

1715. *January 21.*

CATHARINE WARDLAW and her HUSBAND, *against* SIR GEORGE MAXWELL  
of Orchardtoun and MAXWELL of Cuill.

## No 51.

The probate of a written testament was sustained as a title to found a process in Scotland, the pursuers confirming before extract.

THE deceased Jean Wardlaw, at her marriage with the deceased Maxwell of Cuill, gets an obligation from Orchardtoun, and another from her husband, to pay her L. 20 Sterling a-piece yearly after her said husband's death; and she surviving him, makes a testament in Ireland, leaving the by-gones of these annuities to Catharine Wardlaw; and the probate of the testament bears it to have been subscribed in presence of three witnesses, whereof two are women, one of whom subscribes by initial letters only.

Catharine coming to pursue the Representatives of Orchardtoun and Cuill, it was *alleged* for them, That the testament was null, as to any effect in Scotland, *imo*, Because women cannot be sustained witnesses in Scotland; yea, *non constat* that they are sustained in England; *2do*, Because the principal testament was not produced, but only an Irish writ of administration, which is not subscribed by any person.

*Answered* for the pursuers to the *first*, That the law and custom of each place must regulate, as to the solemnities requisite in subscribing, at least with respect to moveables; and that such is the custom of England is notour, and needs no probation. To the *second*, That the testament produced was authentic, from the records of the diocese where the principal testament was probated; which was all that possibly could be had in this case, since the principal testament behoved to be probated in Ireland, and must lie as a warrant for the probate in the clerk's hands; so that the pursuers behoved either to quit their claims in Ireland, or leave the principal there. But the probate produced having the seal of the office appended, and being attested by the clerk, as our sasines are commonly attested by notaries; it has all the requisites of a formal probated writ.

*Replied* for the defenders, That though it were probative, yet it cannot be a title in Scotland, unless the pursuers had applied for a confirmation of the goods in Scotland, as the Lords found, *Rob contra French*, No 49. p. 4497.

*Duplied* for the pursuers, That though this were true as to administrations *ab intestato*, which can indeed go no further than the jurisdiction of the granter; yet the administration here proceeding upon the defunct's testament, it may be confirmed in any judicature, with respect to all the defunct's goods. Thus, in the case *Lawson contra Kello*, No 43. p. 4497. the Lords sustained action at the instance of Lawson, upon the title of executrix, nominated by her husband in a testament confirmed at London. And as to the decision objected, the speciality thereof was, that the executrix confirmed in England was competing, and renounced to be executrix; and therefore the Lords found necessity of a new confirmation.

THE LORDS sustained the title libelled on, as a sufficient title in this process, the pursuers confirming before extract.

No 51.

Act. *Borwel.*Alt. *Ila.*Clerk, *Dalrymple.*

*Fol. Dic. v. 1. p. 321. Bruce, No 36. p. 45.*

## S E C T. IV.

## Assignations not in the Scots Form.

1627. December 11. FALCONER *against* HEIRS of BEATIE.

IN a registration pursued by John Falconer as assignee by progress, made by Andrew Wilson Scotsman, resident with his wife and family in Germany, to a bond of 1000 merks, owing to him by Robert Beatie burgess in Montrose, against the heirs of the said Robert Beatie, it being *alleged*, That the first assignation made by Wilson, which was made in Germany, where the said Wilson dwelt, was null, because it wanted witnesses insert therein, and so could not produce action by the law of this realm; which allegiance was repelled, and process sustained thereupon, the pursuer either proving that it was the custom in that part of Germany where the assignation was made, that such writs are sustained without witnesses, or else finding caution to warrant the defender at the cedent's hands, any of the which two being done, the LORDS would sustain the assignation, albeit made betwixt two Scotsmen, and albeit pursued in Scotland, and disconform to the Scots law. See 12th December 1627, and 15th January 1628, *inter eosdem*; *voce* HERITABLE AND MOVEABLE.

Act. *Falconer.*Alt. *Mowat.*Clerk, *Scot.*

*Fol. Dic. v. 1. p. 321. Durie, p. 319.*

1636. July 16.

SINCLAIR *against* MURRAY.

AN assignation being made by Murray, one of the King's butrymen in England, to another Murray, in and to some bonds and debts owing to him by his debtors, which, after his decease, were used for the ground and title of a pursuit made by the assignee, which being quarrelled by the defender, viz. the person who would have been heir to the cedent, that it was null, because it designed not the writer of the body of the assignation; and it being *answered*, That

No 52.

Assignation made in a foreign country, of a bond due by a debtor in Scotland, was sustained, though wanting witnesses, being according to the form of the country.

No 53.

An assignation made in England, of effects in Scotland, and granted by one Scotsman to another, was