'queath;' Erskine, p. 552.; Stair, 31st January 1667, Henderson against Henderson, *voce* TESTAMENT; 21st November 1759, Mitchel against Wright, *voce* LEGACY. No 44.

*Answered;* 1*st*, Personal contracts, or even obligations to convey heritage in Scotland, which are executed abroad, and according to the forms there established, may be effectual; but the deed in question, which was altogether dependent on the will of the granter, laid him under no obligation; and his heirs can as little be bound by it, unless it be good as an actual settlement of heritage, to the validity of which it is essential, that it be completed according to the rules of our own law; Erskine, b. 3. t. 2. § 40.

2*dly*, It may be true that a testament, and a conveyance of heritage, may at present be written on the same piece of paper. But the latter always requires *verba de presenti*, importing an immediate alienation of the property, 4th December 1735, Brand, *voce* TESTAMENT; although such alienation may indeed be so qualified by clauses declaring the deed revocable, dispensing with the delivery, &c. as in effect to leave it no further operation than a testamentary deed. But the will in question is a mere declaration of what the testator desired to be done, not 'at its date,' but 'after his death.' The clause in which the word 'give' occurs, is not a separate and independent conveyance of his Scotch heritage. The settlement begins with testamentary words, declaring the testator's will respecting his whole estate, real and personal; and 'for that 'purpose,' that is, to render his will more easily effectual as to his heritage in Scotland, he 'gives' it in trust to Alexander Crichton. This clause, therefore, so far from being distinct from the testamentary part of the deed, is inserted for the sole purpose of facilitating its execution.

THE LORDS assoilzied the defender.

A reclaiming petition was refused (7th July 1795) on the general point; but it having been there urged, that since Alexander Crichton refused to implement his brother's will, he was bound to restore a legacy which had been left him by it, the COURT remitted that branch of the cause to the Lord Ordinary.

Lord Ordinary, *Dreghorn.* Act. *Maconochie.* Alt. *Jo. Clerk.* Clerk, *Menzies.*

*R. D.* *Fol. Dic. v.* 3. *p.* 225. *Fac. Col. No* 174. *p.* 410.

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1795. *December* 9.

The CREDITORS of William Robertson, *against* The DISPONEES of Janet Mason. No 45.

Heritable property in Scotland cannot be conveyed by a testament executed in England and in the English form.

ALEXANDER ROBERTSON of London, vintner, was married to Janet Mason, daughter of William Mason, nurseryman at Dalry near Edinburgh. It does not appear that any contract was entered into, or any fortune given with her, on the marriage.

In 1772, William Mason executed a disposition, in which, upon a narrative 'of the love, favour, and affection, which he had and bore to Janet Mason

No 45. ' *alias* Robertson, his eldest lawful daughter, spouse to Alexander Robertson, ' of the parish of Botolph, and county of Middlesex, vintner, and for divers ' other good causes and considerations him thereunto moving,' he conveyed the six acres and a half of land belonging to him at Dalry, with the houses built thereon, ' to and in favour of the said Janet Mason *alias* Robertson, and Alex- ' ander Robertson, her husband, their heirs, executors and assignees whatso- ' ever, heritably and irredeemably.'

A similar description of the disponees was given in the procuratory of resignation, and in all the other clauses of the disposition, except in that for the delivery of the symbols of infeftment, in which the husband was mentioned ' for ' his interest.'

It contained a clause of absolute warrandice.

Of the same date, William Mason, by a separate deed, bequeathed his whole personal property to Alexander Robertson, burdened only with payment of the testator's debts, and provisions to his younger daughters.

William Mason died soon after.

Alexander Robertson took infeftment on the disposition. In 1779, he executed, in London, and in the English form, a testament, in which he ' gives, ' devises and bequeaths,' his whole property to his wife, particulary his interest in the lands of Dalry, and his other heritable property in Scotland, which was considerable. The deed likewise contained a nomination of executors.

Upon her husband's death, Janet Mason, under this deed, obtained an adjudication in implement against her eldest son William Robertson, then abroad.

William Robertson afterwards brought an action against her for setting aside the deed 1779, as a conveyance of heritable property in Scotland, and for having it declared, that, by the deed 1772, the fee of the lands of Dalry was vested in his father.

Both parties died during the dependence of the action; but the adjudging creditors of the pursuer afterwards insisted in it against the disponees of the defender. The grounds for setting aside the deed 1779, and the argument of the parties, were the same as in the case, 10th June 1795, Henderson against Selkirk, No 44. p. 4489.

The Lords unanimously ' found, That the last will, executed after the English form, cannot effectually convey any heritable property in Scotland.'

On the effect of the deed 1772 the defenders

*Pleaded;* Where the fee of a subject, conveyed to a husband and wife, and their heirs, is vested, is a question of intention, to be gathered from the circumstances of each case. It is a settled point, that it is vested in the wife, where her heirs are chiefly favoured in the substitutions, or where, as in the present case, the subject is derived from her; Stair, 19th June 1667, Johnstoun, No 5. p. 4199.; Stair, Inst. p. 502. (524); Bank. v. 2. p. 337.; Ersk. b. 3. tit. 8. § 36.

The deed in question proceeds upon the narrative of love and favour to the disponer's daughter, and it could not, therefore, be meant that the husband

should have it in his power to dispose of it, to the disappointment both of her and her children. Accordingly, in one clause of the deed, the subject is conveyed to him only for 'his interest.' No 45.

*Answered;* The general presumption, that where a subject is conveyed conjunctly to husband and wife, the fee is vested in the latter as the head of the family, has been long established in the law of Scotland; Craig, lib. 2. d. 22. § 6.; Stair, b. 2. t. 6. § 10.; and, as there is no preference given to the heirs of the wife, in the present case, and the subject did not proceed from herself, but from her father, it does not fall under the usual exceptions; Forbes, 23d July 1713; Edgar, No 7. p. 4201.; Stair, b. 2. tit. 6. § 10.; b. 3. tit. 5. § 51.; Fount. 19th January 1697, Laws, No 30. p. 4236.; Harc. 20th December 1682, Ramsay, No 28. p. 4234.; 11th August 1781, Blair's Creditors, mentioned in the report, 5th August 1782, Blair against Bell, &c. No 34. p. 2280; 20th January 1790, Henderson, No 16. p. 4215. From the narrative of the deed, there is no reason to presume, that the disponer meant to infringe the ordinary rules of law in her favour. Indeed, as he had previously given his daughter no provision, the subjects may be considered as conveyed *nomine dotis;* and accordingly, the deed contains a clause of warrandice, and no power to alter. The giving the fee to the husband was, therefore, a very rational act; and the more likely to be adopted by William Mason, that from his giving his son-in-law the absolute disposal of his personal estate, he seems to have had complete confidence in him.

The loose expression, by which the subjects are described as given to the husband 'for his interest,' occurring in the clause for delivery of the symbols of infeftment, and not in the dispositive or other important clause of the deed, cannot affect the question.

THE LORD ORDINARY reported the cause.

THE LORDS unanimously 'found, That the fee of the lands of Dalry was vested in Janet Mason.'

A reclaiming petition was (14th January 1796) refused without answers.

Reporter, *Eskgrove.* Act. *Solicitor-General Blair, Maconochie, Monypenny,*
Alt. *Wallace.* Clerk, *Home.*

*D. D.* *Fac. Col. No* 189. *p.* 457.