DIVISION VI.

Effects locally situated in Scotland must be under the direction of the Scots law; and conveyances of such effects must be in the Scots form.

SECT. I.

Heritable Subjects bequeathed by Testament.

1623. *December* 9.

COLONEL HENDERSON'S CHILDREN *against* JAMES MURRAY.

No 40.
A Scotsman abroad *animo remaniendi* made a testament, dividing his lands and moveables equally among his children. This was found not effectual in Scotland to carry the land estate from the heir at law, though by the *lex loci* lands were testable.

COLONEL HENDERSON, upon his deathbed, made his testament in the Low Countries, and according to the law and consuetude of that country, divides his moveables, lands, and heritages among his children, by such proportions as he thought good. His two sons and three daughters as heirs to him by his said testament, pursued James Murray merchant in Edinburgh, factor to their father, to produce his bonds, being in the said Murray's hands, and the debtors, makers of the bonds, to hear and see them decerned to appertain and be delivered to them. It was *excepted*, that the bonds were heritable, and could pertain to none but the defunct's eldest son, who was not served heir. It was *answered*, That the defunct was married, and resident in Holland, had procreated his children, and made his purchase there; and had made his testament according to the laws of that country, which gave power to a man to dispose of his heritages in his testament. And by the law, a testament made by the testator according to the law of the country where he dies, rules his lands and goods wherever they lie in any other state or kingdom, albeit contrary to the laws of that kingdom; and *alleged*, Bartol, and many Doctors *ad legem cunctos populos C. de Testamentis*. It was *duplied*, that neither the laws and customs of Holland, nor the will of a testator, could alter the laws of this country, or make heritage or heritable land to fall under testament, which only comprehended moveables. The matter being reasoned among the Lords, some alleged that the testament being made by a soldier, should have the privilege of a military testament; that the eldest son could not be served heir, because the father died not the King's subject; and the will of the defunct should be a rule to his children, according to the law of the country where the defunct dwelt, and made his testa-

No 40. ment, and died. I *answered*, That the privilege of a military testament was only in the form and solemnity; the *testamentum pagani* required seven witnesses, citizens of Rome, and required writ and seal; that two witnesses without writ were sufficient in a soldier's testament; or if it was written with his own hand upon the scabbard of his sword, he being *in procinctu*, it was valid without witnesses, which new dispensations with form and solemnity of law, wherein the soldier was dispensed to be ignorant, but he had no privilege in the substance to alter it, he could not defraud his natural and lawful heir of his legittim, appointed *per legem falcidiam*;—that the heir Gilbert the son of a stranger might be served and retoured heir to his father, *virtute dispensationis domini regis*, as the custom was in favour of strangers, and of old in favour of those who died at the horn, as was clear by brieves extant in the chancery;—and that by act of Parliament it was ordained, that the King's subjects should be ruled by the King's laws, and by no other law of any other prince; and that it was not expedient that lands or goods within this country, should be ruled by the laws and custom of any other prince or state. And the votes of the Lords being of equal number for the several opinions, I voted as I had reasoned, and it was decided accordingly.

Fol. Dic. v. 1. *p.* 320. *Haddington, MS. No* 2945.

*** Durie reports the same case:

Colonel Henderson dying in Flanders at the siege of Bergen-op-Zoom, before his decease, in his testament, he institutes his bairns his universal heirs, and divides his money amongst them, which moneys were employed in Scotland, and lent out to divers his debtors, upon heritable bonds; which bonds were left by him in the hands of James Murray, who had employed the moneys, and to whom the trust of handling and employing thereof was committed by the said Colonel; after his decease, his bairns instituted heirs by his testament, and which by the law of that province is allowed, pursue here in Scotland the havers and the debtors for production of the bonds and registration thereof. In the which action, the Lords found, that albeit by the laws and custom of the country where the testator died, the defunct might institute all his bairns heirs, and divide his heritage amongst them, yet that testament could not be valuable, but for the goods and heritage which were within that province where the testator made his testament, and could not extend to any goods and gear which were within another kingdom or territory, where the goods would not fall under that division and testament of the defunct, by the law of the kingdom within the which the goods and lands lay; but the said goods ought to be asked by that person, who would be found to have right thereto, by the law of the kingdom within the which they were, and not the laws of any other kingdom, neither could any other country law have place in Scotland, for any thing

No 40.

being within Scotland, but the proper law of the country itself; and therefore found that none of the defunct's bairns could pursue for their obligations, the same being heritable, but only the heir, and who should be retoured and served heir after the laws and custom of Scotland.

Item, There are some singular cases in our decisions, which only agree with the civil law, anent cautioners; whereas generally our practique disagrees therefrom; for where by the civil law cautioners could not be convened, while the principal were discust, by the consuetude of this kingdom, the creditor might, at his own option, pursue either the cautioner or principal at his pleasure, and may convene the cautioner, albeit he should never seek the principal; but their cases differ, and hold not with the general rule, viz. where one is cautioner for a tutor, in which case, the cautioner for a tutor cannot be convened, while the tutor himself be discust. *Secondly*, where any is cautioner for an executor at the time of the confirmation of a testament, to make the goods confirmed furthcoming, in which case the cautioner cannot be convened, while the executor be fully discust; which discussing of him must not only be personally, by denouncing of him rebel, but also by discussing of his moveables by poinding, and of his lands or heritable goods by comprisings; till all which be lawfully done, the cautioner cannot be convened. The like holds also in one who is cautioner for a factor to merchants, as was found 8th July 1626, Smith *contra* ——, (*See* Appendix to the Title FACTOR.) *Item*, In cautionry for making of arrested goods furthcoming, which are found when arrestments are loosed, *vide* 21st June 1626, L. Lochinvar, No 126. p. 788; 21st November 1627, Rollock *contra* Crosbies, No 6. p. 2074. And generally when a cautioner is for any *cui incumbit necessitas officii gerendi*. Sicklike a cautioner found in a suspension of a sentence for poinding of the ground, cannot be charged while the ground be first discust, as was done 18th February 1623, Drysdale *contra* Blaikburn, No 67. p. 2141.

Act. *Hope, Stuart & Baird.* Alt. *Nicolson & Ayton.* Clerk, *Gibson.*

Durie, p. 88.

1634. *July* 3. MELVIL *against* DRUMMOND,

No 41.
An heritable bond due in Scotland was found not legally conveyed by a testament according to the English form, tho' the testator resided in England, *animo remanendi.*

ESTHER TAILOR and George Melvil her second spouse, pursue Archibald Drummond, executor to umquhile —— Drummond her first husband, for payment to her of a sum of money, left in legacy to her by her husband, wherein the LORDS found, that albeit by the law of England, where the infeftment was made, which bore that legacy, the testator might leave legacies of heritable sums, and that the heir could not quarrel the same, but that such legacies are effectual; and albeit the heir was born in England, and so was alleged behoved