1676. *July* 21. TRAILS *against* GORDON.

No 12.
Special legacies suffer not abatement with general legacies, when left in the same writ; but because legacies are ambulatoty, a legacy was found to derogate from a former legacy.

UMQUHILE George Gordon, messenger, having granted a bond of provision of 8000 merks, to Trails his oye, and ordained his son Mr George to satisfy the same, by assigning such bonds as he thought fit, and having also granted assignations on his death-bed to the said Mr George of the most part of his bonds; Trails pursues him for payment, who *alleged*, that the pursuer's provision on death-bed is but effectual as a legacy against dead's part, and albeit the assignations made to the defender were accounted as legacies, yet they are as special legacies, and the pursuer's provision is but a general legacy; and it is a certain rule, that special legacies are never affected or abated by general legacies. It was *answered*, That the rule holds in legacies granted in the same writ, and at the same time; but all legacies being ambulatory, the testator may alter or recal them any way he pleases. *Ita est*, The pursuer's provision is long posterior to the assignation granted to the defender, and bears expressly to be paid by him in money, or by assignment of the defunct's bonds, which therefore burdens the former assignations, which are effectual as legacies;

Which the LORDS found relevant.

Fol. Dic. v. 1. *p.* 535. *Stair, v.* 2. *p.* 456.

1676. *December* 14. MITCHEL *against* LITTLEJOHNS.

No 13.

A BOND of provision, granted upon deathbed, obliging the defunct, his heirs, &c. though it could only take place in the dead's part, was yet found preferable to a legacy, though the legacy bore an obligation upon the heirs and executors to pay the same, for a legacy is only a succession, and cannot therefore compete with a *jus crediti*.

Fol. Dic. v. 1. *p.* 535. *Stair. Dirleton.*

*** This case is No 39. p. 3216. *voce* DEATHBED.

*** Gosford likewise reports it:

1676. *December* 13.—KATHARINE MITCHEL having intented action against the eldest son of John Littlejohn, for payment of 600 merks yearly, conform to a bond of provision made to her by the said John Littlejohn, her deceased husband, there being an allegeance proponed, that the bond was granted upon death-bed, and so could not burden the heir; the LORDS, by their interlocutor, 17th June 1676, did sustain the action, she proving that he had convalesced, and went to kirk and market, after the date of the bond; but, thereafter, the children of the first marriage, besides the heir, compearing, it was *alleged* for

them, that the marriage being dissolved within year and day by the death of their father, all provisions by contract of marriage did fall in consequence; so that this bond, posterior to the contract, at most ought to be looked upon as a legacy; and the children of the first marriage, besides the heir, being provided to the sum of 28,000 merks, in contemplation of their portions natural, the father, by his latter will and testament, having burdened his eldest son, whom he had nominated his sole executor, with the said provisions made to them, they ought to be preferred, not only as to their legitimate portions, the inventory receiving a biparted division, by the dissolution of the marriage within year and day, but likewise in so far as the said provision did exceed the half, they ought to be preferred to the said Katharine, and exhaust the defunct's part *pro tanto*. There was likewise compearance made for a legatar, who craved to come in *pari passu* for 1000 merks left in a legacy, upon that same grourd, that the wife was only a legatar by her bond. It was *replied*, notwithstanding of what was alleged she ought to be preferred to the children, because the bond granted to her not being for implement of her contract of marriage, but for just and onerous causes, and that prior to any bond granted by the children, and the executors being burdened, by the testament, in the *first* place, with the payment of that yearly annuity contained in the bond, and it being less than what she is provided to by her contract of marriage, it can never be interpreted a legacy, or pure donation, but a true debt, to affect the defunct's moveables without any division, and so she ought to be preferred both to the children and legatars.——The Lords having considered this case, and the bond, did find, that the wife's provision, albeit the marriage was dissolved, should affect the husband's third part as if he had lived year and day, and that the rest of his third should only be liable to the children, in so far as they were not satisfied by the legitim portion; and likewise did prefer her to the legatars, which was just upon that ground, that she was a creditor, notwithstanding of the dissolution of the marriage; but the supposing of a tri-parted division, as if the marriage had stood, which was dissolved by death, seemed to me to be strange. No 13.

Gosford, MS. No 919. p. 595.

1677. *February* 6.

Janet Tait and Campbell, her Husband, *against* Tait. No 14.

The Lords found, that a bond, being granted on death-bed, with consent of his apparent heir for his interest, bearing an obligement to pay a sum of money, is to be considered, not as a legacy, but as a bond *inter vivos*; seeing, by the common law, all persons are *in legitima potestate* as to the granting of bonds; and our custom, whereby persons on death-bed are not in *in liege poustie*, is qualified with an exception, viz. unless the heir consent, in whose favours the same is introduced.

Reporter, *Castlehill.*

Dirleton, No 449. p. 219.