1685. *March* 3. The EARL of TWEEDDALE *against* The DUCHESS of LAUDERDALE.

THE Earl of Tweeddale, as assignee by the Lady Yester, and her children, pursues the Duchess of Lauderdale, *rei vindicatione*, for the jewels once belonging to the Countess of Lauderdale, mother to the said Lady Yester, and, by her testament at Paris, legated to Lady Yester and her children. ALLEGED,—1*mo*, That no process could be sustained on the extract of the testament produced; for it was no better than a copy; seeing, after she had subscribed her testament, she, *ex intervallo*, called for a notary-royal and public tabellion, and caused him form a codicil on the back of it, leaving Marishall de Schomberg, Monsieur Claude, minister at Charenton, near Paris, and others, some legacies; and affirmed to him her testament was contained in the other page, (but it was not formed by him, but by the Lady Boghall, in English, which language the notary understood not;) and he subscribes, in respect of her infirmity. Now it cannot be probative, unless the notary had either drawn it, or read it, or retained the principal: none of which was done.

ANSWERED,—It is now uncontroverted, that attests and extracts of principal writs, given under form of instrument by notaries abroad, (who have more trust than ours,) have been received by the Lords as sufficient *per se*, *ob consuetudinem loci;* as was decided *supra*, 22d July 1681, in the case of Sir William Davidson's children.

The Lords, on this debate, sustained process, Tweeddale either producing the principal testament *cum processu*, or a legal extract thereof, or else proving that this is a legal and authentic extract by the laws and custom of France.

Then, 2*do*, It was farther ALLEGED for the Duchess,—That thir being moveables gifted to her by her husband, and in her possession, that presumed property and dominion; unless the Earl of Tweeddale subsume and qualify that her own, or her Lord's possession, was vitious and unwarrantable, *clam*, *vi*, *vel præcario*, and instruct *quomodo desierunt possidere*. ANSWERED,—They needed say no more, but that they were in the Countess of Lauderdale's possession at the time of her decease in 1671, and legated by her to the pursuer's cedents: and that, as to jewels of such value, possession was not found title enough, by the Lords, to defend against restitution, in *John Ramsay's* process against *James Wilson and Others*, marked by Stair, 12*th December* 1665. REPLIED,—The case there was clearly *fraudulenta contrectatio* of Mr Robert Byres, which made them *res furtivæ*, and a *vitium reale* affecting the thing itself, *etiam contra mille singulares successores;* the parties havers neither being jewellers to their trade, nor of that quality to have so rich jewels. DUPLIED,—The Duke of Lauderdale's way of attaining the possession of thir jewels was as vitious as it was violent; for, after his first Lady's death, by his influence and power with the French king, without confirmation, or any other title, by concussion and terror, he got that king's warrant to take them from Lady Boghall, on this pretence, that the goods of strangers dying in France belonged to the king, as *nullius et caduca*, *jure albinatûs;* whereas she, being a Scots-

woman, was not an alien nor aubeine, but a naturalized regnicole; as appears by our Act of Parliament 1558, and from Servin and Bacquet in their *Plaidoiez.*

3*tio*, ALLEGED for the Duchess of Lauderdale,—That thir jewels having been given by the Duke of Lauderdale to his first Lady, *stante matrimonio*, at least bought with his money, she having an hydropick insatiable thirst after such bagatells, which being a donation *inter virum et uxorem, stante matrimonio*, was revocable, and actually revoked by him, and given to the Duchess. ANSWERED,—Thir *jocalia*, or *ornamenta muliebria*, did not fall under the communion of goods, nor were they liable for, or affectable by the husband's debts, but were *bona paraphernalia*, and the wife's own proper *peculium*, which she might give away to whom she pleased; and the title *Dig. de Auro et Argent. legat.*, shows, that the *mundus muliebris* was properly her own, and defines what falls under it. REPLIED,—Lawyers were very clear, that *vestes et ornamenta exigui prætii* were reputed to be *simpliciter et absolute donatæ* to the wife; but where they were of a great value, they were only *commodatæ ad usum, ut cultior et ornatior videretur*; *ll.* 29, 30, and 31, § 8. *D. de Donat. inter Vir. et Uxor.*; and the Italian and citramontane Doctors are very churlish upon this head; and Jul. Clarus, *Recept. Sent.* § *Donatio, quæst.* 10, No. 3, gives this reason for it:—That the *infelices mariti* of this age gratify their wives' ambition in buying them more jewels than they bring of tocher. Tertullian says, *in auribus pendent bina patrimonia et jugera.* Andreas Gayll, *lib. 2. observ.* 91, makes it *casus arbitrarius, secundum facultates et nobilitatem mariti*, and the value of the jewels.

4*to*, ALLEGED for the Duchess,—That the conception of the legacy being to the Lady Yester and her children, this *formula legandi* stated the property of these jewels in the Lady Yester's person; and she had, by an ample renunciation, discharged, renounced, and abandoned all claim she had thereto, in favours of the Duke of Lauderdale her father; and so her children are cut off.

ANSWERED,—The legacy being in thir terms, "to the mother and her children," the termination of the fee is on the children, and the mother is merely liferentrix *et usufructuaria*, and burdened with a *fidei commissum tacitum* to leave and restore them to her children; so her renunciation of them cannot prejudge her bairns.

REPLIED,—By the conception of the legacy, it is neither a conjunction of the two to bring them in equally, nor a *fidei commissum*, but a clear substitution, whereby the mother is stated in the right of these jewels, in the first place, and the bairns only called, in the second place, *ordine successorio*, failing of her, or in case of her not disposing on them. And that this is the true sense of it, appears from thir arguments:

1*mo*, That, in all writs, especially in latter-wills, *voluntas et mens testatoris est maxime attendenda*,—the meaning and intention being *domina et regina testamenti*, and the words but *cortex exterior, mera apparentia, figura et superficies verborum*; so that, *in quæstionibus dubiæ voluntatis*, the best way to expiscate the defunct's design, is to consider his affection to the parties, and that he who is first named, *et persona prius honorata*, must be likewise *primus in intentione*; so, where the Countess of Lauderdale couples her daughter and her children in a legacy, it must, *ex conjectura pietatis et ordinatæ charitatis*, be construed, first, to the

daughter, and next to her bairns; for the lawyers have borrowed that philosophic axiom from logic, *propter quod unumquodque est tale, illud ipsum est magis tale:* now, *propter matrem,* (as the channel and conduit,) *nepotes ab avia sunt dilecti; ergo mater est prædilecta;* and, on the same presumption, leans Papinian's inference in *l.* 102. *D. de Cond. et Demonstrat.*; approven by Justinian, in *l.* 30. *C. de Fidei-com.* where this question is raised, If *liberi, in conditione positi, censeanter tacite vocati.* For there is a natural order and substitution according to the sibness and relation, whereby the nearer excludes the remoter; and, by this rule, the Lady Yester must be presumed to be first called. See Stair, *tit.* 26, Of Succession, § 2.

2do, As this *ordo verborum et naturæ* teaches us to interpret the clause, as presuming the Lady Lauderdale's affection centered, *primo loco,* on her daughter; so there is another rule to the same purpose delivered by Jul. Clarus, *Recept. Sentent.* § *Testamentum, quæst.* 76, *viz.* that the testator is presumed to have made his will conform to the disposition of the common and municipal laws; so that, when he institutes the persons who would *alioqui* succeed to him *ab intestato,* he is understood to do it *eo modo et ordine quo de jure communi vel municipali ad successionem ab intestato vocarentur.* Now, to apply this rule, the Lady Yester would *ab intestato* succeed to her mother, and exclude her own children; *ergo* the like must hold *in hac formula legati.* The same Clarus, *Dict.* § *quæst.* 80, holds, that, where a grandfather institutes his son and grandchildren, they are not called, *simul et semel, ordine simultaneo,* but *ordine successorio*; and that it is not a *fidei-commiss.* upon the son to restore *post mortem* to his bairns, but *mera substitutio vulgaris*; so that the first person has the power of disposal on it at pleasure. F. Mantica, *lib.* 4. *de Conjecturis Ultim. Voluntatum, cap.* 7, debates this point very subtilely, and lays down his first conclusion, that such a conjunct institution is not simultaneous, but successory. But there is none of them all so express on the subject as Everardus, *loc.* 1, *num.* 4, where he says, *Ubi plures personæ, inter quas cadit ordo charitatis, inter se subordinantur per copulam, non tamen concurrunt simul, nec faciunt sibi partes per concursum, licet hoc videatur esse de natura copulæ, sed veniunt ordine successivo.* And Anton. Faber. *Cod. Sabaud, lib.* 6. *tit.* 8, shows it was so decided with them *in linea descendenti, sed non in collaterali,* in 1588; and all this is borrowed from the doctrine of the great Bartolus, who stands for this opinion in his Commentary *ad l.* 27. *D. de Liber. et Postum.*; yea, goes a greater length, that, though the testator should invert the order, and name the *nepotes ante filium,* yet *ordo naturæ* would call the son first. There is a parallel case in *l.* 77, § 32. *D. de Legatis,* 2. And Ludov. Romanus, *singular.* 67, says, *Immunitas alicui et filiis relicta, ordine successivo intelligitur.*

If the Lords should find that the children came in for their share, as well as the mother, then Tweeddale's advocates intended to urge that the division behoved to be *in capita;* so that the jewels should divide into six parts, there being five children, and they to carry five parts, and the mother, who had renounced, only one. But this is expressly contrary to the analogy and interpretation of all law and lawyers: for Mantica and Clarus, *ibid.* tell us, the whole children, in such a case, *propter unitatem sermonis, in unum quasi corpus sunt redacti, et sic conjuncti unius quasi personæ potestate funguntur, et pro una*

habentur; so that the division will fall equal; the mother to get one half, which she has discharged, and the children the other half among them.

Vol. I. Page 346.

1685. *March* 4. Sir James Stewart *against* John Stewart of Ascog.

Sir James Stewart, as Sheriff of Bute, pursues Mr John Stewart of Ascog, advocate, for reducing his right to the crownry of Bute, and for declaring his lands free from the custom and casualty of so many oats, &c. payable to the crowner's office, formerly belonging to the sirname of . The reasons were:—1*mo*, He, being a member of the Session, had bought this right while depending in a plea. 2*do*, He acted and exercised the said jurisdiction before he had taken the test. Ascog denied both; but objected against his title of Sheriff, seeing both the *officium vicecomitis et coronatoris* are consistent in one place, and the one needs not interfere with the other.

Vol. I. Page 348.

1685. *March* 4. Anent Witnesses to Testaments.

This point was debated, if a testament was null which had only two witnesses, whereof one had a legacy left to him, and so was a party interested and concerned in the subsisting of the testament. By the Roman law it was not a sufficient objection, § 11, *Institut. de Testament. ord.* But Vinnius, in his Commentary, is not well pleased with this, and thinks it was more tolerable *jure civili*, where they had *copiam testium*, than now with us. Some thought the testament only null as to his own legacy, seeing he could not be *testis in re propria*, but valid *quoad* all the rest.

Yet, in a bond of warrandice, or relief, one of the creditors concerned in the relief may be a valid and probative witness, because he has only a consequential interest. *Vol. I. Page* 348.

1682 *and* 1685. The Case of the Patience and Palmtree Ships.

1682. *February* 14.—The case of the two prize-sloops, called the Patience and Palmtree, of Sunderberg, was this day debated, the Duke of York being present. It was argued how far the Lords might review their own decreets. See the 12th Act of Parliament 1661, and *Bouritii advocatus, c. de Revisione.*

The King's Advocate had this compliment to his Royal Highness, that to