

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

composed the L. 1250; as the adjection of the word *another* shows that he supposed the one of which he was then speaking to be a quite different debt from any of those contained in the heritable bond: So that the legacy to Mr Grant carried in it the implied condition of a debt being due to the testator by Straithmartin, other than the L. 1250, the non-existence of which must void the legacy, conform to *L. 75. § 1. and 2. De Leg.* nor does it make any difference, that Straithmartin was truly owing L. 520 Scots, by a moveable bond, of the date described in the settlement; seeing, in the preceding part thereof, it was bequeathed to her husband, as part of the L. 1250; from which there is no reason to presume an intention to make any derogation.

On the other hand, it was *argued* for Mr Grant, That the assignation in his favour was as express and particular as any other in the settlement; a proof that it was intended to leave this bond to him, which was then in the testator's hands, as well as the corroborative bond; therefore, he ought to be preferred to the general assignation of an accessory corroborative security, containing several other sums in favour of Justice Meldrum; as it must, in so far, be understood to be restricted by the subsequent special legacy of one of these sums to him, agreeable to the doctrine laid down in *L. 2. pr. D. De Trit. vin. vol. ol. legat.* and *L. 99. § ult. De Legat.* 3.

Besides, it is a rule, that, where the accessories are legated to one, and the principal subjects to another, the first must vanish in competition with the last; as is plain from § 17. *Inst. De Legatis.* The application whereof to the present question must have the greater force, when it is considered, that his legacy is posterior in order to Justice Meldrum's; which, as it might have been annulled or restricted by a subsequent writing, so there appears no reason why the donor could not do it in the same deed.

As to the argument drawn from the adjection of the word *another*, it was *answered, imo*, That it must be supposed to refer to the bond mentioned in the immediate preceding clause, which was another bond due to the testator, though by a different debtor.

2do, Esto it referred to Straithmartin's, it is no evidence the testator believed that this L. 520 Scots bond was not corroborated by the heritable one. And, abstracting from the general presumption, that every man knows the state of his own effects, it is plain, from the particular recital of debts and sums in the settlement, that he knew the one was corroborated by the other; consistent with which he might properly call it *another bond*, as they were two separate deeds; and, if he knew it, the second bequeathment can bear no other meaning but a restriction in part of the former.

THE LORDS preferred Mr William Grant to the bond of L. 520 Scots, principal, &c. and upon the heritable bond of corroboration, in so far as relates thereto.