1662. *July* 25. BARBARA NAYSMITH *against* JOHN JAFFRAY.

No 53.
Found that an obligation heritable *quoad creditorem*, may be moveable *quoad debitorem*. See No 51. p. 5481.

BARBARA NAYSMITH pursues John Jaffray her son, as heir and executor to his father, for payment to her of her umquhil husband's hail means and escheat, by virtue of a missive letter, written by the defunct her spouse, bearing that if he happen to die before his return, that his wife should do with what he had as she pleased, that he thought it too little for her; but he desired her to discharge L. 1000 or 1000 merks to his brother Alexander, and 500 merks to his sister Magdalen, if she follow her advice.

'THE LORDS having formerly found, that this letter was *donatio mortis causa*, or a legacy, and so could only affect dead's part,'

It was now further *alleged*, That by the pursuer's contract of marriage, he was obliged to employ 6000 merks on land, or annualrent to him and her, and the longest liver of them two, and to the bairns to be gotten betwixt them, which failing, his heirs. This obligement to employ being a debt, the moveables must be liable for it *primo loco*, and the pursuer can only have dead's part of the remainder of free goods. The pursuer *answered*, That this destination being on heritable clauses, cannot affect the moveables. 2*dly*, The bairns cannot have right thereto till they be heirs, and so they will be both debtors and creditors, and the obligation will be taken away by confusion.

THE LORDS found this defence relevant notwithstanding of the answer; and that albeit the clause was heritable, *quoad creditorem*, yet it was moveable *quoad debitorem*, and so behoved to be performed out of the defunct's moveables, and that the entering thereto, would not take away the obligement by confusion, more than one paying a moveable debt, wherein he is both debtor and creditor; yet he will have action of relief against the executors out of the moveables.

It was further *alleged*, That in the said missive there are two particular legacies left to the defunct's brother and sisters, which must abate the general legacy. The pursuer *answered*, That both legacies were only left thus, 'I wish,' &c. which cannot be obligatory, nor constitute an effectual legacy; but is only a desire or recommendation left in the pursuer's option; and for Magdalen's legacy, it was conditional, she following the pursuer's advice, which she did not, but left her contrary to her will. The defenders *answered*, That *verba optativa* were sufficient in legacies, at least were sufficient to make *a fidei commiss.* legacy; because all *fidei commiss.* either for restoring the inheritance, or for restoring legacies, in the civil law were in such terms; and albeit such words would not be sufficient, *inter vivos*, yet *favore ultimæ voluntatis*, where the defunct's will, howsoever manifested, is the rule, and so is most extended, such words are sufficient; as to the condition in Magdalen's legacy, it cannot be understood of being under the the pursuer's command all her life, and so can only be meant, if Magdalen miscarry contrary to the pursuer's advice, in

No 53. some considerable matter of her carriage; and however, it is not a suspensitive condition, hindering the payment of the legacy, but obliging the legatar thereafter.

'THE LORDS found the legacies constituted, and in terms foresaid valid; and as for Magdalen's legacy, declared, that in case Magdalen miscarried, and took not the pursuer's advice, that she should be liable to refund the legacy to the pursuer, but would not put her to find caution for that effect, the condition being so general. *See* LEGACY.

Fol. Dic. v. 1. *p.* 369. *Stair, v.* 1. *p.* 135.

*** The case Dickson against Young, No 3. p. 3944, was decided in the same manner.

1687. *February.* ALEXANDER YEAMAN *against* YEAMAN and OLIPHANT.

No 54.

FOUND that from a bond secluding executors being put in the register, a charge is not presumed to make it moveable, either *quoad* executry or escheat. 2. That legitim transmits without confirmation. 3. That quot and confirmation are debts privileged, and preferable to legacies. 4. That obligements (to) infeft in liferent are prestable by executors, whereof heirs have relief. *See* LEGITIM.

Fol. Dic. v. 1. *p.* 369. *Harcarse,* (EXECUTRY.) *No* 442. *p.* 119.

*** Fountainhall reports the same case:

1686. *March* 12.—THE case of Marjory Yeoman and Oliphant her husband *contra* Alexander Yeoman, was reported by Lord Redford, and the LORDS find her legacy must bear a proportional abatement with the rest of the legacies; and find, that the children surviving the father transmit their legitim to their nearest of kin, though they died without establishing it in their person by confirmation.

The case of Bell against Wilkie, 12th Feb. 1662, *voce* NEAREST of KIN, was cited from Stair's Instit. B. 3. T. 8. § 51. and *Perez. ad tit. Cod. de his qui ante apertas tabulas hæreditatem transmittunt.* And the 120th act 1540, and 14th act 1617.

1687. *February* 1.—THE case of Marjory Yeoman and Oliphant her husband, against Alexander Yeoman her brother, mentioned 12th March 1686, was reported by Drumcairn; he as executor craved allowance against his sister's legacy of the annualrent of L. 10,000 Scots, payable to their mother for her liferent use, by her contract of marriage. *Alleged,* The clause of this obligement was heritably conceived, to be waired on annualrent or land, and so could not affect the moveables, but the heir. *Answered,* It never having been actually