

No 67. as where they are *in rem versum* of the minor.—THE LORDS repelled the defence.—See APPENDIX.

Fol. Dic. v. 1. p. 577.

57. December 14.

KATHARINE CRAIG *against* WILLIAM LINDSAY, and Others.

No 68.

A deed *inter vivos*, made by a minor, without consent of his curators, void.

JOHN CRAIG, at his death, left a son, William, and a daughter, Katharine, both infants. To William he gave his land, worth about 400 merks yearly, and a general disposition to his moveable subjects, worth 600 merks, with the burden of debts. To Katharine he gave a bond of provision of 3600 merks, which was a debt upon her brother.

William Lindsay, and three others, tutors to William Craig, during William's minority, saved out of the rents of the estate 2200 merks, and lent it out upon moveable bonds. A few months before his majority, they prevailed upon him to grant to themselves, and to eight others, their relations, a deed, whereby 'he bound and obliged him, his heirs and executors, &c. thankfully 'to content and pay, upon the first term after his decease, to the persons 'therein named, the several sums therein expressed, with annualrent from and 'after the term of payment: And for the more sure payment of these respective sums, he thereby constituted and appointed them his lawful cessioners 'and assignees, in and to the particular debts and sums of money therein mentioned.' And by an after clause in the same deed, he 'disponed and assigned to the same persons his whole *bona mobilia*, body-clothes, &c. with power 'to them, immediately after his decease, to intromit with and dispose upon 'the premises.' The sums contained in this obligation exhausted the whole moveable subjects of William; and the bonds assigned in security of that obligation, were the bonds which had been taken by the tutors for the savings of the estate. This deed contained a power of revocation. William died soon after, and before majority.

Katharine, upon her brother's death, brought a reduction of this deed; and *pleaded*, That if it was to be considered as a disposition, which it truly is, seeing it creates an obligation, and contains an assignation in security thereof, then it is void, as being a gratuitous deed, granted by a minor, having curators, without their consent; or if it be considered as a testament, then it is void, as gratuitously granted, in prejudice of the relief competent to the heir from the testator's moveable subject, and to that relief which Katharine herself was entitled to, for the payment of her own portion of 3600 merks.

Answered for the defenders, If the deed in question is to be considered as a disposition *inter vivos*, minors are not disabled to make such dispositions, unless where they make them to their prejudice. It conveys only moveable

bonds granted to the minor himself, or his curators for his behoof, of which he had the absolute disposal, and might have bequeathed them by testament or legacy to any person he had a mind. It seems impossible to say, the minor suffered any prejudice by this deed; because he reserved an express power to himself, at any time after, *etiamsi in articulo mortis*, to alter the same, and dispose of the premises, in whole or in part, at his pleasure. And as little can it be said, that any prejudice is done to his nearest of kin, to whom the moveables would otherwise have devolved, that he has conveyed them to another by such revocable deed. The subject was by law at his disposal. He could, without consent of curators, disappoint their succession by testament. And as they have no legal right by the succession, but upon the failure of his settling it otherwise, it cannot be said they have sustained any legal prejudice, whether he has settled it in one form or another.

And, therefore, it is too whimsical a regulation to be presumed in the law, that a minor, who can effectually dispose of his whole moveables by testament, without consent of curators, should be laid under a disability of doing the self-same thing by another form of writing, by which he himself is nowise prejudiced; and when the succession of his heirs *in mobilibus* is equally disappointed, whether he declares his will in the one form or in the other.

But if, on the other hand, the deed in question is to be considered as of a testamentary nature, which it truly ought to be, seeing it bequeaths a moveable subject, and does not take effect till death, then there is no doubt in law, that a testament by a minor, without consent of his curators, is good. And, with regard to the obligation of relief, which William is said to have been under to his heir, it truly supposes an obligation upon the minor to heap up all the rents and profits of his estate during his possession, and to preserve the same as a fund for payment of his predecessor's debts. But it would be highly unreasonable, that a minor, who has the full property of an estate, without any limitation, should not be allowed to dispose of the fruits of it during his possession. This would be to put him in a worse case than an heir of tailzie, who is fettered by limitations and irritancies; or than an interdicted person, who, by reason of incapacity, is deprived of the administration of his affairs; for such persons are still at liberty to do with their rents what they please.

Many worse consequences would follow from this doctrine. A minor, possessed of an estate which goes to male-heirs, cannot burthen it with a shilling in favour of his daughters, if he should die in minority; but, by this new doctrine, it should not be in his power even to give them the savings he had made out of the rents by his own good management; but they must be applied, contrary to his will, to pay the debts of his predecessors, which affect the estate settled upon heirs-male.

The Lord Kilkerran, Ordinary, found, "That it was not in the power of the deceased William Craig, a minor, gratuitously to dispose of his moveables, in prejudice of the relief of his moveable debts, competent to his heir from his

No 68. moveable subjects; and, therefore, reduced the bond and assignation, and decret following thereon, in so far as the same are prejudicial to the pursuer's relief of the defunct's moveable debts."

But the LORDS took up the matter upon the first point; and

" Found, That the deed in question was a deed *inter vivos*, made by a minor, without consent of his curators; and, therefore, void and null."

Act. *Jo. Dalrymple, Lockhart.*

Alt. *And. Pringle, Brown, Ferguson.*

J. D.

Fol. Dic. v. 4. p. 4. Fac. Col. No 66. p. III.

S E C T. IV.

What a Minor cannot do even with consent of his Curators.

1623. February 8. SALTCOATS *against* The JUSTICE-CLERK.

No 69.

A minor cannot discharge a bond, even with consent of curators, without payment made.

SALTCOATS being bound as cautioner to the Justice-Clerk, to infest Mr William Kellie in lands redeemable upon 3000 merks, and to pay the principal upon requisition, charged the Justice-Clerk to relieve him of his cautionry. The Justice-Clerk suspended, upon an acquittance made by his daughter, (who was assignee to Mr William Kellie), authorised by himself as lawful administrator to her. Saltcoats *alleged*, That in effect the offer was, that the Justice-Clerk should discharge himself, and that the daughter might revoke the discharge, and annul the acquittance given to the cautioner, without payment. In respect whereof, the LORDS found not the discharge sufficient.

Fol. Dic. v. 1. p. 577. Haddington, MS. No 2753.

No 70.

A discharge, granted by a minor, without an one-rous cause, was found null, although she might have disposed the sum in testament.

1626. July 25. LOCKHART *against* LOCKHART.

ONE Marion Lockhart having given discharge to Lockhart of Bar of a sum of money, wherein the father of the said Lockhart of Bar was obliged to the said Marion; the said Marion pursues an action of restitution *in integrum* against the said discharge, by reason the same was done in her minority, having neither received money nor other good deed; which action was sustained, notwithstanding the defender *alleged*, that this action could not be sustained, except the pursuer would allege, that the said discharge was given by her *sub*