

1666. *February 24.* ARDROSS *against* The LAIRD of TOUCH and AGNESS DUNDASS.

IN a double pointing raised at Ardross's instance, against the Laird of Touch, on the one part, and Agness Dundass, heir served and retoured to Mr Hary Mauld, Elder and Younger, on the other part; anent a debt of 8000 merks, owing by Ardross to Mr Hary Mauld, Elder; and which bond, after Mr Hary's decease, was renewed in favours of Grizel Seaton, his relict, and the former bond retired; who did assign the same in favours of Touch:—In this double pointing there was produced, for Agness Dundass, her service as heir to the said Mr Hary Mauld, with a decreet recovered against Ardross in absence.

It was ANSWERED for Touch, That he ought to be preferred: *1mo.* In respect that Ardross was debtor to him in the sum charged for, conform to his bond granted to Grizzell Seattoun, his cedent. *2do.* Albeit Ardross had been debtor, by a former bond, to Mr Hary Mauld, yet he, by his testament, had left the heir half of the said sum, *viz.* 4000 merks to his daughter Elizabeth, who was thereafter married to Touch; and, consequently, who had right to the legacy *jure mariti*: and the just half of the said sum to his daughter Anna Mauld; who having deceased before Elizabeth, her part did belong to the said Elizabeth, as to her nearest of kin, and so to Touch, upon the former ground.

To which it was ANSWERED, *1mo.* That the bond granted by Ardross to Grizzell Seattoun, meets not with Agness Dundass her decreet and charge, which is for a debt due by Ardross to Mr Hary Mauld, to whom she is heir. And, as to the second, Ought to be repelled, because *non constat* that the debt due by Ardross was moveable; and it is rather presumed to have been heritable, and so to belong to the said Agness Dundass, as heir specially to the said Grizzell Seattoun; and Touch having fraudulently retired and concealed the same, of purpose to prejudge the said Agness. *2do.* Mr Hary Mauld's testament produced, being dated *in anno* 1648, and contained the legacies of Ardross's sum, was never confirmed; but on the contrary, Grizzell Seattoun, who, albeit she be nominated executrix, yet did thereafter confirm her executrix dative, and misken the said nomination. *3tio.* The testament is null wanting witnesses. *4to.* Albeit the testament could be sustained, yet it could only give Touch a right to the sum of 4000 merks, which was left to Elizabeth his spouse, and not to the other half of the sum left to Anna Mauld; in respect, albeit Elizabeth Mauld was nearest of kin to Anna Mauld, yet she was never confirmed executrix to her; and consequently the defender, being now nearest of kin to the said Anna, and who shall produce her confirmation before sentence, has right to Anna Mauld her part of the said sums.

The Lords preferred Touch for the one half of Ardross's money, and the nearest of kin, Agness Dundass, to the other half, belonging to Anna Mauld, in respect that Elizabeth was not confirmed executrix to her sister.

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1666. *February 24.* The LAIRD of WEMYSS *against* DUNCAN MENZIES of CONVIE.

IN a pursuit at the instance of the Laird of Wemyss against Duncan Menzies