No 63. influence than a curator, would bring most of testaments in question, and lay foundations for infinite pleas, to the exhausting of the defunct's means.

THE LORDS found, That the defunct might test, though having curators, without their consent, and might nominate their curators; and repelled all reasons of reduction, seeing neither incapacity of mind, force, nor fraud were alleged; but, if importunity had been alleged, by urging the defunct by reiterated desires, threats, or sharp words, to any particular way of disposal, by which defuncts might not be in tranquility to die in peace, but might be obnoxious to such importunity, the Lords might have enquired into the matter of fact; but this was not insisted on by the pursuers.

Fol. Dic. v. 1. *p.* 577. *Stair, v.* 2. *p.* 807.

1697. *January* 13.

GEORGE YORKSTON, Goldsmith, *against* AGNES BURN, and WILLIAM SHEILS, Her Husband.

No 64.
Found in conformity with the above.

PHILIPHAUGH reported George Yorkston, Goldsmith, against Agnes Burn and William Sheils, her husband, for reducing a testament made by the said Agnes's daughter when she was about 14; 1*mo*, Because she had curators, and they did not consent. The Lords found this not necessary. 2*do*, Because it contained special legacies in favours of her own curators, under whose influence she was when she died, and was a tender valetudinary child. The Lords also repelled this, unless they would condescend either on methods of persuasion or threatenings used to make the same. But the third reason stuck with the Lords, viz. That, by her father's assignation of the debts to her, there was a substitution of his own brothers and sisters (who were her nearest of kin *ab intestato*), in case of her decease before the age of 21. This was contended to be of the nature of a condition, and declaratory of the father's meaning, that she should have no power of disposal of the sums till her majority. It was *answered*, This substitution was no more but a pure destination, that if she died without disposal, then it should go to the substitutes named by him, and was not to retrench her natural power of testing, which is sufficiently restricted in other cases, and therefore should be left free where law impedes not.—*Replied*, The substitution could have no import that way; for, in case of her decease without disposal, these substitutes should succeed however.—*Duplied*, The substitution had still its effect, for it divided it unequally amongst them, some had more, some had less; whereas, by succeeding to her, they would all draw their equal shares. And, by the Roman law, a father was permitted *per substitutionem pupillarem* to make a testament for his children, while under pupillarity, but no longer unless they were furious.——THE LORDS all agreed, that as to the legacy of the bygone annualrents preceding her decease, the testament was valid, because

that was only the product; but many demurred *quoad* the L. 1000 legacy left out of the stock; yet, in regard there was no prohibitory clause restraining her, they found the testament good *quoad* the whole, by a plurality of seven against six. No 64.

1697. *November* 18.—YORKSTON against Burn and Sheill, decided *supra*, 13th January 1697.—THE LORDS reconsidered their interlocutor, after a new debate, wherein the Roman law was much urged, § 8. and 9. *Instit. De pupillar. substitut.* and *l.* 7. *D. eod.* where a parent's substitution cannot reach to majority, and evanishes with their age of 12 and 14. But the Lawyers shew this was a nice scrupulosity of that law; and the recent customs sustain such, at least as a *fidecommiss.*—See Gudelin, Gronevegen, and Vinnius, on the Pupillar Substitutions. And Covarruvias, with Paponius, shew it has been so decided in the Sovereign Courts. And when either Notaries drew testaments with such clauses, or fathers subscribe them, what other meaning and design can they have, but that the minor shall do no voluntary deed to evacuate it, during his minority? On the other hand, it was *contended*, This substitution was no more but a pure destination how the succession should be regulated, in case there was no intervenient deed to cut it off; and what if a father should say, "And in case my son or daughter should die before they arrived at the age of "30 or 40, then I appoint their uncles to succeed them;" would that substitution hinder the institute's disposal on the sums? No more should it here, seeing a minor has *testamenti factio* as well as a major. THE LORDS now, by the plurality of one vote, changed the former interlocutor, and found the substitution equivalent to an implied prohibition; and, therefore, she could not, during her minority, legate upon that sum.

It might be argued, that the minor might at least dispose so far as her legitim extended, and the father's substitution could not prohibit that.

Fol. Dic. v. 1. *p.* 577. *Fountainhall, v.* 1. *p.* 753. & 795.

1708. *February* 20.

The LADY CARDROSS *against* The REPRESENTATIVES of ALEXANDER HAMILTON, Bailie to Sir WILLIAM STUART of Strathbrock.

No 65.
A tack granted by a minor, without consent of his curators, found null.

SIR WILLIAM STUART of Strathbrock having, in *anno* 1671, set a three 19 years tack of some lands in Broxburn to Alexander Hamilton, his bailie, bearing expressly with advice and consent of Sir William's curators undersubscribing, which yet no curators subscribed; the Lady Cardross, as heir to Sir William Stuart, pursued a removing from these lands against the Representa-