

1749. July 12.

The TRUSTEES of DOCTOR FRASER *against* FRASER of Phopachy.

ANDREW AUCHINLECK of Conachy, and Mr Thomas his brother, granted bond to Dr William Fraser of Phopachy for 2000 merks; and, in the same deed, Mr Thomas assigned to the creditor, in security, as much of 4300 merks, and annualrents that should arise thereon, due to him, heritably secured, as should pay the said 2000 merks and annualrents.

Dr Fraser conveyed his moveable estate to trustees, for certain uses; between whom and William Fraser of Phopachy his heir, there arose a competition for this 2000 merks; the one *arguing*, that it was due by a moveable bond; and the other, that an heritable debt was assigned in security of it.

THE LORD ORDINARY, 29th June, "found the sum heritable." And THE LORDS refused a bill, and adhered.

Petit. *A. Macdowall.*

*Fol. Dic. v. 3. p. 267. D. Falconer, v. 2. No 84. p. 91.*

1757. November 15.

GEORGE FULLARTON of Bartonholm, *against* CHARLES SCOT of Bavelaw.

WILLIAM SCOT of Bavelaw having died in the 1691 without issue, the succession of his heritable estate devolved upon Charles Scot of Bavelaw, his brother; and the right to his executry fell to his five sisters; four of whom were married, and one of them, viz. Agnes, to Adam Fullarton of Bartonholm.

Charles Scot, soon after his brother's death, with consent, as it would seem, of his sisters, confirmed himself executor to his brother; and, *inter alia*, gave up L. 2820 Scots, as the bygone annualrents of two bonds which had been granted to William Scot, secluding his executors, for L. 1000 each, by Richard Lauder of Hatton; and having afterwards made up titles, by general service, to these two bonds, led an adjudication, in 1694, against the estate of Lauderdale, for payment of the accumulated sum of L. 5524 Scots.

In 1695, Charles Scot entered into a contract with his sisters, and their respective husbands; whereby, upon a narrative of his brother William's having intended to divide 4000 merks in different proportions therein named, amongst him and his sisters; which intention he was willing to fulfil; he therefore assigned and disposed to his said sisters certain debts therein specified, partly heritable, partly moveable; particularly the foresaid two bonds due by Lauder of Hatton, to be divided amongst them, according to the proportions mentioned in the deed, deducting the expense that might be laid out by him in recovering the same. On the other hand, the sisters and their husbands renounced, in favour of Charles, all right they might have to the office of executry, or to

No 59.

A sum due by a moveable bond, but in security of which, the debtor had assigned a corresponding part of a larger sum, due by an heritable bond, was found heritable.

No 60.

A supervenient heritable security or adjudication for a moveable debt due to a wife, does not so far alter the nature of the debt as to exclude the husband's *jus mariti*, or after the wife's death to transmit the debt to her heir in prejudice of her husband.

No 60. the moveables of William, accepted of the said division in lieu thereof, and empowered Charles to prosecute all necessary diligence for recovery of the above debts; with a proviso, That what further should be recovered, beyond the extent of the 4000 merks, should be divided according to the same proportions.

In 1701, Charles Scot disposed those debts mentioned in the contract 1695 to Sir Alexander Brand, Mr Michael Lumisden, and Adam Fullarton, (the husbands of his three sisters), their heirs and assignees, to the end they might recover the foresaid sums, and divide the same according to the proportions mentioned.

Soon after this Charles Scot died, and was succeeded by William Scot of Bavelaw, advocate, his son and heir.

The trustees above named, by virtue of the conveyance from Charles Scot, having taken measures with regard to all the debts contained in the contract 1695, (excepting the two debts due by Lauder of Hatton), in 1708 made a division of the sums recovered, according to the proportions mentioned in the contract 1695.

About the year 1720, William Scot, as in right of Charles his father, brought an adjudication against the Earl of Lauderdale, for payment of the foresaid two bonds due by Lauder of Hatton; and the Earl of Lauderdale having proposed to transact this debt, by granting his bond of corroboration for the same, William Scot, in order to entitle him to make the transaction, entered into a contract with the several parties interested in this debt, viz. the Representatives of his aunts, and particularly Robert Fullarton writer to the signet, as factor for William Fullarton of Bartonholm, only son of the above-named Adam Fullarton and Agnes Scot; and from them obtained a commission, empowering him to transact with the Earl, and accept of the bond of corroboration. This contract proceeds upon a recital of the agreement 1695; and a particular clause is added, whereby it is agreed, That the sum for which the Earl was to grant bond, should be divided into certain proportions, agreeable to the rights arising from the former contract; particularly 'two eighth parts are declared to appertain to William Fullarton of Bartonholm, as deriving right, by progress, from Agnes Scot his mother.'

In consequence of this contract and commission, the Earl of Lauderdale granted his bond of corroboration to the said William Scot for the principal sum and annualrents contained in the foresaid two bonds, accumulated into the principal sum of L. 7638 Scots, payable at the term of Whitsunday 1720; and William Scot, upon receiving payment of the annualrents due thereon, divided the same among the parties having right, conform to their several interests.

The Earl of Lauderdale having failed in payment of this bond, William Scot proceeded in his adjudication; and, in the 1729, obtained a decret of adjudication against the Earl's estate for the accumulated sum therein mentioned. And thereafter Laurence Scot of Bavelaw, the son and heir of the said William

Scot, with concurrence of the other parties above mentioned interested in this debt, received payment of an agreed sum from the present Earl of Lauderdale, in satisfaction of the debt.

The said Robert Fullarton writer to the signet, as having right by a general disposition from William Fullarton of Bartonholm, brought an action against the said Laurence Scot of Bavelaw, for payment of William Fullarton's proportion of the sums paid by the Earl of Lauderdale; and Laurence Scot having brought a multiplepinding against all parties concerned, *pleaded*, by way of defence, That this debt due from the family of Lauderdale, having been rendered heritable by the adjudication in 1694, led by Charles Scot of Bavelaw, the proportion thereof assigned to Agnes Scot by the contract 1695, did not fall to Adam Fullarton, her husband, *jure mariti*, but belonged to herself, and descended to her heirs; and that as no title by service had been made up to her by the said William Fullarton her son, the pursuer's author, it now descended to Laurence Scot, the defender himself, as her heir; and that he had right to retain the same.

Both parties died during the dependence, and the process was renewed betwixt the pursuer and defender.

*Pleaded* for the pursuer; *1mo*, The claims competent to Charles Scot's sisters before the contract 1695, being such as fell to their husbands *jure mariti*, the nature of them was not altered by the contract 1695, which was only intended to make those claims effectual, and not to alter or impair the rights of the husbands; and therefore that Agnes Scot's share in that contract belonged to Adam Fullarton her husband, and afterwards to William Fullarton, as executor to his father. *2do*, That the right vested in Agnes Scot by the contract 1695, to call Charles Scot to account for the payments he should recover out of the debts mentioned in that contract, was a personal and moveable right, and not an heritable right; and therefore that that right was vested in William Fullarton her son, both by the contract 1720, whereby William Scot became bound to pay her share to William Fullarton, and by William Fullarton's having been confirmed executor to his mother. *3tio*, That William Scot having, by the contract 1720, become explicitly bound to pay his share of the Earl of Lauderdale's debt to William Fullarton, as having right thereto, could not afterwards object to William Fullarton's right; and that this objection is as little competent to the defender, the heir and representative of William Scot.

*Answered* for the defender; The principle upon which the whole of the pursuer's argument is built is not well founded, viz. That an accessory heritable security taken, or the acquisition of an heritable estate made, after marriage, for a debt due to the wife simply, moveable, and falling under the husband's *jus mariti*, would not exclude the husband's right. For, if a husband and wife concur in taking an heritable security for a legacy, or purchasing in her name an heritable estate, with any debt falling *sub jure mariti*, it is clear, that the husband's consent to convert such debt into an heritable estate, must, in the eye of the

No 60. law, be held a donation or gift on his part ; which, though it might be revoked by him, or reduced by his creditors ; yet, if not revoked or reduced, must stand good, and the heritable right descend to the heirs of the wife, and not to the executors of the husband.

*Observed* on the Bench ; The legacy intended by William Scot to his sisters in 1691, was plainly the foundation of this claim ; therefore the share of each of the sisters was a subject which would fall under the *jus mariti*, seeing the security granted for it came in place of the legacy, and must be regulated by the same rules. And all the future transactions show, that it was so understood, particularly the commission to Mr William Scot in 1720, which was equivalent to an obligation to pay the proportions there settled.

On the other hand, it was *observed*, That by the express terms of the contract 1695, there appeared to have been no legal claim for a legacy ; therefore the subjects ought to remain, and be regulated according to their proper nature : That the right to those debts was clearly *in hæreditate jacente* of Agnes Scot, at her death, and therefore could not transmit without a service to her, nor could the commission in 1720 dispense with the necessity of making up proper legal titles.

“ THE LORDS preferred George Fullarton pursuer, to Charles Scot defender, for the pursuer’s proportion of the sums paid by the Earl of Lauderdale to Laurence Scot of Bavelaw ; and therefore found the said Charles Scot liable for the sum of L. 217 : 7 : 6d. Sterling, being the pursuer’s proportion of the said sum uplifted from the Earl of Lauderdale.”

Act. Aud. Pringle.

Alt. Montgomery.

Clerk, Home.

G. C.

Fal. Dic. v. 3. p. 267. Fac. Col. No 56. p. 91.

1789. December 4.

No 61.

A legacy declared to be a burden on lands, can be conveyed by a testamentary deed.

MRS AMELIA LAMONT, *against* The CREDITORS of LAUCHLAN and ARCHIBALD LAMONT.

MRS GRIZEL LAMONT, to whom L. 100 had been left, made her last will and settlement, ‘ whereby she bequeathed to her sister Mrs Amelia Lamont, all goods and gear, of whatever denomination, of which she was possessed, or might be possessed at the time of her death.’

The settlement proceeds in the following words : ‘ And whereas I have reason to believe, that Lauchlan Lamont of Auchagoyle, my brother, has made a deed in favour of certain persons ; and in particular, that by the said deed he has burdened his estate with a certain legacy or sum of money to be paid by his heirs, executors, and assignees, to me, my heirs, executors, and assignees ; I therefore hereby declare, by this my last will and testament, the said Mrs Amelia Lamont, my sister, to be my sole heir, executrix, and assignee,