1770. *February* 20. ROBERT WILLOCH *against* JOHN OUCHTERLONY.

HERITABLE AND MOVEABLE.

Arrears of Interest upon a Debt secured by Adjudication, heritable, and not transmissible by Testament.

A Disposition on Trust, the purposes of which were only thereafter declared in a Testament, but for which there was a reservation in the Trust, held to be a sufficient conveyance of heritable subjects.

[*Faculty Collection, V.* 18; *Dictionary*, 5539.]

MONBODDO. I have always understood the law to be that no heir can be prejudiced by a deed executed on death-bed, or in the form of a testament, although *in liege poustie*. In the conveyance of our heritable property, it is no wonder that a particular form of words should be required, as in the Roman stipulations. This rule admits of two exceptions, and no more. *First*, In a disposition to a third party, with a power to burden, that power may be exercised on death-bed, or in a testament; because the heir, *ab ante* deprived of the succession, is not thereby prejudiced. *Second*, If the disposition is to the heir, and he accepts, as was the case of *Pringle of Crichton*, this also good against the heir, who cannot challenge what he himself does. If, in this case, the trustees had any right to the subject independent of the testament, it might be good; for the trustees do not object. But this rule does not apply; for, if there had been no testament, the heir-at-law, not the trustees, would have had the right. The trust can only subsist *quoad* the creditors. Ouchterlony plainly professes his intention to transgress the law of his country. By this way a man may make a trust-deed without uses declared,—may keep it by him,—then execute a testament declaring the uses, and so disappoint the law. The case of *Forbes* was particular: the faculty was in the marriage-contract; and the provision to the younger children, in consequence of that contract, was, by the House of Lords, considered as a debt. In the case of *White*, posterior to that of *Forbes*, the Court found that provisions could not be made to children by heritable bonds on death-bed.

JUSTICE-CLERK. The trust-deed feudally divested the heir of the estate and transferred it to others. The trustees might have procured themselves infeft on it, and taken it out of the *hæreditas jacens* of Ouchterlony. In pursuance of this deed, Ouchterlony, being in England, says the trust shall be further burdened with legacies, &c. Any probative writ would have been good to carry the legacies. He did the same thing *in liege poustie*, under the form of a testament. It would expose the law of death-bed, and make it odious in our neighbouring country, were this deed to be held ineffectual.

COALSTON. The law of death-bed is essential to our law and constitution, and, till altered by the legislature, must be supported. It consists of two parts:

1*st*, That the heir cannot be prejudged by a gratuitous deed on death-bed: 2*d*, That the heir cannot be disappointed by a testamentary deed. The trust-disposition did not prejudge the heir; for, if no subsequent testament had been executed, the heir would have taken the estate: it therefore follows that the interlocutor allows the heir to be prejudged by a testament. I admit that all this is a subtlety in our law, without sufficient reason: it is not only a subtlety, but a snare. I wish to see it removed; but I cannot remove it.

BARJARG. The only objection here is as to form, which, I think, is removed by the trust-deed which denuded Ouchterlony.

GARDENSTON. In construction of law, a testament is a death-bed deed, though executed *in liege poustie*: yet there is a distinction made in the practice of the Court. If any word in a deed *in liege poustie* can infer a disposition, it will be good; and where is the difference here? If the testament had been first, and the trust-deed came afterwards referring to the testament, would it not have been effectual? And where is the difference here?

PITFOUR. I agree with the esteem expressed for the law of death-bed as to its substance. As to its form respecting also testamentary deeds, that also is established in law. Here Ouchterlony dispones his estate to trustees for uses to be hereafter declared: against this there is nothing but strict form. It is the same thing as if he had referred to a writing under his own hand: and here is a writing.

On the 20th February 1770, "The Lords sustained the defence against payment of the L.4517; and found that it was carried by the trust-right;" adhering to interlocutor of 12th December 1769.

Act. A. Wight. *Alt.* H. Dundas.

Reporter, Justice-Clerk.

Diss. Coalston, Hailes, Monboddo.

Remitted on appeal.

1770. *February* 21. HOUSTON STEWART NICOLSON, Esq. *against* MRS MARGARET PORTERFIELD.

PROCESS—ADULTERY.

The pursuer of a divorce for adultery must condescend specially upon the person with whom the crime is supposed to have been committed.

[*Faculty Collection, V.* 62; *Dictionary*, 12,639.]

HAILES. The judgment of the Commissaries is consonant to practice and to reason. The same judgment was given by this Court in the cases of *Dormont* and *Cuninghame*. The judgment in the case of *Michie* was not different: for there the husband was abroad, and could know nothing of his wife's gal-