

1724. July 3.

Mr FRANCIS WAUCHOP of Kackmure, Advocate, *against* WILLIAM WILSON,
Merchant in Edinburgh.

WILLIAM WILSON, the defender's grandfather, in his latter will and testament, *anno* 1659, named his infant sons his executors and universal legatars; and appointed his wife, and some other friends, tutors to the children.

In this testament, he left 20 merks yearly to his sister Margaret, during her lifetime, and likewise a very considerable legacy to his wife, which he expressly burdened with the payment of all his debts, and of the annual legacy to his sister; and the wife subscribed the testament with the husband.

Anno 1661, the tutors confirmed the testament; and the merchant goods, and others bequeathed to the wife, were given up in inventory.

Mr Wauchop having acquired right to Margaret's legacy, insisted against Mr Wilson, as representing his father and uncle, the executors, upon the passive titles, for payment of the annual legacy, due for many years; and *contended*, That an executor was obliged to execute the testament, by paying the debts and legacies, so far as the inventory does extend; and, in this case, the testament was confirmed in name of the children, and the goods, and others specially legate to the wife, were given up in inventory; and, therefore, the defender ought to be liable in payment of this legacy, which was a burden upon the wife's; *2do*, That legacies, especially to near relations, were so favourable, that, should a testator legate a *res aliena*, the executors would be obliged to purchase it for the behoof of the legatar; *3tio*, That, in this testament, the relict was burdened with the payment of his debts as well as legacies; and, as the creditors would have action against the executors, and not be left to make out their payment from the relict, so must the pursuer, whose claim was equally a burden on the executry; and, as to them both, the obligation upon the relict was no more than an accessory security.

It was *argued* for the defender, That, when a special legacy is appointed to be paid out of a particular fund, the executors cannot be liable, if the subjects should perish; because, the legatar ought to have secured himself, before the fund of his payment was dilapidated; and though, in the present case, the executors had confirmed the relict's legacy, (which was occasioned from the custom at that time, that the Commissaries would not admit of a partial confirmation,) yet she continued in possession of the goods, and for some years regularly paid the legacy pursued for, which appeared from a discharge in process.

As to the argument from a *legatum rei alienæ*, and from the relict's being burdened with the payment of debts, it was *answered*, That the first could not be regarded, unless the pursuer could allege, that the testator had not left

No 21.

When a special legacy is appointed to be paid out of a particular fund, the executors are not liable if the subject should perish.

No 21. as much to his relict as would have paid this and the other legacies ; nor could the second, because, debts became a burden *ex lege*, and the debtor's whole effects are subject to the payment of them ; whereas, legacies are only *ex voluntate testatoris*, and the rules prescribed by him are precisely to be observed, and they payable out of such funds as he had allotted for them.

THE LORDS having considered the discharge produced, granted by the pursuer's author to the relict, assoilzied the defender.

Act. *Ipsc.*

Alt. *Jo. Horn.*

Edgar, p. 67.

1736. February 6.

Competition, MARGARET HAMILTON with Mr WILLIAM GRANT, Advocate.

No 22.
A legacy of a bond of corroboration found to have been derogated from by a posterior legacy of another bond, which made part of the first.

THE deceased Mr George Meldrum was creditor to Duncan of Straithmartin by a bond, dated 11th December 1702, for the sum of L. 520 Scots ; and, on the 24th of June 1704, Straithmartin granted an heritable bond of corroboration for this, and other sums he was then due to Meldrum, extending to L. 1250 Scots. Meldrum, in the settlement of his effects, disposed to Justice Meldrum, his nephew, the sum of L. 1250 Scots, in the following terms :
' *Item*, to the said Justice Meldrum, the sum of L. 1250 money foresaid, annualrents thereof, bygone and to come, liquidate expenses, and termly fail-zies, contained in an heritable bond, granted by Alexander Duncan of Straithmartin to me, dated 24th June 1704, and in my sasine following thereon.'

After which, follow three or four legacies to other persons ; and then the following one is subjoined ; *Item*, to William Grant, second son to Sir Francis Grant of Cullen, my nephew, L. 520 Scots principal, annualrents thereof, bygone and in time coming ; and L. 150 of penalty, contained in another bond, granted by the said Alexander Duncan of Straithmartin to me, dated 11th December 1702.'

As the heritable bond of corroboration for the L. 1250 happened to be made up in part of the L. 520 Scots bond, a competition ensued betwixt Margaret Hamilton, as coming in the right of the deceased Justice Meldrum, her husband, and Mr Grant.

For Margaret Hamilton it was *pleaded*, That the whole sum of L. 1250, contained in the heritable bond of corroboration, was, by the testator, specially made over to her husband, without any restriction ; therefore, the subsequent legacy to Mr Grant, of another bond of L. 520, could have no effect, since none such appears, other than that of the same date and sum, which is corroborated by the heritable bond assigned to Justice Meldrum. Further, it was plain, from the words of the legacy to Mr Grant, that the testator believed he had a bond due to him by Straithmartin, other than that which in part