

No 1. a legacy in case his wife was with child of a daughter, he could never be presumed but to have left the legacy in case there was no child; and the will and intention of the testator is chiefly to be looked to in all testaments. THE LORDS sustained the legacy, and found, that, albeit it was conditionally conceived, yet it resolved in *legatum purum ab præsumptam defuncti voluntatem, qua omnes regantur conditiones in ultimis voluntatibus.*

*Newbyth, MS. p. 78.*

No 2. 1678. June 18. COMMISSIONERS of the Shire of Berwick against CRAW.

A TESTATOR leaving 4,000 merks in legacy to build a bridge, which cost but 1,000 merks, it was found, that the executor had not fulfilled the defunct's will, and that the surplus ought to be employed to other pious uses.

*Fol. Dic. v. i. p. 441. Stair.*

\* \* \* See this case, No 10. p. 1350.

1724. January 31.

HELEN HAMILTON and her Husband against JOHN GORDON Factor to the Earl of Hopeton.

No 3.

A woman disposed her whole effects to a friend, upon the narrative of her confidence in his honesty to make the payments mentioned in the disposition; and she enumerated several legacies to be paid to her relations, and a certain sum as a legacy to the donee. Found, that the donee had right to all that remained after paying these legacies, tho' it was argued,

MARGARET HAMILTON, relict of Patrick Erskine, disposed to the said John Gordon her whole means and estate, (except part of her moveables, which she disposed to her friends) upon this narrative: 'For the entire trust and confidence I have in John Gordon. and because of his integrity and honesty for making the payments underwritten, therefore I dispone,' &c. And she burdened him with several considerable legacies, particularly the liferent of 2,000 merks to Helen Hamilton and her Husband, and 500 merks of the fee of it; and she left 1,000 merks to the said John Gordon; and there was a provision, that in case the fund should fall short, the whole legatars should suffer a proportional abatement. And the legacies were made payable at the sight of Robert Inglis and William Broadfoot writer of the deed.

It happened that there was a surplus of Margaret's effects, after payment of all her legacies; and the said Helen her sister being executrix decerned *qua* nearest of kin, pursued Gordon for that surplus, upon this head, that by the narrative of the deed it appeared he was only a trustee for the payment of the legacies; and he had accordingly a sum allowed to himself as a legatar, which was inconsistent with his having the whole subjects after payment of the other legacies.

It was *answered* for Gordon, That the disposition to him was absolute and without any limitation; and the pursuer had a particular legacy left her, which shews that the defunct did not intend that she should succeed to any more; and the deed is not only in favours of Gordon, but even of his assignees, and a cessible right is always absolute with respect to the subject conveyed. Nor did the giving a legacy to Gordon exclude him from the surplus; for the defunct being afraid that her effects would not answer all the legacies, intended that in all events he should have his legacy at least clear.

“ THE LORDS before answer remitted to the Ordinary, 18th January, to take Robert Inglis and Robert Broadfoot’s oaths on what was communed and treated the time of granting the disposition.”

Robert Inglis having deponed, “ That the disponent advised with him concerning the disposal of her worldly affairs, and that she told him at the time the disposition was granted, that the defender should enjoy all the subject disposed, with the burden of her legacies therein contained, and 500 merks left verbally to Mr Andrew Mitchell minister, and that she was of opinion her estate would be more than sufficient to answer her legacies; but that the reason for her giving a particular legacy to the defender was, that in all events he might have some share of her means, in case by any fatality or bad debtors any part of the subjects should perish, and the proportional deduction upon the legacies was concerted in that view.”

Broadfoot deponed, “ That the defunct did not explain her meaning or intention to him, but that he wrote out the paper according to the instructions he had from the defunct, and the amendments put upon the scroll written by Robert Inglis.”

“ THE LORDS found the disponent had right to the surplus.”

Reporter, *Lord Grange.*

*Act. Graham et Erskine.*

*Alt. Hay.*

*Fol. Dic. v. 3. p. 307. Edgar, p. 13.*

1724. July 21.

WILLIAM DENHOLM Wigmaker in Edinburgh *against* ANNA WATT Relict of Robert Drysdale Merchant there.

WILLIAM DENHOLM, as creditor to Robert Drysdale by two bonds of 200 merks each, payable the first term after Drysdale’s decease, insisted against Anna Watt his relict, as executrix or vitious intromitter, for payment of the sums in the bonds.

It was *alleged* for her, That the testament was exhausted, she being creditrix by her contract of marriage for more than the value of all the effects left by her husband at his death, in regard, that, by the contract, he had disposed to her the half of his household furniture, and likewise the half of his merchant-

No 3.

that by granting him a special legacy, the disponent indicated her will that he should have no more.

No 4.

A wife was provided to the half of her husband’s household furniture, and half of his shop goods, according to an inventory, in which the goods were