

1712. December 16.

JOHN MONRO Chirurgion in Edinburgh *against* MAJOR GEORGE MONRO
of Auchinbowie.

No 33.

A father executed a bond of provision in favour of a younger son, which he kept in his own custody. This bond was found not to be comprehended in a discharge of all clags, claims, &c. granted by the son to the father.

THE deceased Sir Alexander Monro of Bearcrofts having in anno 1699, assigned his share in the African Company to his second son John Monro, without prejudice to his portion; and in the year 1703, disposed his whole moveable sums, goods and gear to his daughter Jean, who, as executrix to her father, confirmed the African money in his testament, and assigned the same to Major Monro her eldest brother, who uplifted it; John Monro pursued repetition against the Major, by virtue of the assignation from Sir Alexander their father.

Alleged for the defender; The assignation to the pursuer, cannot carry right to the African money, because, *imo*, The same was never delivered by the father to him. And though bonds of provision by parents in favours of children *in familia* require no delivery; yet bonds in favours of children forisfamiliated, and otherways sufficiently provided, as the pursuer was, are not effectual till they be delivered. *2do*, *Esto* the assignation had been valid, yet it was taken away by a posterior discharge granted by John to Sir Alexander his father, of all actions, causes of action, suits, bills, bonds, judgments, challenges, and demands whatsoever, which John had or might have against Sir Alexander upon whatsoever account preceding the date thereof; thus it was determined in a parallel case, 29th June 1680, Young *contra* Paip, *voce* PRESUMPTION. *3tio*, The assignation was revoked at least by the general disposition in favours of Jean, conform to the decision Hall against Gordon, 17th February 1708, *voce* PRESUMPTION; especially considering, that Sir Alexander not only did not deliver the assignation of the African money to John, but delivered it to Jean with the universal disposition; which clears, that the African money was understood to have been a part of the subject of the general conveyance, and not designed to be effectual to John. *4to*, The assignation is taken away by a discharge granted by the pursuer to the defender, upon a decret arbitral determining differences betwixt them, wherein the pursuer discharged all clags and claims he had against the Major for himself, and as representing his father; which is a renunciation of any latent claim against the inheritance to which the Major had right.

Replied for the pursuer; *imo*, All writs granted by parents to children whether *in familia* or forisfamiliated, require no delivery, Stair, b. 1. t. 7. §14. *2do*, It is absurd to pretend, that the discharge granted to Sir Alexander could take away the assignation; it being the nature of a discharge to extinguish, and not to convey a right. Besides, there was no action competent against Sir Alexander or his heirs, upon the assignation; and the discharge doth only discharge all actions and law-suits competent to his son against him before the date of the discharge, which could not take away his father's good-will. The cited de-

cision where a settlement in a contract of marriage was presumed to be in satisfaction of a prior bond, *quia debitor non præsimitur donare*, doth not concern the present case, where there was no posterior payment made to John, which could be reckoned in place of the assignation. 3^{to}, The assignation could not be taken away by the general disposition; *quia specialia derogant generalibus*, whether the special right be prior or posterior to the general, *L. 4. § 3. L. 99. § ult. ff. de Leg. 3. l. 15. ff. de Peculio, L. 1. Pr. ff. de Auro Argent. Leg. Inst. § 1. de Codicil. Vin. Comment. ibid. 29th Jan. 1679, Aikman contra Boyd's Heirs, vote* PRESUMPTION. The practique betwixt Mr Hall and the Lady Gordon doth not meet; for there Cesnock had expressly revoked the right in favours of the Lady Gordon; but here the question is, Whether Sir Alexander Monro hath revoked this assignation. Had the general disposition carried the African money, Jean's right to it would have been as good without this paper, as with it; consequently it was not delivered to her as an instruction of her right. Nor could the delivery of the assignation to Jean be an extinction of John's right; on the contrary, it made it as effectual as if it had been delivered to John himself, since it went thereby out of the granter's hands. Nay, Jean, who was the father's trustee, and presumed to understand his intentions best, delivered the assignation to John as his proper evident after the father's death. 4^{to}, The discharge upon the decret arbitral could go no further than the submission, which was only in relation to depending processes; and the pursuer had then no clag nor claim against the Major in relation to the African money, the present claim having arisen from his subsequent deed of uplifting that money. Nor could either party have in their view at that time when the discharge was granted, that any difference would emerge concerning such a fund, which in all human appearance was then desperate.

THE LORDS found, the assignation in favours of John is a valid assignation without delivery, being betwixt father and son. And found the general disposition by Sir Alexander Monro to Jean his daughter of his heritable and moveable estate, with the delivery to her of the assignation in favours of John of his interest in the African Company, is not a revocation of that assignation in favours of John. And found, that the discharge granted by John to the father, doth not extend to the money in the African Company. And also found, that the discharge following upon the decret arbitral granted by John to the Major, doth not exclude this claim.

Fol. Dic. v. 1. p. 345. Forbes, p. 644.

1736. February. GRAY against The CREDITORS OF DRUM.

A WOMAN being confirmed executrix as nearest of kin, after her decease, the next in blood made up titles by confirmation to some moveable debts, omitted out of the inventory of the former testament, and insisted against the debtor