

bring in the same into the equal division of the goods between the two brothers, in case the disposition were reduced *quoad* an half; but it carried *ut supra*.

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Fol. Dic. v. 1. p. 545. Fountainhall, v. 1. p. 753.

1721. January 18.

LADY BALMAIN *against* GRAHAM.

No 32.

A DISPOSITION by a husband to his wife of the stocking that should be upon his mains the time of his decease, being quarrelled by his children, as in prejudice of their legitim, being of a testamentary nature, revocable, as not having been a delivered evident; it was *answered*, That the form of the disposition is *per modum actus inter vivos*, whereby a present right is conveyed, though suspended till the granter's death, and being done *in liege poustie*, it cannot be reached by the law of death-bed, and there lies no other bar to the father's power of alienation; *2do*, This is a rational deed, an additional provision to a wife, and not of that nature as to admit of a construction that it was intended to disappoint the children of their legitim. THE LORDS found the goods disposed belonged to the Lady *tanquam præcipuum*. See APPENDIX.

Fol. Dic. v. 1. p. 545.

1728. February.

MARION HENDERSON, and HUGH CAMPBELL, her Husband, for his Interest, *against* DAVID HENDERSON.

CLAUD HENDERSON, merchant in Glasgow, having a son and three daughters, made a disposition of his whole heritable and moveable estate to his son; wherein, 'for the love and favour he had to him, he, the said Claud Henderson, in case it should happen him to depart this life before his said son, gives, grants, and disposes to him, his heirs, executors, &c. all and whatsoever debts, goods, gear, lands, heritages, &c. belonging or competent to him, or what he should thereafter purchase or acquire.' Then follows a clause, empowering the said son 'to procure himself served heir of line in special and in general to his father, and to obtain himself executor decerned and confirmed to him;' and he thereby nominates his said son 'his sole executor and universal legatar, and intromitter with his goods and gear whatsoever.' Of the same date, he grants bonds of provision to his daughters, which he declares, 'should be in full satisfaction of all they could anyway claim by his decease.' The other daughters resting satisfied with their provisions, Marion, the youngest, rejecting her bond, intended a process against

No 33.

A father, by any deed to take effect only after his death, (tho' not on death-bed,) cannot disappoint his children's legitim.

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her brother, the disponee, to account to her for her legitim; and she *contended*, That, by no testamentary deed, or donation *mortis causa*, can a father evacuate his children's right of legitim.

It was *allowed* by the defender, That the legitim is so founded in law, that a father cannot arbitrarily exclude his children from it; but then he *contended*, That the father, as administrator of the goods in communion, with ample and almost absolute powers; as he can arbitrarily change his heritage into moveables, or his moveables into heritage; as he can alienate for onerous or rational causes, or even gratuitously, providing it be not *dolose* to disappoint the legitim; no reason can be assigned, why, under the same restriction, these powers may not be exercised in deeds testamentary or *mortis causa*, if not done *in lecto ægritudinis*, as well as deeds *inter vivos*; and it was expressly determined, Thomson *contra* the Creditors of Thin, No 141. p. 5939, *voce* HUSBAND AND WIFE, 'That the husband hath an absolute power of disposal of all the moveables, both to take effect in his life, and after his death, *' sine dolo.'* And Sir James Stewart, in his Answers to Dirleton, *voce* BONDS OF PROVISION, holds, that bonds of provision, lying by a father at his death, will come off the whole head of the executry, and so impair the legitim. In the present case, there is not the smallest pretence to allege, that the father designed fraudfully to cut his daughters out of their legitim; on the contrary, he dealt with them bountifully; he bound himself in a determinate provision of 12,000 merks to each, much more than was provided to them by their mother's contract of marriage; and if he gave his son more ample provisions, with a view to establish a family, that is a liberty with great reason to be indulged in one, whose stock is the acquisition of his industry. It is certain, had Mr Henderson dreamed of the least difficulty in the method he chose to execute his will, he had many other ways to make it effectual; he would not have failed to give his son an absolute disposition *inter vivos*; or, if he inclined it should remain with himself during his life, it was but turning his moveables into heritage, and the matter was done. And, truly, to take the dispute in this view, it appears unaccountable, that the law should arbitrarily restrain a man from disposing of his effects in a certain shape, which yet it freely allows him to do, by making a small circuit.

Answered for the pursuer, A father can change his moveables into heritage, alienate upon onerous or reasonable considerations, even upon some occasions, gratuitously, or do any other reasonable deeds *inter vivos*, because these are all of them acts of administration, indeed more exuberant than belong to ordinary trustees; but when he goes about to make a testament, name executors, or donators *mortis causa*, there he is acting quite out of his sphere; he drops the character of administrator, and assumes that of absolute proprietor; and therefore deeds of that nature can have no effect, except upon the dead's part, of which he has the absolute disposal. *2do*, The legitim is a portion of goods, which necessarily accrues to the children *ipso facto*, upon the death of their

father; whatever was truly his at his death, the third share falls to them; and from the nature of the thing, no testamentary deed, or *mortis causa* donation can exclude the legitim, because these take no effect till after death. And hence it is thought that a bond of provision lying by a father at his death, cannot impair the legitim, because it was never a debt upon him, and consequently not upon the legitim; and this is the Viscount of Stair's opinion, who says, l. 1. t. 5. § 6. § 2. *in med.* 'That bonds of provision delivered in *liege poustie*, do as other debts, affect the whole executry;' plainly intimating, that unless delivered in *liege poustie*, they do not. And the decision mentioned above, Thomson *contra* the Creditors of Thin, is perfectly consistent with this; the case there was of a bond delivered in *liege poustie*, suspended only as to the payment till the death of the granter; and from the decision applied to the case, can be inferred no more, but that if a man makes a formal alienation *inter vivos*, which naturally excludes the legitim, he may suspend the effects till after his death, providing it be not *dolose* to disappoint the legitim.

These grounds of law do both of them conclude strongly against the defender; for his right is not only a donation *mortis causa*, of his whole effects, which surely passes the power of an administrator, however exuberant; but these effects all of them were absolutely the father's when he died, and of necessary consequence subjected to the legitim.

There was another argument *pleaded* for the defender, That the legitim surely is no stronger than a provision of conquest to bairns in a contract of marriage; which the father, it is true, cannot fraudulently disappoint, because of the obligation brought upon him by his deed, similar to the obligation upon him in the case of legitim, arising from the law; but that he may rationally divide such conquest among his children, giving to one more, to another less, according to his pleasure, provided he does not exclude any of them, seems to be the opinion of our lawyers; and so it was decided betwixt A. and J. Dowies, 9th Jan. 1728, *voce* PROVISION TO HEIRS AND CHILDREN, where the LORDS found, 'that the father had a power of making an unequal division of the sums, lands, and conquests amongst the heirs and bairns of the marriage; but that he could not totally exclude any of them without a cause, from a share thereof' And in this case it was *contended*, that the father had gone no further than to make an unequal division; and was so far from excluding any of his children, that they have all of them got reasonable provisions, suitable to their father's estate, and their station in the world.

The pursuer *answered*, There is no similitude betwixt the cases; a provision of conquest to the heirs and bairns of a marriage, was never intended further, than that the father may not have it in his power arbitrarily to disappoint the children of the marriage; and it is perfectly consistent with this, that one child have more than another, for this is still keeping within the limits of his obligation. But the legitim is not an obligation, it is a right to a share of the father's moveables, which takes place *ipso facto* upon his death, in favours of e-

No 33. very one of the children equally ; and the law of the legitim considers not the children of one marriage, in opposition to the children of another marriage ; or the whole children conjunctly, in opposition to strangers ; but each child separately for an equal share.

' THE LORDS found the pursuer entitled to her legitim.'

Fol. Dic. v. 3. p. 545. Rem. Dec. v. 1. No 107. p. 207.

1742. June 2. WILLIAM ROBERTSON *against* MRS JEAN KER.

No 34.
Though a father leave his whole moveable estate to an only child, with a substitution to another, yet the child's heir *in mobilibus* is preferable to the substitute *quoad* the legitim.

MAJOR ROBERTSON, whose estate was all in moveables, made a testamentary settlement, in which he nominated to be his executor and universal legatee, William Robertson his only child, and the heirs of his body ; whom failing, Jean Ker his spouse. After the Major's death, tutorial inventories were made up of his estate, which was managed, during the son's life, without any confirmation. And the son having died, about the age of fifteen, unmarried, the relict took up the succession by virtue of the substitution contained in the testament.

William Robertson, brother to the Major, *insisted* in a process against the relict, claiming the legitim belonging to his nephew the minor out of the Major's effects, to which he the pursuer had now right as next of kin to his nephew. The defence was, that the testament in favour of the son, whereby he got the universal succession, was full satisfaction of the claim of legitim.

Answered, The substitution in favour of the relict in case of the son's death without issue, imports a prohibition upon him to alter the settlement, at least during his minority ; therefore this testament was not full satisfaction of the legitim, since, instead of an absolute, it bestowed only upon the son a limited right. And as there is no evidence the son ever acknowledged this testament by acceptance or otherwise, his claim of legitim did subsist, and must transmit to his next of kin, precisely as if the Major had died *intestate*.

Replied, The Major's settlement is a simple destination ; it contains no clause prohibiting an alteration of succession ; nor can any such clause be implied ; and, though it were implied, and even expressed, the settlement would notwithstanding be effectual, as there is no law to bar a substitution with regard to the legitim.

' Found, that notwithstanding the testament, the pursuer, as heir *in mobilibus* to his nephew the testator's son, has right to the legitim that belonged to his nephew.'

The point strongly laboured for the pursuer was, that the legitim is a right in the moveables which the children have in common with their father and mother, of which common property the father is administrator during his life ; but that, after his death, the same divides in three equal parts, one part to the wife, another to the children, and the third, called dead's part ; which last is