1736. *June* 24.

LEGATARS of JOHN CALDWALL, Merchant in Barbadoes, *against* THOMAS CALDWALL.

No 23.
A legacy of L. 20 Sterling for a suit of mourning, found preferable to other legacies of sums of money, to the extent of the probable cost of the mournings.

THESE legatars brought a process, for payment of part of their legacies, against Mr William Caldwall, merchant in Leith, and which, after his decease, was transferred against the said Thomas, his executor, as having some of the said John Caldwall's effects in his hands.

The defence offered was, That there being L. 20 Sterling left to each of the executors for mournings, the defender, who was one of them, was preferable for that sum.

Answered, That the legacy of L. 20 to the defender was only a general legacy, as well as those left to the pursuers; therefore, all of them must come in *pari passu* upon the executry. Neither can the purpose for which it was to be applied vary the rule; seeing it is only mournings to such as are in the defunct's family, and not to strangers, that have a preference as part of the funeral expenses.

Replied, That, where there are special legacies left to certain persons, and sums of money to others, if the executry prove deficient, the special legacies suffer no deduction. Now, this was truly a legacy of a suit of clothes, which the defunct appointed to be taken off by each of his executors after his death; so that it is the same in effect, as if he had legated a suit of clothes, of L. 20 value to each of them; and when such appointments as these are made by the defunct himself, they become part of the funeral charges, which, by the nature of the thing, must be immediately laid out, (as was the case here,) at least before any gratuitous legacy can be paid.

THE LORDS found the defender preferable for the mournings bequeathed, which they modified to L. 10 Sterling, and *pari passu* as to the remainder.

C. Home, No. 25. *p.* 49.

1740. *June* 15.

PRESBYTERY of KIRKCUDBRIGHT *against* ALEXANDER BLAIR.

No 24.
Legacy to pious uses, whether revoked or not.

JAMES BLAIR of Senwick, disponed to the Moderator for the time being of the Presbytery of Kirkcudbright, and remanent members thereof, as trustees for the purposes after-mentioned, the sum of 15,000 merks out of the first and readiest of his means and estate pertaining to him at his death; and obliged his heirs, executors, and successors, to pay the same at the first term after his decease; and for their better security, and more effectual payment of the said sum, he assigned and disponed in their favour, all and sundry debts and sums

of money, either heritable or moveable, due and addebted, or that should be due and addebted to him at the time of his death, by bond, bill, &c. or any other manner of way; and specially without prejudice of the foresaid generality, he assigned and disponed to them severally, sums addebted to him by certain persons; after which followed the particular articles of sums of money due him, extending in all to near 20,000 merks, after which the deed proceeds thus; and which sum of 15,000 merks, I ordain the said trustees to pay in the manner, and for the charitable purposes after specified, (and then follows the names of 24 parishes), to the ministers, heritors, and elders of each parish, for the behoof of the poor of their respective parishes, he orders his trustees to pay to every parish 1000 merks. And the deed concludes with the following proviso, That in case it shall happen that my means and estate hereby disponed, shall, at the time of my decease, either fall short of, or exceed the sum of 15,000 merks, then, and in that case, I hereby destinate and appoint, that each of the parishes above-mentioned shall suffer a defalcation, or have an additional sum added, proportionally to the foresaid sums hereby mortified to them, as said is. No 24.

Posterior to this deed, Senwick acquired Castraman, part of the estate of Rusco, at a public roup before the Lords, sold his estate of Senwick, exacted the debts assigned by the above deed, and applied the same towards payment of the price of the lands purchased, after which he died; and Blair of Dunrod, his brother, having entered himself heir to him, and confirmed what remained of James's personal estate, as creditor to him, the Presbytery brought an action against Dunrod, for recovering the mortified sum.

The defence offered was founded on this maxim of law, That special legacies of particular subjects, or bonds, are tacitly revoked by the testator's alienating the thing, or exacting the sums in the bonds voluntarily in his own life; for that shows he had no mind the same should go to the legatees, *Inst.* § 21. *De legatis*, *l.* 21. *D. De liber legat.* Here the granter assigns all his debts, heritable and moveable, which he then had, or should have the time of his death, but does not subject his lands of Senwick; so that this mortification was to be made good out of these bonds, and the land estate go to the heir, as not subjected to the legacies. Now, since in place of Senwick, he purchased other lands of a much greater value, and applied the bonds specially assigned to the trustees towards defraying that purchase; what other intent could he have, but to benefit his heir, and deprive the legatees of his intended gratification? The heir in the defunct's land was to be free by the mortification, and providing his estate is not subjected, he does not oppose the legatees taking what shall remain free of the subject allotted by the defunct for payment of their legacy. As the case would thus stand upon the general principles of law, so the last-mentioned clause puts the matter beyond controversy; for to the assignation of the bond, generally and particularly, there is subjoined an appointment by the defunct to lay the same out upon interest; but as he uplifted the sums himself,

No 23. there can be no doubt, that he thereby voided the mortification; and which is further evident, from the latter part thereof, declaring, 'That in case his means 'and estate should, at the time of his death, fall short of, or exceed the said 'sum of 15,000 merks, each of the parishes shall suffer a defalcation, or have a 'further sum added proportionally to the foresaid sums thereby mortified.' Now, as it is clear, that if the defunct had converted his whole land estate into money, and lent it out on bonds, it would all have gone among the parishes, though it had been twice 15,000 merks, that by the same rule, his exacting the bonds due to him, and converting the same into a land estate, must diminish, yea extinguish this legacy, by the express terms of the settlement.

Answered; There is not the least reason to apprehend, that the defunct altered his charitable design, that this mortification should be effectual, or that he meant to revoke or alter the same, by the accidental alteration of the subjects, whereof his estate consisted; for it appears, from the whole strain of the settlement, from the positive bond or obligation upon the granter and his heirs, to pay the sum mortified, and from the manner in which the assigning clause is introduced, viz. for the better security and more sure payment of that sum, that a special legacy, or assignation of certain subjects only, was not intended; but that the funds were pointed out and appropriated for the purpose expressed by the granter for the ready execution of his purpose. It is true, the last clause seems to be drawn with inaccuracy, and not exactly conformable to the main design of the deed; but surely an argument of intention drawn from the inaccuracy of the writer, is not sufficient to defeat the intention of the writer, expressed in the direct and principal clauses of the deed. One part of what is provided in this last clause might be reasonable and *inerat de jure*, namely, if the disponer's funds should fall short, each of the parishes should have a defalcation, as some of the debts might perish by the failure of the debtors, or be uplifted by Senwick in his own lifetime; but the other part thereof, viz. in case his means should exceed 15,000 merks, &c., it must be confessed, is not so easily reconciled with the main scope of the deed; however, whatever incongruity there may be therein, the pursuers insist it is not sufficient to make the deed to be constructed as if it contained no such bond for the 15,000 merks; neither will it follow, that the uplifting the sums assigned, and laying the same out upon other funds, would have imported an alteration of the legacy; for, supposing this is a special legacy, (which it is not), the sale of a subject specially legated, or voluntarily uplifting of a debt, does not always import an ademption; for it may appear from circumstances, that this was done by the testator without any intention to alter or revoke; see *l.* 11. § 12. and 13. *De legatis, tertio*: And the present case affords an example of the same kind; for the alterations of Senwick's affairs were brought on *necessitate urgente*, he being found liable as heir of provision to his father Rusco, and so obliged to purchase part of that estate, to save his own.

Replied; That with respect to the argument drawn from the obligement on Senwick, his heirs and successors, to pay the 15,000 merks at the first term after his decease, the clause behoved to be taken wholly and together as it stands, and the former part must receive a just interpretation and limitation from the latter, as there is a plain variation in some particulars; and if so, it is certain, that this obligement, however seemingly extensive, must fall to the ground, when the funds specially allotted for its satisfaction, under a quality that it should receive its measure or extent therefrom, fail or come short. Next, this part of the clause founded on by the pursuers, is expressly with and under the conditions and provisions after mentioned, one of which was, That in case the said subjects should fall short, the dividends among the respective parishes should receive a proportional diminution; and in case they should exceed the said sum, a proportional increase: So that, according to this view of the deed, it is not tenible to plead any thing could be due of this legacy, if the whole fund was extinguished by the defunct's own act; it appears beyond contradiction, that the intent was, that his personal estate should only go to make it good, and that it was not to touch the heir in the land estate, as indeed it could not, considering it was introduced as a testament. And with regard to the alleged necessity on Senwick, to purchase the lands of Castraman, it was observed this was no such necessity as the law could mean. The necessity the law intends, is, where the debtor forces the money upon the testator, so that the uplifting it is not properly an act of his, and consequently cannot infer his revocation of the legacy, unless the heir plainly shew he intended it. Besides, it is ridiculous to imagine, that the defunct would have purchased the lands of Castraman at such an advanced price (38 years purchase), so as the superplus price, beyond the true value, would have more than exhausted his own estate of Senwick, for that would be to suppose he was throwing away the value of that estate in order to save it. In a word, it is absurd to suppose the defunct was under the least necessity to purchase these lands. It was a voluntary and rational act of his own, in order to save to himself and his heirs that part of the family estate of which he was descended; and however great the price may seem, it was the lowest any of the parcels sold at; neither were any of the purchasers losers by their bargains. No 23.

The Lords found, That the deed of mortification subsisted only for such of the debts specially assigned, as remained unuplifted at the death of James Blair of Senwick, the mortifier.

But, upon a reclaiming petition and answers, the Lords found, That the orders to uplift and apply the several sums, which were the fund of the mortification, not being executed, do not import a revocation of the mortification; and therefore adhere.

No 23. *N. B.* After this it would seem there was an act pronounced before answer, and a great deal of further litigation; but the Collector has not the papers.

C. Home, No 151. *p.* 257.

1741. *June* 4. BESSIE PATERSON *against* PATERSON of Drygrange, &c.

No 24.
Legacies fall by the legatee's pre-deceasing the testator, even though there be annexed a general clause, 'and 'to their heirs 'and execu-'tors.'

The *jus accrescendi* does not take place among those to whom any thing is left equally and proportionally.

THE deceased Alexander Paterson, cordiner in Potterrow, made a testamentary deed, in which he assigned and disponed to Robert Paterson of Drygrange, and James Shiels, brewer in Portsburgh, all his money and moveable goods, &c. and that as trustees for the uses and persons therein designed, containing a clause that they might apply the remainder, after paying his debts and legacies, for their own proper use and behoof. Amongst the legacies, he left 1000 merks to Charles Paterson, his brother-german; 'and likewise, he left to the said 'Charles and Bessie Paterson, equally and proportionally betwixt them, his 'whole household plenishing and made work that should be in his house and 'belong to him the time of his decease.' Charles predeceased Alexander, and, upon Alexander's death, Bessie confirmed herself executrix *qua* nearest of kin to Charles, and brought a process against the trustees for payment of the 1000 merks, and for delivering of the household plenishing, &c. that had been bequeathed to her and Charles equally and proportionally betwixt them.

As to the legacy for the 1000 merks, it was *objected* for the trustees, That Charles having predeceased the testator, the legacy died with him. Neither can it weaken the objection, that the legacies are left to the several persons therein named, and their heirs, executors, or assignees; because this legacy is not given to Charles Paterson, and his heirs and assignees, as if he were distinguished from other legatars, to whom a legacy had been left to them singly without such adjection; but there is one general clause prefixed to all the legacies, that the executors shall pay to the several persons therein named, and their heirs or assignees, the respective sums, and others therein mentioned, legated and bequeathed to them. 2*dly*, In several of the special legacies, there is an express mutual substitution, where it was intended that the same should not fall by the death of some of the legatars. 3*dly*, Supposing this adjection had been made to the legacy of Charles singly, it would not have altered the case, as is determined by many lawyers, particularly *Voet. Tit. Quando dies legat. ced.* § 1. who gives this reason for his opinion, That the mention of the heirs of the legatar is understood only to declare expressly what would have been true without such adjection, to wit, that the legacy being once due, or taken by the legatar, should be his in perpetual property, and descend to his heirs, without returning after his death to the heirs of the testator, and that such adjection is altogether superfluous.