

husband should be distressed for his wife's debt, contracted before the marriage, which should exceed any tocher received by him.—THE LORDS did find, that there is a great difference where a woman, in a contract, is obliged to pay a sum of money, and to enter her husband to the possession of particular goods and gear, extending to a value in money; for, in the *first* case, the parties having lived long together, albeit the wife had gotten no discharge, it was not sufficient to prejudice her of her liferent; but, in this case, she affirming that she had goods and gear to a certain value, and they being condescended on, it being offered to be proved that they were evicted, and did belong to the children of the first marriage; they found, that she ought to condescend and prove that she had real goods in her own possession, and that the allegiance of eviction of the same goods was relevant to take away the title of executrix creditrix, whereby a lawful creditor of her husband was prejudged, and so she could only have a right to a half, or a third, of the free gear *deductis debitis*.

*Gosford, MS. No 960. p. 411.*

No 336.

1733. July 13.

SHEARER *against* SOMERVILLE.

A BARGAIN made betwixt husband and wife during the marriage, whereby their contract of marriage was past from, and the longest liver to bruik all, was found onerous, and not revocable as *donatio inter virum et uxorem*. See APPENDIX.

*Fol. Dic. v. 1. p. 410.*

No 337.

1749. January 17.

CAMPBELL *against* CAMPBELL'S TRUSTEES and STEWART of Binny.

MR ARCHIBALD CAMPBELL minister of Weem, by his contract of marriage, 17th December 1716, with Anne Stewart, became bound to settle 6000 merks on himself and her in conjunct fee and liferent; disposing to her, in case of her survivancy, his whole household-plenishing and silver plate, including heirship moveables; and if there should be no heir of the marriage, the fee of 2000 merks; for which causes, she disposed to themselves in conjunct fee and liferent, and to the children of the marriage, whom failing, to her nearest heirs, heritable subjects to the amount of 6200 merks; and her liferent right of a house in the town and 21 acres in the parish of Dalkeith.

Mr Campbell made an assignation, 5th February 1736, of certain special sums, and in general of his whole effects, to Trustees for the behoof of the schoolmaster of Weem, and of five other schools to be erected within the parish; providing that all the remanent money (after satisfying certain special

No 338.

Mutual contract between husband and wife not revocable.

No 338.

' legacies) should be secured for the use of the said schoolmasters;' in the *first* place, for such an augmentation as the Trustees should think proper of the schoolmaster of Weem's salary; and *next*, for an annual rent effecting to 2000 merks to each of the others; the deficiency, if his estate fell short, to fall on the last in order as named; reserving power to alter; excepting from the assignation 2000 merks and his household plenishing, which he had settled on his wife; and burdening it with her life rent right of his whole effects, and with certain special legacies.

Of the same date with this mortification an agreement was entered into by the spouses, by which he made the said settlement of life rent, and of the 2000 merks and household plenishing; and she accepted thereof, and disposed to her husband all the provisions in the contract of marriage, and all debts heritable and moveable belonging to her.

Mr Campbell and his wife, 23d June 1738, revoked the settlement on two of the schools, and on that of Weem; and, 9th July 1740, he conveyed to a gentleman his own bond for 5000 merks, and obliged himself to pay him 1000 merks more, the whole subject to his own and wife's life rent, for the use of the subsisting schools; and assigned certain sums to the amount of about L. 78 Sterling to his wife, in corroboration of the provisions in the contract 1736, and conveyed to her and two others, under the burden of her life rent, and the legacies in the first disposition, his whole effects, except the above 6000 merks, declaring that if these deeds should not prove effectual for conveying his heritable subjects, the first mortification should subsist, as a corroborative security for supporting the last mortification to the three schools.

Mrs Campbell died 1745, after which a reduction of these last deeds, on the head of death-bed, in so far as the subjects disposed were heritable, and incapacity at the time of executing, was pursued by Archibald Campbell, nephew and heir, and one of the nearest of kin of Mr Campbell.

*Answered*, The pursuer is barred from reducing on death-bed by the deed 1736, and the disponent was abundantly capable.

*Replied*, The mortification in favour of three of the schools being revoked, it cannot be pretended the sums once settled upon them could be retained by the Trustees, or yet fell to the other schools, they must therefore belong to Mr Campbell's legal representatives.

THE LORDS, 7th December 1748, " found the reasons of reduction on the head of death-bed relevant and proved; and found that the heir was not excluded by the deed in the year 1736, and the revocation in the year 1738, from reducing the deeds in question; but found that the 6000 merks behoved first to be secured for the benefit of the schools, and that the remainder ought to belong to the pursuer as heir and executor."

On a petition and answers, and a petition from Stewart of Binny, executor for Mrs Campbell, shewing that she had been lesed by the agreement 1736, and had in her power, during her life, to have revoked the donations thereby made

to her husband, which she had omitted to do during his life, out of apprehension of displeasing him, and after his death, on consideration of the settlements in her favour in the last deeds; and therefore these ought not to be reduced to the prejudice of her executor, or else he ought to be allowed to recur to the stipulations in her contract of marriage.

*Answered*, That she had not revoked, either before the execution of the reducible deeds in her husband's lifetime, or afterwards; and she could not be allowed to take advantage of these deeds, on pretence that she had not revoked in consideration of them, considering the proof of the incapacity, and of the share she had in eliciting them.

“ THE LORDS adhered, and refused Binny's petition.”

Act. R. Dundas.

Alt. J. Ferguson.

Clerk, Kirkpatrick.

*Fol. Dic. v. 3. p. 287. D. Falconer, v. 2. No 43. p. 40.*

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SECT. V.

Whether Liferent Provisions to Wives *stante matrimonio* be revocable.

1623. February 12. WALLACE against M'DOUGAL.

IN an action of registration pursued by Wallace *contra* M'Dougal, of a bond given by M'Dougal to Wallace, obliging the debtor to pay the sum at a certain term, and failing of payment thereof, to pay annualrent therefor to the creditor and to his wife, and to the longest liver of them two, and after their decease to the heir of the husband; the husband being dead before the term of payment in the bond, this bond being desired to be registrated at the instance of the heir of the defunct, and at the instance of the husband's relict, to whom the liferent was conditioned by the bond, against the debtor;—the LORDS found, that it ought not to be registrated at their instance, seeing the man died before the term of payment, and so the sums remained moveable, and never became heritable by the foresaid clause, and consequently that the same would belong to his executors, and not to the heir nor relict.

Clerk, Hay.

*Durie, p. 45.*