

No 55. 1781. June 14.

CATHARINE GERRAN and her Husband *against* JOHN ALEXANDER of M'Kilston.

A LAST will was expressed in the following manner: 'I leave to Catharine  
' Gerran, spouse to James M'Ghie merchant in Stranraer, the sum of L. 300  
' Sterling in liferent alimentary, and to be divided by her among her children  
' at any time before her death; and, failing of her dividing the above sum, it  
' is to be divided by the heirs and representatives of the said John Alexander,  
' the testator, as they shall think proper.'

It became a question upon this clause, how far the mother could affect the  
legacy? and 'the LORDS found unanimously that she had only a right of life-  
rent.'

The Lord reporter observed, that by many decisions, it had been found that  
the fee was really in the parents, though the destination bore only in liferent  
to them, and in fee to their children; but that this was not *ex necessitate*, as  
had sometimes been supposed, lest the fee should be *in pendente*. It was upon  
the presumed will of the granter, who only meant a *spes successionis* to be in  
the children; and, therefore, whenever there appeared to be intended a right of  
property in the children, the parent's right was either limited to a mere liferent,  
or considered as a trust fee, which could be defeated.

Reporter, Lord Braxfield.

Act. ———.

Alt. James Boswell.

*D**Fol. Dic. v. 2. p. 215. Fac. Col. No 56. p. 96.*

## S E C T. IX.

## Mutual Substitutions among Children.

1752. November 15.

ANDREW MACREADIE *against* The Executors of JAMES MACFADZEAN.

No 56.  
Found, that a  
mutual sub-  
stitution in a  
bond granted  
by a father to  
his two  
daughters,  
one of whom  
was married

JANET MACREADIE, in her contract of marriage with James Macfadzean, does,  
' with advice and consent of Provost Macreadie, her father, convey to her hus-  
' band all and sundry lands to which she has now right, and to which she may  
' hereafter succeed, in virtue of any deed made by her said father to her, or  
' to any other of his children.' And further, 'she makes her said husband and  
' his foresaids, her cessioners and assignees in and to all debts due to her, and

in and to the whole writs concerning the subjects before disposed, both heritable and moveable; and all and every other writ conceived, or which may be interpreted to be conceived, in favours of her the said Janet.'

About a month after this contract of marriage, Provost Macreadie assigned a bond of L. 500 to Janet and Margaret Macreadies, his then only surviving daughters, 'equally between them; and failing either of them by decease, without heirs of their bodies, or conveyance in a contract of marriage, to the survivors of them.' And in the same deed he made his said daughters his executors and universal legataries. After Provost Macreadie's death, Janet, upon a recital of her said contract of marriage conveyed to her husband her half of her father's executry, and also of the said bond of L. 500. Soon thereafter she died without issue, and her husband died after her.

Margaret Macreadie assigned the whole sum in the bond of L. 500 to Andrew Macreadie her brother, and soon thereafter she died. After her death a competition arose between the said Andrew Macreadie and the executors of James Macfadzean, for Janet Macreadie's half of the bond of L. 500.

*Argued* for Andrew Macready; That the mutual substitution of the two sisters in the assignation to that bond, in case of their dying without heirs of their bodies, or conveyance in a contract of marriage, barred both of them from gratuitous alienation.

*Answered* for the Executors of James Macfadzean; *imo*, The contract of marriage expressly contains *acquirenda* in heritable subjects, and the words of it cannot well be taken in a more limited sense as to moveables; therefore, that contract alone must carry Janet's half of this bond. The Provost must undoubtedly have considered the contract in this light; for he could never mean to disable Janet, to dispose of this sum, unless her husband should die and she should marry again; this would have been to put Janet, who had married with his consent, in a worse situation than Margaret, who was unmarried, and who might make an unequal match.

*2do*, The substitution of the two sisters is simple, and each of them is made fiar of one half of the bond. The case is very different from such where there is a clause of return to the granter.

The COURT did not seem to lay any stress upon the general assignation in Janet's contract of marriage, but considered her after conveyance to her husband as gratuitous. They held, that the mutual substitution of the daughters implied a limitation on them not to alien; and that it was plain the father meant this, by his making the exception of alienating in a contract of marriage; for, *inclusio unius est exclusio alterius*. In the next place, as Janet was married when the father made this limitation, it was also plain, he did not intend the sum should go to her husband in the marriage then subsisting. This would imply a contradiction in the substitution; for how could there be a substitution of Margaret to Janet, if Janet's sum was intended to be instantly conveyed to her then husband?

No 56.

at the date of the bond, under a prohibition to alienate, *except in a contract of marriage*, could not be disappointed by the married daughter's general disposition in her prior contract of marriage, of all heritage acquired, nor by her posterior gratuitous alienation to her husband.

No 56.

'THE LORDS preferred Andrew Macreadie as assignee by his sister Margaret to the whole sum in the bond in question.'

Act. *Alex. Boswell.*Alt. *And. Macdowall.*Clerk, *Kirkpatrick.**Fol. Dic. v. 3. p. 216. Fac. Col. No 34. p. 54.*1752. *December 22.*LIEUTENANT WAUCHOPE *against* JOHN GIBSON of Durie.

No 57.

In bonds of provision to children, a simple substitution of one child to another does not bar gratuitous alienation.

By contract of marriage, dated 1713, betwixt the deceased Alexander Gibson of Durie and Elizabeth Stewart his second wife; the former became bound to provide and secure to the children of the marriage, if three or more, 20,000 merks, to be divided by the father, and payable at the first term after his decease; which sums are declared to be in full contentation and satisfaction of their legitim, &c.

Of this marriage, there was issue four children, viz. Alexander, Anne, Cecil, and Mary; all of whom survived their father.

In 1727, Durie made a total settlement of his estate in favour of John Gibson the defender, his eldest son by the first marriage; and, of the same date, he executed a bond of provision, in favour of the four children of the second marriage; by which, upon the narrative of their being yet unprovided, he became bound to pay to each of Alexander and Anne, 6000 merks, and to each of Cecil and Mary, 5000 merks at the first term after his decease; and, failing any of the said children by decease, without lawful issue of their own bodies, the one half of such child's portion is declared to pertain and belong to the said John Gibson, and the other half to be equally divided among the surviving children; declaring the same to be in full satisfaction to the said children, of all executry, portion natural, and bairns part of gear, they can ask or claim by his decease; but reserving to himself power to revoke or alter, &c. Durie also granted an additional bond of provision, dated in 1728; wherein he recites the bond 1727, and that the annualrent of the portions granted to his younger children would not be sufficient for their education and maintenance, therefore settled an annuity of L. 100 Scots, over and above the annualrents of their portions. Soon thereafter Durie died. Alexander and Cecil died soon after him. Mary, by her testament and assignation, made over to her only surviving sister Anne, wife of the pursuer, her whole effects; and particularly the 5000 merks contained in the bond 1727.

After Mary's death, the pursuer, under the right of Anne his wife, brought his action against John Gibson the defender, and claimed, *1mo*, The 20,000 merks provided in the contract of marriage; *2do*, The 5000 merks provided to Mary by the bond 1727, and by her conveyed to his wife.