No 8.

It was *urged*, That Elizabeth Edwards, before her death, made a general disposition to her husband, without burdening him with this bond.

On two bills and answers, the LORDS adhered.

Petitioner, *Tho. Hay*.

Fol. Dic. v. 3. *p.* 308. *D. Falconer, v.* 2. *No* 44. *p.* 42. & *No* 152. *p.* 176.

*** See Kilkerran's report of this case, No 35. p. 2977.

1749. *November* 17. SMITHS *against* TAYLOR.

No 9.

A person on death-bed acquainted his nephew that he, along with his two nieces, should equally share his effects. The nephew, in an action at the instance of the nieces, deponed that he did not consent to this division, although he did not object to it. It was found that his silence did not import consent, to the effect of sustaining the nuncupative testament alleged, but that the nieces were entitled each to a legacy of L. 100 Scots.

JOHN SMITH, tenant in Inverquhomry, on his death-bed acquainted John Taylor, carpenter in Peterhead, his full nephew, that he intended he, with Margaret and Jean Smiths, his nieces by the half blood, should equally share his effects; but Taylor, as he deponed in the cause, 'never consented to it.'

Margaret and Jean Smiths, on their uncle's death, pursued John Taylor on an alleged promise to communicate the effects; and the LORD ORDINARY, 15th February, 'Found that the oath did not prove the allegeance, that the defender consented to an equal division of the defunct's effect, amongst himself and the pursuers; but that the defunct having on death-bed appointed his whole effects to be so divided, the pursuers were thereby entitled to their proportion of the sum of L. 100 Scots; and repelled the allegeance, that the verbal legacy ought to be found effectual to each of the pursuers to that extent, in respect it was but one legacy in one enunciation.'

Pleaded in a reclaiming bill, The pursuers demand ought to be sustained to the whole extent, as it is proved by the executor's oath; the reason, that nuncupative testaments are not sustained, being the danger of a proof by witnesses in affairs of moment; for they are valid to the extent of L. 100, the precise sum which may be proved owing on contract by witnesses; at least the legacies ought to be sustained to that extent to each.

2*dly*, It ought to be sustained against the defender *ex dolo*, for that he allowed the testator to think he was to fulfil his will; whereas, if he had spoken out, a testament would have been executed.

Answered, The defender's holding his peace was not a fraud to subject him to pay what was not validly bequeathed; and nuncupative testaments are invalid for want of solemnity of execution, not solely for defect of proof, Stair, B. 3. T. 8. § 34. and 35. A legacy has been sustained to the extent of L. 100 without writing; but a settlement of a man's affairs, though under that value, is of a different nature; and therefore the pursuers, who had no legacy, ought not to be heard at all; though the defender acquiesced in the interlocutor, allowing them L. 100. But they can never have more; both for the reasons expressed, and that otherwise it would be in a man's power by a nuncupative will, to exhaust a large subject by different legacies.

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The Lords found, That the pursuer's claim of a share of the defunct's effects, could not be sustained on a nuncupative testament; but found the provision in their favour resolved into legacies, which ought to be sustained to the extent of L. 100 Scots to each of them; and found they had right thereto. See Legacy.

Act. *Ferguson.* Alt. *H. Home.* Clerk, *Gibson.*

Fol. Dic. v. 3. *p.* 308. *D. Falconer, v.* 2. *No* 96. *p.* 111.

*** Kilkerran reports the same case:

1749. *November* 7.—John Smith, tenant in Innerwhomry, died without a written testament; and John Taylor, his nephew by his sister-german, was his nearest of kin. But Margaret and Jean Smiths, his nieces, by his sister consanguinean, alleging that he had sent for said John Taylor about a fortnight before his death, and told him that he appointed his whole effects, which were all moveable, to be equally divided between him the said John Taylor and his said nieces, Margaret and Jean Smiths, and that the said John Taylor had agreed thereto, brought a process against him for two-thirds of the effects, and referred the fact to his oath.

The Ordinary ordained him to depone upon what passed between the defunct and him; and he having deponed, that his uncle sent for him on his death-bed, and told him that he appointed his whole effects to be equally divided between him and the pursuers, but that he the deponent never consented to it, the Ordinary found, 'That the oath did not prove the allegeance, that the defender consented to an equal division with the pursuers, but found that the verbal appointment of the defunct was effectual to the extent of L. 100 Scots, as a verbal legacy, and no farther; and repelled the allegeance, that the verbal legacy ought to be found effectual to each of the two pursuers to that extent, in respect it was but one legacy in one enunciation.'

The pursuers reclaimed, and upon the general point, that writ was essential, and *de solemnitate* necessary to a testament; the Lords, without any hesitation, 'adhered,' agreeably to a very distinct judgment observed by Stair, to have been given upon that point, 19th January 1665, Shaw *contra* Lewis, No 47. p. 4494. And it was observed by one of the Lords, that we had taken this from the law of France, where, by the edict of Charles IX. in 1566, published by Buserius in 1582, with a commentary upon it, testaments are ineffectual without writ.

But the Lords varied the interlocutor upon the second point, and 'Found the appointment by the defunct in favour of the pursuers was of the nature of a legacy, and entitled each to L. 100.'

So much the words of the appointment were thought to import, supposing the appointment to be of the nature of a legacy; and about that only it was that some hesitated, who inclined to think that the defunct's appointment was

No 9.

rather a testament, as being a total settlement of his effects among the defender and the two pursuers, and as such fell under the general rule, That a testament without writ is void: But the Court found as above; they considered it as a direction by the defunct to the defender, his nearest of kin, to give equal shares with himself to the pursuers. See LEGACY. TESTAMENT.

Kilkerran, (TESTAMENT.) No 4. *p.* 571.

1756. *March* 2. FARQUHARSONS *against* FARQUHARSON.

No 10.

A PERSON having no children, executed a deed, disponing in favour of his brother's heirs and assignees whatsoever, all his lands, &c. that should belong to him at his death. The brother had two sons and two daughters. The sons died before the uncle, who thereupon came to succeed to their estate; and he dying soon after, a brother consanguinean took up the succession to their lands, which by the investiture, went to heirs male. The two nieces insisted in an action, declaratory of the estate devolving and belonging to them, in virtue of their uncle's disposition of all lands belonging to him at his death to the heirs whatsoever of his father. *Objected* for the brother consanguinean, That the event of the disponer's succeeding to that estate could not possibly be in his view; for it would be absurd to suppose that he intended to dispone to the sons, who were the heirs of his brother, an estate which was their own.——THE LORDS found no action competent to the nieces upon the deed in question.—Affirmed upon appeal.

Fol. Dic. v. 3. *p.* 309.

*** This case is No 43. p. 2290.

*** Lord Kames also reports the same case:

1756. *February* 10. PATRICK FARQUHARSON succeeded to the estate of Inverey, which by the investitures was settled upon heirs-male, and had been so for a long time. His brother Charles was bred a writer in Edinburgh, and in the year 1721, having contracted a lingering disease, which made him apprehend death, he thought it necessary to settle his affairs. He executed a deed 26th October 1721, in which he assigns and dispones 'to and in favours of Patrick Farquharson of Inverey, his heirs and assignees whatsoever, all lands, heritages, tenements, annualrents, debts, sums of money, heritable and moveable, horses and goods and gear whatsoever, of whatever kind and denomination the same be of, that shall happen to pertain and belong to him the time of his decease.'

Charles recovered his health, and the deed was forgot as no longer necessary. Patrick Farquharson dying after, was succeeded by his two sons Joseph and