No 9.
Executors of a posthumous child entitled to that child's legitim, tho' not confirmed, notwithstanding a general disposition by the father to his wife.

The wife having in her contract of marriage accepted certain provisions in full of all terce of lands, or third or half of moveables, the child's legitim found in this case to amount to one half of the moveables.

1762. *January* 7. ISOBEL JERVEY *against* JOHN & THOMAS WATT.

ISOBEL JERVEY, in her marriage contract with William Watt, accepted a certain annuity "in full of all terce of lands, or third or half of moveables, which might fall to her by the decease of her husband."

Upon the 4th of May 1754, William Watt, the husband, executed a general disposition of his whole effects in favour of his wife, and named her his executrix, reserving power to alter at any time in his life, and dispensing with the not delivery.

William Watt died upon the 22d of January 1755; and, about six weeks thereafter, his wife was delivered of a daughter.

This child having lived only a few months, John and Thomas Watts, brothers of William, brought an action against his relict, to account for the whole of her husband's estate; in which they insisted, that the settlement in her favour could have no effect, because of the *conditio si sine liberis*. But, in this plea, they were over-ruled by the judgment of the Court.

They next insisted, that as nearest of kin to their defunct neice, they were entitled to the half of the moveables as her legitim.

This demand occasioned two questions, 1*mo*, Whether any legitim could be claimed by them? and, 2*do*, What the extent of such legitim should be?

Pleaded for the relict upon the *first* point, Although it has been found that a father cannot, by a testamentary deed, dissappoint his children of their legitim, no testament has hitherto been set aside, *quoad* the legitim, at the instance of the extraneous heirs of such children. The interest of a child, and of the heir and successor of such child, appear to be very different. A father is, by the law of nature, bound to aliment his children; they are therefore understood to have an interest in his effects after his death, which it is not in his power to disappoint. But as this duty respects only the children themselves, their right cannot descend to their heirs, so as to prevent him from disposing of his goods by testament.

By the Roman law, from which the doctrine of the legitim is derived, the *querela inofficiosi testamenti* was only competent to children and parents, and did not descend to the heirs of the children in the case of their surviving the testator, but dying *ante motam querelam*; *L.* 15. *D. De inofficioso testam.*

When the present testament was made, William Watt had no children. The child which his wife afterwards brought forth was not then begot; he might therefore lawfully dispose of all his moveables at that time. It is true, that the after existence of the child might entitle her to quarrel the deed, either in whole or in part, according to circumstances; but, as she did not live to do so, there seems to be no foundation, either in law or practice, for extending the power of challenge to the pursuers, or any other extraneous heirs. If it be competent to them, it must also descend to relations at the distance of

ten or twenty degrees; nay, even to the *ultimus hæres*. And it appears not a little absurd to suppose, that a father should not have it in his power to settle his moveables, so as to prevent a donatar of *ultimus hæres* from taking them; nor is it of any moment that children transmit their legitim without confirmation, as that is no more than a piece of form. The case of succession *ab intestato*, is very different from the present, where a father has disposed of his effects by a will, and settled his succession. No 9.

Answered for the pursuers, Nothing is better established in the law of Scotland, than that the legitim vests in children *ipso jure;* and this, of itself, is sufficient to answer all the arguments urged upon the part of the defender. If the child had been confirmed, the legitim would have transmitted to her nearest of kin; because, by confirmation, it would have been fully vested in her person; and as it is a fixed point, that it vests equally without confirmation, it must equally transmit in the one case as in the other. This point is also settled by several decisions recited in the Dictionary, by which it has been constantly found, that children surviving their father transmit their legitim to their nearest of kin, though they die without establishing it in their own person by confirmation. And in the case of Christie, 13th July 1681, § 6. *h. t.*, where, after the death of a father who had named his daughter Jean his executrix, and substituted another in the case of her decease, a posthumous son, James, was born, the Court, in a question betwixt James (who was confirmed executor to his sister upon her death,) and the substitute, found, that the substitution could only reach to the dead's part, and that the bairns' part belonged to James, as nearest of kin, and executor to Jean From which it appears, that a father cannot so much as appoint a substitute to his children in the legitim, in bar of the nearest of kin.

Nor is it of any consequence, that by the Roman law, the *querela inofficiosi* did not transmit to heirs, unless moved by the child, parent, or brother, to whom it was competent. It was considered as an *actio injuriarum, L.* 8. *D. De quer. inoff.* and it was an established point with them, that *actio injuriarum hæredi non datur.* But in this country, in which there is not the same abhorrence at the *rescindatio testamenti*, the demanding the legitim is by no means considered as an *actio injuriarum;* and therefore it has been established, that, though the child die without making a demand, or without any *aditio hæreditatis* or confirmation, the legitim will nevertheless transmit to its nearest of kin.

Pleaded for the relict upon the *second* point, Supposing a legitim due, it can only extend to a third of the moveables; for, although her acceptance of a special provision might have barred her from claiming any share of her husband's moveables, *ab intestato*, the case is very different here, where she claims upon an universal disposition, granted before the existence, or even conception of the child. The contract of marriage being a paction betwixt the husband and wife, they had the sole interest in the mutual stipulations in favour

No 9.

of each other. The renunciation of the wife's legal provision was made in favour of her husband; he therefore was at liberty to pass from it, and to put her in the same situation as if no such stipulation had been made; and, although the disposition mentions nothing with regard to impairing the legitim, or altering the wife's conventional provisions, it must be held as equivalent to an express discharge of her renunciation, as the greater certainly includes the less. Being a disposition of his whole effects, he must be understood to have given to his wife whatever was in his power to give; and that he could have restored her against any stipulation made in his own favour, cannot be disputed.

Answered for the pursuers, The legitim is a portion of goods over which the father has no power of disposal. It necessarily accrues to the children, *ipso facto*, upon his death; and as, where there is no relict, or where she has renounced her *jus relictæ*, the half of the father's moveables falls to them; so, from the nature of the thing, no testamentary deed, or *mortis causa* donation, which takes not effect till after death, can exclude or diminish their share. So indeed, it was solemnly determined in the case of Henderson, February 1728, § 6. *h. t.* Although, therefore, William Watt had expressly taken away or diminished his child's legitim by his deed, which was only to take place after his death, it could not have been effectual for that purpose; and far less can the legitim, in this case, be disappointed or impaired by an implied or presumed intention. The only will that can be presumed for him, is, that he meant to grant to his wife what was in his power to give her, viz. the dead's part; but that he had no intention to encroach upon the legitim, which was not under his power. The universal disposition cannot therefore be held as equivalent to a discharge of the wife's conventional rights, and as restoring her to her legal provisions.

"THE LORDS found, that the legitim was due, and that the pursuers were entitled to a bibartite division of William Watt's moveables." See Jervey against Watt, *voce* IMPLIED CONDITION, No 52. p. 6401.

Act. *Wal. Stewart.* Alt. *James Dundas.*

A. W. *Fol. Dic. v.* 3. *p.* 382. *Fac. Col. No* 73. *p.* 164.

No 10.

A son who had received a sum in his father's lifetime, found obliged to collate it.

1775. *December* 20. JAMES SKINNER *against* WILLIAM-ANN SKINNER.

IN an action brought at the instance of the younger son, against the elder, to account for his intromissions with the effects of their deceased father, who died intestate and a widower, and consequently his succession fell to be divided in two parts, legitim and dead's part, the pursuer *insisted*, That the defender is bound, before he can claim any share of legitim in this case, to collate the sum of L. 100 Sterling, advanced him by his father, as well as the sums which have