1783. *February* 25.

MARGARET JOHNSTON, and Others, *against* WILLIAM DOBIE, and Others.

No 15.
Window-frames, doors, and the like, found within a house when a-building, but not yet fixed to their proper places, belong to the heir.

JAMES JOHNSTON executed, in favour of Margaret Johnston, his wife, and of certain other persons, a disposition of the whole estate heritable and moveable, that should belong to him at the time of his death. But as he lived only a few days after the date of this deed, it was, at the instance of his heir at law, reduced *ex capite lecti* 'so far as respected the heritable subjects thereby conveyed.'

When Mr Johnston died, a house was erecting for him, in which a set of doors and windows, and other articles, were then lying, in order to be fixed to their proper places in the building. A question thus arose in regard to them between the heir at law and the disponees; the former contending, that along with the house itself they had fallen under the heritable succession; and the latter claiming them as moveable subjects.

Pleaded for the disponees; A subject, it is admitted, in its nature moveable, may be rendered heritable by the destination of the proprietor, whether expressed in words, or *rebus et factis*. As, however, for this end, words clear and unequivocal must, on the one hand, be employed; so, on the other, the acts whence the design is to be inferred, must be such as to preclude ambiguity. Hence, though a man should have pitched on a certain piece of ground for the purpose of raising an edifice, should have provided the materials for the undertaking, and should have even collected and conveyed them to the destined spot; so that, it must be acknowledged, no purpose could be marked with stronger probability, than that of a building consequent on those preparations, or of the union of those moveables with the immoveable soil; yet still, until the building should have commenced, and the union been actually constituted, the moveable nature of the materials would remain unchanged. Such is the doctrine of our law; Erskine, b. 2. tit. 2. § 14. as it is also of that of England; Viner's Abridgment, *voce* HEIR.

In the present case, it was to be sure highly probable that Mr Johnston had destined the doors, the window-frames, and the other moveables in question, to be united with, and to become part of his proposed tenement; and a like probability would have attended his purchasing in their rudest state the materials out of which they were formed; yet, as their fixture had not been accomplished, they were still no parts of the building, nor more joined to it by an actual union, than when in the state of unwrought timber or metal. Notwithstanding, therefore, any probability to the contrary, there was here no certainty of destination, and consequently no effectual change of the nature of the subjects from moveable to heritable.

Answered; As it has been admitted, on the one hand, that a proprietor *destinatione*, expressed either by word or deed, may convert a moveable into an heritable subject; so it is now, on the other hand, granted, that not merely a

No 15. probability, but a reasonable measure of certainty of design, arising from the acts of the proprietor, is required to effectuate that change. The doctrine of Mr Erskine is accordingly subscribed to. But though in the case supposed by that author, the mere collecting of rude materials for building would not infer an alteration of their moveable nature, yet no sooner should the building have been begun, than the change must have instantly taken place; the probability of intention thus rising to certainty; Stewart's Answers to Dirleton's Doubts, Tit. Executry. In like manner, had the timber, iron, or brass, which compose the doors and windows in question, remained, though in the possession of Mr Johnston, in their rude, unwrought, or unfinished state, whatever high degree of probability of design they might have evinced, their nature, it may be allowed, would not have been altered; but by their having been completely formed, fitted, and adjusted to their peculiar places in a particular tenement, the absolute destination of them for the use of that tenement becomes unquestionably ascertained. The *animus destinandi* is then as fully expressed as it possibly can be *rebus et factis*.

Some of the Judges seemed to be of opinion, that even the simple collecting of materials for building might often sufficiently denote the *animus destinandi* of the proprietor, so as to render them heritable. Others appeared to admit no other rule but the then actual state of the subjects. The opinion of the majority was, that in cases like the present, where the will of the proprietor, so strongly marked, is actually carrying into execution by overt acts, such *animus* should have full effect,

The Lord Ordinary had 'found, that the articles of unfixed work were to be considered as parts and pertinents of the house, and that the same do fall and belong to the heirs at law.'

The judgment of the COURT was, 'To find that the articles of unfixed work destined for the house fall to the heir, and not to the executor, and in so far adhere to the interlocutor of the Lord Ordinary.'

In a reclaiming petition it was farther *argued*, That as Mr Johnston could undoubtedly have effectually alienated *in lecto* the subjects in question, as being, at any rate, heritable *destinatione* only; so in fact, his disposition being reduced as to the proper heritage alone, ought, with respect to them, to be understood as still subsisting. But this petition was refused without answers.

Lord Ordinary, *Alva*. Alt. *R. Dundas*. For Margaret Johnston, *Henry Erskine, Morthland*. Clerk, *Home*.

S. *Fol. Dic. v.* 3. *p.* 267. *Fac. Col. No* 98. *p.* 156.

No 16. The executors of a tenant not liable for the

1791. *March* 8. The DUKE of GORDON *against* JOHN LESLIE, and Others.

WILLIAM LESLIE was the tacksman of a farm belonging to the Duke of Gordon. He was also creditor to his Grace by a bill for L. 220.