

1766. November 14. ANN FORBES *against* SIR JOHN FORBES, Baronet.

HEIR AND EXECUTOR.

Fund, That a clause in a settlement, binding the heir to pay certain moveable debts, was intended merely for the benefit of the creditors, in case the executry should be insufficient for their payment, but did not entitle the executor, on his paying these debts, to claim relief from the heir.

JOHN Forbes of Knapperny, by Margaret Crawford, his wife, had issue two sons and three daughters. The pursuer, Ann Forbes, was the second daughter.

Margaret Crawford survived her husband and her two sons, but the eldest son left issue, the defender, now Sir John Forbes.

In 1747, Margaret Crawford executed a disposition, whereby she conveyed to her grandson, Sir John Forbes, certain heritable subjects, under this express burden and provision, "That the said John Forbes, my grand-child, and the heirs lawfully to be procreate of his body, or lawful assignees, after majority; whom failing, the other persons before named, succeeding in virtue of the substitution before-mentioned, *shall, by their acceptation hereof, be bound and obliged to content and pay all my just and lawful debts, legacies and funeral charges, and, in particular, the legacies after-mentioned, viz. the sum of 500 merks to Margaret Buchanan my grandchild, &c.*"

In consequence of this disposition, Sir John Forbes, upon his grandmother's death, entered to the possession of the heritable subjects disposed. Her executry fell to be divided among her three daughters.

Jean Forbes, one of the daughters, was confirmed executrix to her mother, and intromitted with her moveables. Out of them she paid debts to the amount of L.94 sterling, and divided the remainder betwixt herself and the other two daughters, in equal portions.

Ann Forbes, one of the daughters, insisted in an action against John Forbes, concluding for relief of the third part of the debts corresponding to her share of the executry. She laid her claim upon the burden and provision above-mentioned.

On the 11th July 1766, the Lord Kennet, Ordinary, assoilyied the defender.

On the 31st July 1766, he "found, that although the said clause gave access to the creditors of Margaret Crawford to pursue Sir John Forbes for payment of her moveable debts, yet it does not lay the burden thereof ultimately upon him, nor oblige him to free Margaret Crawford's executors from paying those debts."

Ann Forbes preferred a reclaiming petition, and *pleaded* that the settlement, by Margaret Crawford, of her heritable subjects upon Sir John Forbes, her grandson, was absolutely gratuitous, and that she meant to burden this gratuitous settlement with the payment of her debts, whereby her small fund of executry might remain entire to her three daughters.

The plea urged by Sir John is, that the debts, being moveable, ought to be paid out of the moveable succession, and that the clause in question imports no more than a security for creditors in case the fund of executry should prove short: That so it was determined, *Russells against Russell*, 23d January, 1745, and *Campbell against Campbell*, 12th June 1747.

To which it is ANSWERED,—That it is not disputed that moveable debts are to be paid out of executry. But this is always upon the supposition that the testator does not will otherwise; but here the testator had no such will concerning the payment of her debts. She did not provide, nor had any occasion to provide, for the security of her creditors. Her creditors were safe, whether their payment was to be operated out of her heritables, or out of her moveable subjects. The two cases quoted for Sir John Forbes do not apply. In the first the clause ran thus,—“ I hereby expressly burden this right and disposition, not only with the payment of my funeral charges,” &c. The other thus,—“ And further, it is hereby expressly provided and declared, that the said Dugal Campbell, &c., shall be holden and obliged to pay the portions and provisions.”

In these two cases the clauses were so conceived as to show that nothing more was meant than an additional security to creditors; and it is to be remarked, that in both these cases the debts were considerable, and the funds of executry small. But here the clause is conceived in words more definite and more obligatory upon the heir, “ *they shall by their acceptance hereof be bound.*” This implies an election offered to the heir, either to repudiate the succession altogether, or to accept it under such condition; and, as the heir has accepted, he must perform the condition, for that condition is a mode of his right.

On the 14th November 1766, the Lords refused the desire of the petition, and adhered to the Ordinary’s interlocutor unanimously.

1766. November 18. WILLIAM GEORGE SIMON DAVID ROSS *against* WILLIAM ROSS, *alias* MONRO.

IRRITANCY.

An heir of entail allowed to purge an irritancy, after an action was brought by the next substitute in the entail for declaring the same.

[*Faculty Collection*, IV. 79; *Dictionary*, 7289.]

ON the 23d May 1722, William Ross of Aldie executed an entail of the lands of Aldie in favour of Simon Ross, his son, and the heirs-male of his body; whom failing, to certain other substitutes.

This entail contains the following proviso,—“ That all the heirs of tailie and provision therein mentioned, and the descendants of their bodies, who shall happen to succeed, according to the said destination, shall be obliged to assume, and constantly use and bear the surname of Ross of Aldie, and arms