

1749. *January 18.*

The REPRESENTATIVES of SIR GEORGE M'KENZIE *against* The CREDITORS  
of KINMINITY.

## No 8.

A person granted a bond to another, on condition of marrying with the grantor's consent. The grantor proposed a marriage on certain conditions, to which the parties did not agree. They married privately without the consent. The bond was found due.

ALEXANDER SUTHERLAND of Kinminity became bound by his contract of marriage, failing heirs male, to pay to one daughter 8000 merks Scots.

Of this marriage there was issue, Alexander and Mary; when the Lady died, and Kinminity married again Elizabeth Edwards, whom he predeceased, leaving no issue by her.

Elizabeth Edwards granted bond to Mary Sutherland, for love and favour, for 4000 merks; providing that the sum should return to herself, if she married without her consent, in writing under her hand; or, if it should happen, by the death of her brother, that she should come to have right to the provision in her favour, contained in her mother's contract of marriage.

Alexander Sutherland died, and Mary married to another Alexander, the heir-male of Kinminity; and disposed to him 'all debts and sums of money, 'all goods and gear whatsoever, heritable or moveable, and all lands, tenements, 'and other heritable estate, to which she had right as heir or executor to her 'brother, father, or grandfather; and particularly the sum of 8000 merks, provided to her as the only daughter (heirs-male having failed) of the marriage.'

Elizabeth Edwards married to Sir Kenneth M'Kenzie of Cromarty, to whom she disposed all her effects, amongst which was a claim on the estate of Kinminity.

Sir George M'Kenzie, son of Sir Kenneth, produced his interest in the ranking of the creditors of Kinminity; to which was objected, by the other creditors, compensation on Elizabeth Edward's bond.

THE LORD ORDINARY, 6th January 1749, 'found, that as it was admitted the heir-male survived his father several years, Mary Sutherland was not by his death entitled to the provision of 8000 merks, provided to an only daughter in case there were no heirs-male procreated of the marriage; and therefore repelled the objection made against the said bond of provision, founded upon a supposition that the said Mary Sutherland had right by the death of her said brother, to the said provision of 8000 merks contained in her mother's contract of marriage; and found the bond of 4000 merks, granted as a provision by Elizabeth Edwards, if found due, was conveyed by Mary Sutherland to her husband, by their contract of marriage; and allowed, before answer, the creditors to prove that the marriage was brought about by the mediation of Elizabeth Edwards, and all circumstances tending to evince her consent thereto.'

On a reclaiming bill observed, that the terms of the contract did not comprehend this bond; but as the provision of 8000 merks, on supposition of its being

due, was expressly conveyed, this ought to be held as conveyed coming in place thereof.

THE LORDS adhered.

1750. *July 18.*—IN this cause the Lords having found, as is observed 18th January 1749, that the bond by Elizabeth Edwards was conveyed by Mary Sutherland to her husband, in her contract of marriage; and as the said bond was under the condition of her marrying with the granter's consent, having allowed her to prove that the marriage was brought about by the procurement of the said Elizabeth Edwards, it was proved that she first projected the marriage, and that there was a treaty relating to it, wherein she proposed certain settlements to be made of the estate of Kinminity, which were not agreed to by the young people and their friends, who thereupon married privately; after which she visited and received visits from them.

There had also another bond been granted to Mary Sutherland, by Strachan of Glenkindy, on the condition of her marrying with Elizabeth Edward's consent, which had been recovered out of his estate.

*Pleaded* in defence, That the granter, though she was willing the marriage should take effect, on certain conditions, yet the conditions not being fulfilled, had not consented thereto.

THE LORD ORDINARY, 15th February, ' having considered an excerpt, produced from the ranking of the creditors of the deceased Sir Patrick Strachan of Glenkindy, whereby it appeared, that upon the deceased Elizabeth Edwards her granting the bond of provision in question, and depositing the same in his hands, he the said Sir Patrick Strachan did execute a bond relative to the same, for an equal sum, payable at the same term, and under the same condition, and for which the said Mary Sutherland and her husband were preferred in the said ranking; found it proved that the marriage between Alexander Sutherland of Kinminity, and Mary Sutherland his spouse, was brought about by the mediation and interposition of the said Elizabeth Edwards; and that she discovered even an anxiety to have the said Alexander and Mary Sutherland joined in marriage. As also, found it proved, that after the marriage the said Elizabeth Edwards did not only visit the married persons, but that they also lived in family for some time, and that she continued still zealous to do them all the service that was in her power, and discovered the same by the scope and tenor of the marriage articles between her and Sir Kenneth M'Kenzie; and also seeing there was no evidence produced that the said Elizabeth Edwards, at any time during her life, ever called for, or revoked the said bond, or discovered any intention to take advantage of the said clause, found, that notwithstanding the said Elizabeth Edwards gave no written consent to the marriage, nor was present at the celebration of the same, the said bond could not now be quarrelled or impugned on account of the foresaid clause, by the heirs or creditors of the said Sir Kenneth or Sir George M'Kenzies.'

- 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 allegiance, 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 allegiance, 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.

*2dly*, 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.