1748. *June* 23. CATTOS *against* GORDONS.

No 28.
Legacies laid by the testator on his heritage are to be paid out of the executry.

JAMES CATTO merchant in Ellon, left by testament his whole goods, gear, &c. bonds, bills, and sums of money, and generally all that to him any otherwise appertained, to James Gordon in Meikle-mill of Eslemont and Alexander Gordon of Auchleuries his uncles, under the limitations and reservations after following, amongst which were, 'That his legatars should pay within year and 'day L. 100 Scots to John Catto, son to James Catto, sometime in Ellon, out 'of the rents of his house in Ellon.' And 'he left and bequeathed to William 'Catto in Green of Udny his son John 400 merks out of the first and readiest 'money that should accresce on the sale of his houses and feu in Ellon, and 'the like sum to —— Catto, daughter to James Catto, son to the above de-'signed James Catto.'

In a process for these sums, the Lords first agreed that the last legacy was due, as being no way charged on any heritable subject; but the other two were also insisted for, as *res aliena scienter legata*, or as left, *sub falsa demonstratione quæ non vitiat legatum.*

Pleaded for the defender, By the Roman law, whereby it was in a person's power to convey his whole effects by testament, if any knowingly legated a subject not his own, the heir was obliged to make it good, because it was presumed the testator intended not to trifle in so solemn an act; but this does not apply in the law of Scotland to heritage, which cannot be conveyed by testament, and if which be tested upon, the presumption of law is, that it hath been done *ignorantia juris;* Stair, B. 3. T. 8. § 41. *in fine;* 21st February 1663, Wardlaw against Fraser, No 86. p. 5703. It was found, 21st January 1673, Forbes against Forbes, No 14. p. 2263., where a legacy was left out of rents due by tenants, that if there were not sufficient rents, the legacy was not due, and yet in that case the fund of payment was a moveable subject, which it was not in the present; and, on this topic, it was observable, that in one of the bequests the executors were not obliged to pay, but the legacy left out of the price of his houses, which since they were not sold before his death, the legatar could not recover.

Pleaded for the pursuer, By the Roman law, any false description adjected to a legacy does not vitiate it, providing it appear what it is that is legated; thus, though a debt due by a certain person to the testator, or a discharge of a debt due by the legatar himself generally left is of no effect, if there was no such debt; yet, if the sum be specified, or a certain farm left, as got in portion with the testator's wife, though he really did not acquire it in that manner, it appearing what was intended, the legacy is good, *l.* 75. § 1. *D. De leg.* 1.; *l.* 88. § 10. *De leg.* 2.; *l.* 40. § 4. *De cond. et demon.*; *l.* 1. § 8. *De dote prælegata*, and much more when the description is not of the legacy itself, but of the fund out of which it is to be paid, *Voet*, Tit. *De con. et demon.* No 5.; 22d January

1624, Drummond against Drummond, No 10. p. 2261.; 16th June 1664, Murray against the Executors of Rutherford, *voce* QUOD POTUIT NON FECIT; 11th July 1676, Finlay against Little, No 15. p. 2264. No 28.

Some of the cases mentioned by the defender, wherein the executors were not found liable to make good the legacy, were of heritable subjects directly left, which do not apply to the present question, where it is a sum that is bequeathed, but it is destined to be raised out of an heritable fund, which can only be considered as a *falsa demonstratio*; but yet, at other times, it has been decided, that the value of an heritable subject left was to be made up as *res aliena scienter legata*, the ignorance, if any, being of law, which ought not to e regarded; 2d December 1674, Cranston against Brown, No. 15. p. 8058.; 24th June 1664, Falconer against Dougall, *voce* QUOD POTUIT NON FECIT.

THE LORDS found both the legacies due, in case there was as much executry as should be sufficient to satisfy them.

Reporter, *Tinwald.* Act. *Ferguson.* Alt. *Lockhart.* Clerk, *Justice.*

Fol. Dic. v. 3. *p.* 377. *D. Falconer, v.* 1. *No* 264. *p.* 356

*** Kilkerran reports this case:

1748. *June* 22.—JAMES CATTO, merchant in Ellon, by his testament, nominated Alexander and James Gordons his relations, on the mother's side, his executors, and *inter alia* burdened them with a legacy to John Catto, the son of his nearest relation on the father's side, in these words, 'And I leave and bequeath 'to John Catto, son to William Catto in Green of Udney, 400 merks out of 'the first and readiest money that shall accresce on the sale of my houses and , feu in Ellon.'

The executors being pursued for payment of this legacy, alleged that they were not liable, because the legacy was appointed to be paid out of a subject which fell not to them but to the heir.

Answered for the pursuer, That even where a legacy is left of an heritable subject known by the testator to be such, the executor is liable for the value, if there be as much free executry. For as, by the Roman law, which made no distinction between heritage and moveables, both being conveyable by testament, *ubi res aliena erat scienter legata*, it was presumed, that the testator intended to burden his heir with redeeming it, or paying the value, because a man was not presumed *ludere in extremis*; so, on the same principle, the case falls to be the same with us, where an heritable subject is left in legacy. And reference was made to the case, Cranston *contra* Brown, Dec. 2. 1674, No 15. p. 8058. where, upon this very reasoning, it was so found.

But, 2*do*, Were there a doubt in that, the present case is different, as here the legacy is not of an heritable subject, but of a sum of money; and although the sum pointed out by the testator as the fund for the payment thereof be heritable, that is not to be so understood, as to import a restriction or limitation of the legacy, being no more than a *falsa demonstratio, quæ non vitiat legatum*;

No 28. and so this reference was made to Voet, Tit. *De Condit. et demonstrat.* § 5. and also to some decisions as in point: Thus, Drummond *contra* Drummond, No. 10. p. 2261. observed by Durie and Spottiswood, Drummond having in his testament left a legacy of L. 1000 to be paid out of another sum owing to him, which was heritable, the LORDS found, that although the legacy could not receive effect by payment out of that sum particularly, yet it remained good to affect the defunct's other moveables with the payment thereof. And Spottiswood, Tit. LEGACIES, observes the *ratio decidendi* thus: THE LORDS found, 'That the wrong destination of the money should not frustrate the legatar.' And on the like principle, as observed by Dirleton, July 11. 1676, Finlay *contra* Little, No 15. p. 2264. where a legacy was left payable out of the testator's household plenishing and open accompts, and the plenishing and accompts were not able to satisfy the legacy, the LORDS found it ought to be satisfied out of the other executry.

Replied for the defenders to the *first*, That the decision of the Roman law in the case of *res aliena scienter legata* did not apply to this case; for as with us, an heritable subject cannot be left in testament, the legacy of an heritable subject is rather of the nature of a *legatum rei alienari prohibitæ*, which by the Roman law was void; and that this was also agreeable to our practice: Thus, as far back as 1566, in a case observed by Maitland,* heirship moveables being left by special legacy, it was found, that neither the subject nor price thereof was due; and it has been often found, that deeds on death-bed relating to heritage, could not affect the moveables either as a debt or a legacy.

And as to the *second*, That the pointing out an heritable sum as the fund of payment was only *falsa demonstratio*, the doctrine of the Roman law was no more than this, that *falsa demonstratio rei legatæ non vitiat legatum ubi constat quid testator voluerit*, and which would also hold with us; but there is no consequence from thence, that a legacy should be effectual, where the fund pointed out for the payment is *res alienari prohibita*, nor is there reason it should, more than where such thing is itself *scienter legata*; that the decision Drummond *contra* Drummond, Jan. 22. 1624, is single and has not been followed; for that of Finlay *contra* Little, July 11. 1676, as Dirleton, who observes it, intimates, was put on this, that the executor had in the confirmation given up the subject far short of what it had really extended to; and but for that circumstance, it would have been found to extend no further than the subject destinated for the payment; for so, Jan. 21. 1673, Forbes *contra* Forbes, No 14. p. 2263. a legacy being left payable out of the rests due by the tenants, was found payable out of the rests only, and not prestable further than to the extent of the rests.

THE LORDS "found the legacy due."

THE LORDS were very short in their reasoning on this case: Those who spoke for the judgment given, considered the case in the same light as a legacy of an heri-

* The case here alluded to is probably No 11. p. 5389. *voce* HEIRSHIP MOVEABLES, though that case is dated in 1562, not 1566.

table subject, and that if the matter were entire to be determined on the principles of the civil law, they would have thought the legacy not due, as being *legatum rei alienari prohibitæ*. But they thought it not entire, for that by the course of our decisions, legacies of heritable subjects were put upon the same footing with *legata rei alienæ*; and their only doubt in this case was, Whether or not the testator knew that the house and feu did not fall under the general description of things left in his testament; for, if he did not, then it was in the case of *res aliena* left by a testator, believing it to be his own, which would not be due, the presumption being that he would not have left it in legacy had he known it. But that difficulty being removed by an admission from the bar, that the testator was told it after his signing the testament, they were then clear that the legacy was due; though there were some who said they did not think that our law stood so, that *legata* of heritable subjects in testaments were on the same footing with *legata rei alienæ*, which would be in a great measure to give up the law of death-bed; and who were also of opinion, that wherever a legacy is given to be paid out of a certain subject, it cannot be due further than the subject extends. No 28.

Kilkerran, (LEGACY.) *No* 4. *p.* 328.

1749. *February* 25.

ANN FOTHERINGHAM, and DAVIDSON her Husband, *against* NAIRNS.

No 29.
Legatees were found entitled to possession, in opposition to the executor; the legatees finding caution to be accountable to creditors, if the fund should prove deficient.

JOHN MURRAY, son to Lord Edward Murray, by his testament in April last, nominated Louisa and Henrietta Nairns his executors, and universal legataries; and by another deed in September last, he bequeathed to Mrs Ann Fotheringham, spouse to John Davidson of Whitehouse, certain particular pieces of furniture, free of all burdens, and gave power to her, after his decease, to intromit with the said particulars. As Mr Murray died in Mrs Davidson's house, in which the particulars legated were, a question arose between the legatary and the executors as to the possession of the subjects legated; the legatary and her husband insisting that the possession as well as the property was transmitted by the legacy; on the other hand the executors contending, that as the defunct's debts were preferable to the legacies, the possession of the goods ought to be with them, until it should appear, whether or not there was sufficiency to pay the debts beside the legacies.

Upon this debate, the Commissaries, after having found that the possession was not transmitted, and that action at the legataries' instance was necessary to be brought against the executors for obtaining the same, did, by another interlocutor in the action brought against the executors, find, 'That special titles ought to be made up to the same before delivery.'