No 42.

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 Crawfurd 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 'Crawfurd, Elisabeth Hunter Crawfurd, &c. jointly, each of them in an equal

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

'share of all the goods, as well real as personal, actions and credits, money, dues, No 43.
'and demands, where the same might be situated, none excepted; with full
'right of inheritance, &c.

The will thereafter proceeds to appoint executors, guardians, and administrators to his children; and, after reserving a power to alter, concludes in these words: 'All which, afore-written, being read over to the said testator, he de-'clares the same to be his last will and testament; desiring, that, after his de-'cease, the same shall take effect, and be observed either as a testament, codi-'cil, regulation, from a father amongst his children, how the same might be 'called, and might best avail, though all what is needful had not been observ-'ed herein.'

This will was not signed by Mr Crawfurd himself; but reduced into the form of an instrument by a notary, and signed by him.

The estate which Mr Crawford left at his death was very considerable; the bulk of it was either moveable, or was vested in heritable bonds, taken payable to his children *nominatim*, equally share and share alike.

The only heritable estate which he left, not provided to his children equally, otherwise than by the foresaid will, was, 1*mo*, Two-eighth parts of a lease of the mines of Wanlokhead, belonging in property to the Duke of Queensberry; 2*do*, The lands of Bogangreen; and, 3*tio*, Some houses in the town of Irvine.

Mr Crawfurd's younger children (four sons and four daughters) and their guardians, brought an action before this Court, against Patrick Crawfurd his eldest son and heir at law, concluding to have it found and declared, that the lands of Bogangreen, and two-eighth shares of the lease before mentioned, and the whole other heritable subjects which belonged to Mr Crawfurd at the time of his death, did, in virtue of his settlement, devolve upon all his children equally; and that the defender ought therefore to be decerned to make up proper titles in his person to the several heritable subjects, and to denude in favour of the pursuers respectively, of the shares belonging to them.

The *first* point *argued* for the defender was; Whether the deed in question was even effectual, by the law of Scotland, to carry moveables situated there, as being only an instrument extended by a notary, which could not be viewed in any other light than as a proof of a nuncupative will executed by Mr Crawfurd; which, where-ever it is executed, cannot have the effect to convey subjects in Scotland, beyond L. 100 Scots; the objection to such will being not the want of evidence, but that writing is essential, by the law of Scotland, to the constitution of a testament, and that writing must be the deed of the testator himself, and not of a third party. This question, however, was yielded to be of little importance to the issue, as the defender claimed no interest in the moveables; and the pursuers, independent of this settlement, would take the moveable estate equally, as nearest in kin to their father.

But, 2*do*, Supposing the foresaid writing should be thought effectual to carry Mr Crawfurd's moveable estate in Scotland, the defender maintained it to be a

No 43. clear case, that it is not effectual to carry his heritage in Scotland. It can be no more effectual for that end, than if the deed had been executed in Scotland; and it is a clear principle in the law of Scotland, that heritage cannot be conveyed by testament.

Answered; By the *comitas gentium*, and which, by universal consent, is now become a principle of the law of nations, deeds executed *secundum leges loci*, are probative and effectual, even in other countries where different forms might have been requisite, had they been executed there; and, as the established mode of testamentary settlements, by the laws of Holland, is that of being executed in the form of a public instrument, it must have its effect in other states where different solemnities obtain. Necessity requires it should be so, it being impossible to foresee where the effects may be situated at the testator's death; so that, were his hands to be tied up from disposing of these by deeds of any other form and tenor than such as would be requisite by the laws of the country where the effects happen to be when the testator dies, it would require as many wills, of different forms, as the laws of the several countries may prescribe; and, as experience proved how noxious a principle this would be, the *jus gentium* has established it to be a general rule, whether *ex justitia*, or *comitate*, is immaterial, that deeds executed *secundum leges loci* shall be probative and effectual in other countries and states, *quoad* the effects situated there.

It is, therefore, a jest to pretend, that this settlement, indisputably executed *secundum leges Hollandiæ*, should only be considered as a nuncupative testament; and, as such, unavailable by the laws of Scotland, beyond the sum of L. 100 Scots.

Taking it, therefore, for a good will, the *second* point for consideration is, What subjects and effects are thereby conveyed?

That the whole estate, real and personal, was meant to be thereby carried, is undeniable; and, as the testator never made any alteration thereof, it shews his determined purpose, that it should be the rule for regulating the succession and distribution among his children, as well as his own reliance, that the settlement itself was valid. Hence, there is here no *quæstio voluntatis*. The only question is, Whether the will is effectual to carry the heritable subjects in Scotland? That, in our neighbouring country, it would be available to carry land-rights, is undoubted; and, it is believed to be now the law of most commercial nations, that the whole estate should be conveyable by will, without distinction of what particulars the estate consists, upon this general principle, That *unusquisque rei suæ est moderator et arbiter;* and that the power of disposal, whether *inter vivos*, or to take effect after his death, is inherent in property.

As the law of Scotland cannot regulate the form or effect of deeds executed in another country, *secundum leges loci*, if testaments, by the law of Holland, executed *in liege poustie*, years before the testator's death, are not, *fictione juris*, considered as granted on death-bed, they ought to be equally effectual in this country, so far at least as to impose an obligation upon the heir, to complete

the titles in his person, in the form and manner prescribed by the laws of Scotland, as a *fidei-commiss.* upon the heir, to denude thereof, in favour of that party for whose behoof it was intended. No 43.

Replied; The general rule founded on by the pursuers, does only hold in so far as respects personal contracts or obligations, or the transmission of moveables; for, as to the transmission of heritage, it is a rule established not only by the laws of this country, but of every other country known to the defender, that the transmission thereof must be regulated by the laws of the country where the subjects is situated. And so it was determined, 9th December 1623, Hendersons against Murray, No 40. p. 4481.; 3d July 1634, Melvil against Drummond, No 41. p. 4483.—If the deed is not probative by the law of Scotland; or, if the forms required by the law of Scotland, in the transmission of heritage, are not observed, the deed can have no effect, although it were formal and probative by the laws of the country where the deed was executed; and, in like manner, if any relevant ground of challenge did lie against the deed by the law of the country where the subject is situated, such ground of challenge will strike against the deed, although no such challenge did lie by the laws of the country where the deed was executed. Thus, for example, if a man living in England, should, on death-bed, dispone his heritage situated in Scotland, such disposition would be clearly reducible *ex capite lecti*; and so it was determined, both by this Court and the House of Peers, in the late question between the Earl of Morton and his brother. For the same reason, a testament, executed in England, would not be available to carry heritage in Scotland; and, therefore, although the deed in question were to be considered as a testament duly executed and signed by the testator himself; yet it can have no effect to carry heritable subjects situated in Scotland. It is not sufficient to say, that such was the will of the defunct. Will and intention, when not properly carried into execution, can have no effect.

THE COURT 'found, that the deed libelled on is not sufficient to convey heritable subjects situated within Scotland.'

Reporter, *Hailes.* Act. *Dean of Faculty.* Alt. *R. M'Queen.* Clerk, *Campbell.*
Fol. Dic. v. 3. *p.* 225. *Fac. Col. No* 100. *p.* 258.

No 44.
Heritable property cannot be conveyed by a testament executed in England, altho' it would there have been effectual for that purpose.

1795. *June* 10.

JOHN HENDERSON, acting Trustee and Executor of William Crichton, and Others, *against* CHARLES SELKRIG, Trustee for the Creditors of Alexander Crichton.

PATRICK CRICHTON executed a settlement of the lands of Newington, in favour of his sons, William and Alexander, 'equally betwixt them, and the 'heirs whatsoever of their bodies; and failing any one of them by decease, to