TESTAMENT.

1605. *June* 21. JACK *against* GOURLAW.

No. 1.
A bond by a husband, engaging to purchase land, and infeft his wife in liferent, found null, because included in his testament.

JACK and his wife pursued one Gourlaw, heir to umquhile Gourlaw, for his bond to ware 2000 merks upon land, to the effect that she might be infeft in liferent therein, according to her umquhile husband's obligation made to her, in the month of November, 1601. It was excepted, That the obligation was null, because it was made in the defunct's testament, and consequently could not bind the heir, but was null in law. It was answered, That albeit the obligation was in the testament, yet it was not made upon the defunct's death-bed, it being true, that he being a mariner, he made thereafter many voyages forth of the country, and died upon the coast of Spain, in December, 1602, and so the bond contained all the tenor of a lawful bond for giving infeftment, and lawfully subscribed between notaries, before sufficient witnesses, the adhibiting of a nomination of an executor to the same could not prejudge the effect of the bond. Notwithstanding whereof, the Lords found, That the obligation could not give action, because it was contained in the testament.

Haddington MS. No. 836.

1606. *December* 26. LORD LINDSAY *against* LAIRD of PITMILLIE.

No. 2.
Executor may be burdened in a testament to pay heritable debts.

The umquhile Laird of Pilrig being obliged, by contract, to infeft my Lord Lindsay in an annual-rent of 1000 merks, and to pay him, as well not infeft as infeft, under reversion of 10,000 merks, and my Lord Lindsay understanding that

No. 2. Pilrig, in his testament, had ordained his executor to employ his goods and gear for payment of the said principal sum, and by-run annual-rents thereof, to my Lord Lindsay, for relief of his heir, and that the said Pilrig's executor had confirmed the said debt in testament, my Lord Lindsay pursued Pitmillie, executor to Pilrig, to pay to him the said sum of 10,000 merks, and by-run annual-rents thereof. It was alleged by Pitmillie, That he could nowise be compelled to pay the said sum, because, albeit he had confirmed the same in the defunct's testament, whilk he could not eschew, because it was expressly given up by the defunct's own mouth, and contained in the testament subscribed with his own hand, yet he had made express protestation, that he nowise acknowleged the same to be a debt which he would or should pay, and that he might be free of all such debts and burdens as of the law are not proper to be sustained by executors; which protestation he produced; and farther alleged, that of the law an executor cannot be burdened with moveable debts, and as nothing can appertain to him by the testament but the defunct's moveables, so he cannot be astructed to pay any debts but moveable debts, and the conditions set down in testaments contrary to the law, *habentur pro non scriptis*, of which nature this part of the testament is ordaining the defender to pay an heritable debt. It was answered, That the defunct, neither having wife nor bairns, but being absolute master of his own hail gear, as he might have left the same in legacy to his heir, so might he command his executor to bestow it for his heir's relief; and this ordinance of his testament, *equipollet universali legato*. It was reasoned among the Lords, that, in lawful deeds, regard is not only to be had to the substance, but also to the form, of contracts and testaments; so, albeit it be true that the defunct might have made his heir executor to him, or might have left in legacy to him his hail moveable goods, yet, not having set down his will in that form, but having given up the sum controverted as a moveable debt, the same being of itself unmoveable, my Lord Lindsay, who used for his title in this pursuit the contract passed betwixt him and Pilrig, whereby this debt was plainly unmoveable, and heritable, he could never have action to claim the same as moveable; for, if this debt had been moveable, in case the defunct had had wife and bairns, this debt would have been taken off the hail free gear; which no man will think. It was reasoned upon the other part, That albeit a man cannot hurt his heir upon his death-bed, yet he is absolute master of his moveables, and may freely dispone thereupon in his latter will, at his pleasure; and so this defunct having declared his will to be, that his moveables should be employed to the payment of these debts, for relief of his heir, his will was lawful, and my Lord Lindsay, to whom this debt was given up resting owing, had very good action to pursue for the same. In respect whereof, the Lords found the summons relevant, and repelled the exceptions. Thereafter, the parties desired to be further heard.

Fol. Dic. v. 2. p. 458. Haddington MS. No. 1193.