No 79. or transaction; yet, if an enorm lesion should appear, it is not doubted but the minor would be reponed.

Fol Dic. v. 4. *p.* 3. *Kilkerran,* (MINOR.) *No* 3. *p.* 347.

*** Clerk Home's report of this case is No 68. p. 665. *voce* ARBITRATION.

1797. *March* 8.

FRANCIS CUNYNNGHAME *against* Sir JOHN WHITEFOORD, and Others.

No 80.
A minor cannot dispone his heritage *mortis causa*, even with consent of his curators.

MR WHITEFORD disponed his estate of Dinduff, failing heirs of his own body, to the two younger sons of Sir John Whitefoord *nominatim*, and the heirs of their bodies; whom failing, to Francis Cunyngham; and named tutors and curators to the substitutes, in case of their succeeding in minority.

Mr Whitefoord having died without issue, he was succeeded by James Whitefoord, the son of Sir John, first called by the disposition, who, in his 17th year, with consent of the curators named by Mr Whiteford, and after the death of his brother without issue, disponed Dinduff, failing heirs of his own body, to his father and his heirs male; whom failing, to his own five sisters, and their children, and the other heirs-female of Sir John in their order.

James Whitefoord died in minority, and unmarried, and Sir John made up titles to Dinduff.

Francis Cunynghame afterwards brought a reduction of his right, and

Pleaded; It is perfectly settled, that a minor cannot alter the destination of his heritage *mortis causa*, even with consent of his curators; Stewart's Answer, *versus* Minor; 30th November 1680, Stevenson, No 63. p. 8949.; Marquis of Clydesdale against Earl of Dundonald, No 3. p. 1265.; Bankton, b. 1. tit. 7. § 54.; Erskine, b. 1. tit. 7. § 33. And the rule is in itself reasonable, as it is fair to presume, that it is for the minor's interest, that the heirs under the subsisting investitures should succeed to him, and, besides, it would give room for much arbitrary proceeding, if the validity of the deed were, in each case, to depend on its supposed rationality.

It is true, a minor may sell his lands with consent of his curators, and may make a testament without it. But a sale may frequently be necessary; the price received affords a good criterion of the fairness of the transaction; and if the judgment of his curators does not protect a minor from an unfavourable bargain, he can be restored against it. But there is no necessity for his executing deeds *mortis causa*; and in the execution of them, he exerts merely an act of volition, where the judgment of others cannot so well supply his own defects. The minor's power of making a testament has probably arisen from the small value of moveable property, at the time the point of law was so fixed.

Answered; The rule contended for by the pursuer did not exist in the Ro-

man law, Voet, lib. 28. t. 1. § 32; and it is not a settled point in our law. It is not countenanced by our older authorities, Balfour, p. 181. § 11.; Craig, lib. 1. d. 12. § 30.; Dirleton, *v.* Minor; Stair, b. 1. t. 6. § 32, 33, 34; and our later writers rest their opinions entirely on the case of the Marquis of Clydesdale, which was decided on other grounds. No 80.

Nor is the rule in itself well founded; a minor who either has no curators, or who having curators, acts with their consent, has the same powers over his property with a person of full age. The only difference between them is, that the former has certain privileges, particularly that of restitution against transactions which are unfavourable to him; but to make room for this privilege, the heir of a minor must establish not merely that he, the pursuer, was hurt by the transaction, but that the minor himself was so, which surely cannot be said of a disposition preferring his own family to a stranger.

Indeed a minor may do many things very material to his interest, even without the consent of his curators, against the consequences of which he cannot be restored; he may marry, he may choose his profession and his place of residence, Graham against Graham, No 45. p. 8924. He may make a testament as to his moveables, although from its requiring fewer solemnities, and from its being lawful to execute it *etiam in extremis*, there is more danger of imposition with regard to it, than with regard to dispositions of heritage. And it it is admitted, that a minor, with consent of his curators at least, may make onerous transactions as to his heritage, to take effect *inter vivos*; yet these require greater strength of mind than the execution of deeds *mortis causa*. And accordingly the latter have often been sustained when made by a person who would have been held incapable of entering into an onerous bargain, 17th November 1789, Scott against Jerdons, No 60. p. 4964.; 3d March 1795, Frank against Frank, *voce* WRIT.

THE LORD ORDINARY reported the cause on informations.

THE LORDS considered the law to be perfectly fixed in favour of the pursuer, and unanimously gave judgment in his favour.

Lord Ordinary, *Glenlee.* Act. *Hay*, et alii. Alt. *Solicitor-General Blair*, *Rolland*. Clerk, *Home.*

D. D. *Fac. Col. No* 11. *p.* 50.