

1708. February 17.

WILLIAM HALL, Advocate, *against* Dame MARY CAMPBELL, and Sir WILLIAM GORDON of Aftoun her husband.

No 16.

A special assignation to a daughter, with a faculty reserved in favour of the disponent and his lady, or either of them, to alter and dispose as they thought fit, was found revoked, and conveyed to a second daughter by a general disposition *omnium bonorum*, containing a restriction of the lady to the provision in her contract of marriage, and a revocation of all additional rights in her favour.

SIR GEORGE CAMPBELL of Cessnock having disposed his interest in the capital stock of the African Company of Scotland, to Dame Mary Campbell his eldest daughter, Sir William Gordon's lady, reserving his own and Dame Anna M'Morran his lady's liferent, and full power to himself during his lifetime to alter, and with power to the said Dame Anna, if the longest liver, to dispose of the money as she should think fit; he, Sir George, thereafter made a general disposition of all debts and sums of money belonging to him the time of his decease, in favours of his second daughter Dame Margaret Campbell, married to Sir Alexander Campbell, (now of Cessnock) one of the Senators of the College of Justice, wherein he restricted Dame Anna M'Morran his own lady to the provision in her contract of marriage, revoking all other additional provisions and rights made in her favours, and conveying them to the said Dame Margaret. My Lord Cessnock having confirmed Dame Margaret his lady executrix creditrix to her father upon the general disposition, and given up the share in the African stock in the inventory, they assigned the same to Mr William Hall, who competes with Sir William Gordon and his lady in a multipounding raised by the commissioners of the equivalent.

*Alleged* for Mr William Hall: He ought to be preferred, in respect that the old Lady Cessnock had a right to the African share, which was revoked and given to his cedent by the general disposition: And suppose the old lady had had no interest in the subject, the same is validly conveyed in favours of Dame Margaret Campbell, by Sir George's exercising the reserved faculty in Dame Mary's right, by the general disposition to the other, which necessarily implies a revocation of the assignation in favours of Dame Mary.

*Answered* for Dame Mary Campbell: A general disposition cannot take effect to alter a prior assignation to a particular subject, more than an universal legacy would be understood a revocation of a prior special legacy; yea, the argument holds stronger in deeds *inter vivos*, than in testamentary deeds, such general conveyances being only extended to what remains not specially disposed of. For a man is understood to dispose his goods only as he had them; and so it is that Sir George had no right to that which he had specially assigned to his eldest daughter, but only a faculty which he did not exercise. *Ido*, The old lady had but a faculty to alter and otherwise dispose of the sum, which could only be exercised by herself; and Sir George's taking the faculty from her upon by his revocation, left the writ in the same state as if such a faculty had never been in her person; and the general disposition to the second daughter, cannot be interpreted a conveyance of what was formerly specially assigned to the eldest.

THE LORDS found the disposition and destination by Sir George Campbell of his interest in the African Company, in favours of Dame Mary Campbell and her husband, and Dame Anna M'Morran, revoked, and conveyed to and in favours of the Lord and Lady Cessnock, by the revocation and general disposition therein mentioned, and therefore preferred Mr William Hall their assignee.

No 16.

*Fol. Dic. v. 2. p. 132. Forbes, p. 243.*

1710. June 10.

JOHNSTON against CALLENDER.

THOMAS WILSON, skipper in Leith, left an opulent estate behind him, which, by his testament in 1647, he ordained to be equally divided betwixt his three children, John, Thomas, and Jean. There was 9000 merks of his fortune owing by Murray of Skirling, by bond in 1644 payable to himself, and failing of him by decease to Marion and Jean Wilsons, his two daughters. Marion dying, Jean, who married Ludovick Callander of Dorater, lays claim to the said whole 9000 merks in Skirling's hands. John having squandered away his part of the father's means, retires to Batavia, leaving one daughter behind him, who married one called Steel, who had by her a daughter, with whom John Johnston one of the keepers of the Parliament-House transacts; and upon a bond granted by her to him, he charges her to enter heir to John Wilson her grandfather, and Thomas her granduncle, and thereon adjudges Skirling's 9000 merks; and now pursues Jean Wilson, her aunt, and Dorater her son, to count and reckon for the third of that money, and repay it to him, seeing by the testament John had right to a third of his father's means. *Alleged* for Jean Wilson and Dorater, that John her brother had no interest in Skirling's debt, because, by the original conception of the bond, she and her sister Marion were expressly substituted and provided to the fee. *Answered*, That is very true, but by testament three years subsequent to that destination, he ordains his whole estate to be equally divided amongst his three children, which was a clear revocation of the first appointment, and brings Jean only to a third of that money. *Replied*, The substitution in the bond being of the nature of a special legacy, can never be altered or taken away by a general clause in a posterior testament, unless it had specially revoked the same, and derogated therefrom, which he has not done; which is clear from that elegant text, l. 41. § 3. D. De legat. III. where he concludes, non est verisimile eum qui nihil aliud nisi hæc specialiter legavit, ad filium illud legatum generali sermone transferre voluisse; and Gothofred gives several instances of this in his notes, ad l. 80. D. De regulis jur. In toto jure generi per speciem derogatur; and the LORDS have decided conform, 27th January 1679, Aickman against the Successors of Boyd, No 10. p. 11347. where a subsequent universal legacy did not take away a prior special destination. *Duplied*, This position wants not its limitations; for though it may hold

No 17.

A person taking a bond for a sum, substituted two of his children in the fee, and afterward, by testament, appointed his means to be to be equally distributed among all his children. Found that this testament did not derogate from the prior substitution.