

APPENDIX.

PART I.

IMPLIED WILL.

1800. December 3.

JANET and ANN FLEMINGS, *against* JOHN FLEMING.

JOHN FLEMING, in 1770, obtained a lease of the farm of Bathgate Mill, for thirty eight years, from the Earl of Hopetoun, which, at the tenant's request, was granted to "John Fleming, and after his decease, to his heirs, procreated or to be procreated between him and Christian Wardrobe his second and present spouse; whom failing, to the said John Fleming, his heirs whatsoever, secluding all assignees and subtenants, legal and conventional."

John Fleming had three children by his second marriage, John, Janet, and Ann.

In 1798, John Fleming executed a disposition and settlement, which proceeded on the narrative, that he had already sufficiently provided for the only surviving child of his first marriage; and therefore he "gave, granted, disposed, assigned and made over, to the three children before mentioned of his second marriage, equally among them, share and share alike, and their respective heirs and assignees, all and sundry moveable goods, gear, stocking, crop, plenishing, debts and sums of money, presently pertaining and belonging, or owing and addebted to me, or which shall pertain and belong, or be owing and addebted me at the time of my death; as also, all and sundry lands, houses, and other heritable subjects and debts which shall belong or be owing and addebted to me, with the vouchers and instructions of the foresaid debts, and all that has followed or may be competent to follow thereon; dispensing with the generality of the said disposition and assignation, and admitting and declaring the same to be as valid and effectual, as if every subject and debt, heritable and moveable, hereby generally assigned and disposed, were herein particularly mentioned."

No. 1.

A landlord, at the lessee's request, having granted a lease to a particular series of heirs, the destination in the lease was found not to be affected by a subsequent general settlement executed by the lessee.

No. 1. John Fleming died soon after executing this settlement; and his daughters, conceiving that it gave them a right to two-thirds of the lease of Bathgate Mill, if the landlord's consent, to pass from that clause of it which excluded assignees, could be obtained, they made application to this effect to Mr. Keith, Lord Hopetoun's trustee and commissioner, who granted the following missive:

“ 13th March 1799.

“ As trustee for the Earl of Hopetoun, I agree to join as consenter in a sub-
 “ set of the farm and mill of Bathgate, which was held by the within-men-
 “ tioned John Fleming, now deceased, under lease from his Lordship, pro-
 “ vided the tenant is such as his Lordship shall approve of; and the heirs of
 “ the said John Fleming remaining jointly bound with the subtenant for the
 “ rent, and thereby to give effect to the said settlement, so far as regards the
 “ said lease. (Signed) WILLIAM KEITH.”

John Fleming, the son, notwithstanding these pretensions on the part of his sisters, having remained in the farm, and refused to communicate to them the benefit of the lease, they brought an action of declarator, division, and removing against him, on the footing that the lease fell under the father's general disposition. In defence, the brother

Pleaded: *1st*, From the terms in which John Fleming *senior* took the destination of the lease, it was indisputably his purpose that it should devolve exclusively on the defender, nor was it possible for him to alter this destination, without having previously obtained the consent of the landlord to his assigning the lease. This, therefore, being a *questio voluntatis*, and as every man must be understood to act and will only to the extent of his powers, it cannot be presumed that the defender's father meant that the lease should fall under his general disposition.

2dly, It is a general rule of interpretation, that where a subject stands specially destined to a particular series of heirs, that destination is not to be held as altered or revoked, by a subsequent general settlement, which will be held to carry only such subjects as have not been otherwise settled by the granter; Decision of the House of Lords, 21st May 1783, in the case, 25th February 1783, Dundas against Dundas, No. 124. p. 15585.

Answered; *1st*, The settlement is a rational one; and Lord Hopetoun having, in other cases, allowed effect to settlements *inter familiam* executed by his tenants, the granter, in this case, had no reason to apprehend that it would be disputed by his Lordship, and the right of challenge, to all others, is *jus tertii*. There is no room, therefore, for presuming, that old Fleming did not mean to convey the lease on account of this supposed want of power.

2dly, When a person sits down to execute a general settlement, he must be understood to take a survey of his whole property, and to fix in his mind the shares in which he wishes it to devolve on his family. The just presumption

seems, therefore, to be, that all the granter's property, even those subjects which may have formerly been subject to special gratuitous destinations, must be held as included, unless they are specially excepted.

The Lord Ordinary pronounced the following judgment: " Finds, That the disposition 1798, by the deceased John Fleming, contains words sufficient to comprehend a conveyance of the lease in question, and that there are no sufficient grounds alleged for holding that the lease was meant to be excepted from the general conveyance contained in said disposition: Finds, That the said conveyance of the lease must be effectual in a question between the pursuers and defender, unless the proprietor were to institute a challenge of the disposition 1798: Finds, that the lease is therefore to be considered as a common property belonging to these parties; but that, as it cannot be divided, alienated, or subject, without occasioning just grounds of dissatisfaction and of challenge to the proprietor, sustains the defences *hac statu* against the conclusions for any such measure: Finds, That the subject set must be managed at the common expense, for the common behoof, and by a person agreeable to the majority of those having interest, and against whom no reasonable objection can be made by the minority; so that the defender cannot continue sole manager against the will of the pursuers: Ordains the parties, in eight days, to suggest severally a person they deem fit for being manager, and the defender, within the same space, to lodge the accounts of his bygone management."

On advising a reclaiming petition, with answers, some of the Judges entered into the views of the Lord Ordinary; but the Court, by a great majority, and on the ground that a special destination of a particular subject is not affected by a posterior general settlement, altered his Lordship's interlocutor, and sustained the defences.

Lord Ordinary, *Meadowbank*.

Act. *Cathcart*.

Alt. *Hope*.

Clerk, *Pringle*.

R. D.

Fac. Coll. No. 203, p. 468.

1801. *January 22.*

ANDREW SOUTAR *against* THOMAS MACGRUGAR and Others.

ANN SOUTAR executed a settlement, by which she conveyed her whole property to Thomas Macgrugar and two other persons, and to the acceptor or survivor of them as her trustees.

The granter had an only son, who, prior to the date of the deed, it was rumoured, had died in America. By her settlement she accordingly directed her trustees, after paying her debts and funeral expenses, to pay and deliver the whole residue of her fortune to her son, if he should be heard of within a year after her death; but, in the event of his not appearing, she appointed a variety of legacies to be paid to her relations, amounting in all to £400 Sterling.

No. 1.

No. 2.

A woman having executed a settlement, conveying her whole fortune to trustees, and afterward directing them to pay certain legacies, but without mentioning how