of entail executed in 1757, as the procuratory 1763 was defective in point of form.

When the petition for applying this judgment was moved, memorials were ordered (18th May 1802) with regard to the residue of the personal estate, not yet decided.

Besides the Melvilles, who were the daughters of Jean Bowman, the eldest sister of the testator, Walter Wilson, who was the son of Isobel, another daughter, also appeared, who, in conjunction with them,

Pleaded: The settlements of the heritable estate, and of the moveables on the same day, the last expressly referring to the other, must be looked upon as one complete individual settlement and expression of will, the one of which cannot subsist without the other. The moveables are conveyed to the same series of heirs upon which the landed estate is settled, and the money is to be laid out in the purchase of lands to the same order. The library also is to remain with the same series of heirs for ever.

No. 31.

No. 32.

A will disposing of the personal estate sustained, although containing a reference to the destination of heirs, called by a deed conveying the testator's heritage, which, owing to defects in point of form, was found insufficient for that purpose.

No. 32.

The settlement of the landed estate which was the primary object, cannot now be carried into effect; and the relative and accessory deed, the testament, ought to follow the same fate, when the intention clearly was, that the personal property should belong to the person who was to inherit the lands. Such is the principle laid down in L. 92. D. Lib. 28. T. 5. Magistrates of Montrose, 21st November 1738, No. 50. p. 6398; Princ. of Equity, B. 1. P. 2. § 4.

The will is totally inexplicable, and cannot be carried into effect without reference being made to the procuratory 1763, which has now been found null and inefficient for its purpose of regulating the heritable succession. When this will was executed, a certain series of heirs, the testator conceived, were vested with the character of heirs of entail of Logie, and them he intended still more to aggrandize for the honour of his family, by leaving his personal property to be laid out in the purchase of land contiguous to his family estate, and to decend to the same heirs, under the same burdens. It was not an individual, but a character that was meant to be favoured; and of that character law has for ever deprived the heirs under the deed 1763; and as this has been found insufficient to carry his intention into effect, it cannot now be made use of for counteracting the clear wish he has expressed of creating, not two families, but one only.

Answered: The pursuer's right to succeed is founded on the simplest and the least exceptionable of all titles, the will of the deceased, executed according to the forms of the law of England, where Walter Bowman was then domiciled, devising the property, after failure of James Bowman and George Melville, and their respective heirs male, to the heirs called to the succession of Logie, of even date with the will, where the pursuer appears a *nominatim* substitute, and now first in succession. This reference to a different deed, in order to explain the person meant to succeed, points out sufficiently the pursuer; for though the procuratory 1763, being defective in the solemnities requisite for conveying a landed estate, was insufficient for that purpose, yet in every other respect it is a valid and effectual deed, being executed according to the *lex loci*, and would have conveyed the personal estate situate in Scotland, although, so far as regarded the heritage, it was insufficient, if both kinds of estates had been contained in this one deed. Though both the deeds taken together were intended to form a complete settlement; and though the testator's will has been defeated upon an objection in point of form, applicable to a part of the succession; yet where no such objection lies, the rest of the will should not be defeated, in order to bring in the heirs at law, whom the testator certainly meant at all events to exclude. It is no unusual thing, that one part of a deed should be effectual, and another part not. If a person on death-bed executes a settlement of his whole estates, real and personal; so far as concerns the heritage, the heir may set it aside, but the settlement of the moveable estate remains good. In the same way, in all questions of approbate and reprobate, there must always have been a settlement ineffectual as to part of the testator's estate, which the heir has bound himself from challenging, by accepting other parts of the same settlement.

TESTAMENT.

15955

The Lords found, " that the will 1763, and the deed of procuratory of the same date, so far as referred to therein, form a valid and effectual settlement of Walter Bowman's real estate in England, and personal estate wherever situated."

No. 32.

For Henderson, *Solicitor General Blair.* Agent, *James Thomson, W. S.*  
 For Wilson, *Craigie.* Agent, *Wm. Keyden, W. S.* For Melvilles, *D. Douglas.*  
 Agent, *Alexander Duncan, W. S.* Clerk, *Gordon.*

*Fac. Coll. No. 73. p. 165.*

1805. February 27.

TRAIL against TRAIL.

John Trail, a small tenant in the county of Aberdeen, and Elizabeth Trail, his wife, executed a mutual testament, bequeathing to the survivor the whole of their little wealth. The testing clause is in these words: " In testimony whereof, we have subscribed, pronounced, and declared these presents, (written on this page by Mr. William Fraser, Minister of Tyrie,) to be our last will and testament, this 18th day of June, 1801 years, in presence of Charles Connan, and John Law, in Rickerstoun, and James Trail in Nether Bryndlie, witnesses specially called; and the above named and designed Elizabeth Trail declared she could not write, and put a pen into the hand of the above named and designed Mr. William Fraser, earnestly requesting that he would subscribe her name for her. This she did in presence of the above named and designed witnesses, place and date as above.

(Signed) JOHN TRAIL.  
 ELIZABETH TRAIL.

" Charles Connan, Witness.

" John Law, Witness.

" James Trail, Witness."

Elizabeth Trail having died, (24th June, 1802) without issue, the validity of this testament came to be discussed between her husband, and her sister Isobel Trail, her nearest of kin.

The Commissary of Aberdeen pronounced this interlocutor. " In respect it admitted by John Trail, that the name Elizabeth Trail, subscribed to the testament produced, is not of the hand-writing of his deceased wife, therefore finds said testament unavailable; prefers the defunct's nearest of kin to the office of executor."

A bill of advocation was presented, and passed.

The Lord Ordinary reported the cause; and the Court remitted it back to his Lordship, to supersede it till the Minister annex an attestation, as a notary, of his having subscribed this testament, and then that his Lordship should sustain it.

It appeared, that a practice had prevailed in the part of the country where this originated, of subscribing testaments in the same way as had been done here. Even at a certain period of our law, one very solemn act, the resignation *ad remanentiam*, was executed in this very way: The act 1555, C. 38. requires, that if the vassal cannot write, the procuratory shall be " subscribed, with his hand at the

No. 33.

A Minister having subscribed a testament with the testator's name instead of his own, on being required to do so by a person who could not write, the testament sustained, upon the Minister attesting the fact in the character of a notary.