

S E C T. III.

Heritable debts due by Husband or Wife.

1664. July 19. SCRIMGEOUR *against* EXECUTORS OF MURRAY.

No 21.

SEEING the relict can have no benefit of heritable debts due to her defunct husband, neither has she detriment by heritable debts due by him; and therefore the heritable debt cannot exhaust the moveables to diminish the relict's part.

Fol. Dic. v. 1. p. 386. Stair.

* * See this case No 4. p. 463.

1668. December 23. MARGARET M'KENZIE *against* ROBERTSONS.

No 22.
The relict's third of moveables is not burdened with bonds due by her husband bearing annualrent.

MARGARET M'KENZIE pursues the executors of her husband to pay her share of the moveables, who *alleged* absolvitor, because there was as much debt as would exhaust the whole moveables. It was *answered, Non relevat*, unless it were alleged that the executors had paid the debt; for the debts being yet due, it is *jus tertii* for them to allege thereupon; neither can this pursuer propone allegiances of payment, compensation, or any other, or the defenders reply upon the debts belonging to third parties, unless they were pursuing themselves; but the pursuer is content to find caution to repeat her share in case they were distrest.

THE LORDS repelled the defence, but prejudice to the executor to suspend on double pointing, calling the creditors.

It was further *alleged* for the defenders, That they must have allowance of sums bearing annualrent since 1641. It was *answered*, That no such sums can burden the relict's part, because, by the act of Parliament, the relict has no share of such sums if they were due to the defunct; and therefore, *a pari*, she cannot be burdened with such sums, being due by the defunct. The defenders *answered*, That the act of Parliament excludes relicts from such sums as bear annualrent, being due to their husbands, but doth not bear, that they shall be free of such sums due by their husbands; and statutes being *stricti juris*, the Lords cannot extend them beyond their sense to like cases. The pursuer *answered*, That the Lords always did, and might explain, and extend acts of Parliament to cases implied, and consequent, albeit not verbatim ex-

prest; and as to this act of Parliament, it bears expressly, that all such bonds shall remain in their condition as they were before the act of Parliament 1641, *quoad fiscum et relictam*, before which the bonds bearing annualrent could not have burdened the relict; for the word, 'such bonds,' may not only be extended to bonds due to defuncts, but to bonds due by defuncts.

THE LORDS repelled also this defence, and found the relict's part not to be burdened with any bonds due by her husband bearing annualrent, unless they had become moveable by a charge, or that the term of payment of the annualrent was not come at the defunct's death.

Fol. Dic. v. 1. p. 386. Stair, v. 1. p. 576.

* * * Gosford reports the same case :

MARGARET M'KENZIE, relict of Gilbert Robertson, did pursue her husband's executors for the third of his moveables, wherein the LORDS found, that as bonds bearing annualrent due to the defunct, by the act of Parliament were heritable *quoad relictam*; so they found, that debts due by the defunct upon bonds bearing annualrent, could not diminish a third of the moveables, but that they should be first paid out of these bonds, which were only heritable *quoad fiscum et relictam*; and that they were not sufficient that they should affect the heir before the relict's third, because, as to payment of such debts, they found that the relict was in that same condition she was in before the act of Parliament.

Gosford, MS. No 73. p. 26.

1696. January 10.

OSBORN against YOUNG and MENZIES.

THE LORDS advised the point debated between Harry Osborn late of Pepper-mill, and Catharine Young, and Menzies, her husband, whether a wife's heritable bond granted before her marriage, and whereof the term of payment of the annualrent was then past, did make the husband personally liable in payment of the same? It was *alleged*, That the marriage was a voluntary novation, whereby *subibat personam mulieris*, and undertook all her debts, and which were compensated by the marital affection to her person, with her fidelity, and other qualifications, having taken her for better and for worse; otherwise women contracting a great deal of debt, might by marriage procure themselves a protection from personal execution, and knowing their husbands would not be liable, they might easily cheat their creditors thereby, and take away their rights, whereas *jus meum mihi invito auferri non potest*. *Answered*, The marriage introduced a communion of goods and debts, but not promiscuously of all, but only of moveable debts and goods; so that as the *jus mariti* reaches no heritable bonds (which in this case are understood to be any bonds bearing annualrent,

No 22.

No 23.

The LORDS found a husband not liable for the principal sums of heritable debts due by his wife, whether heritable by a clause of investment, or by bearing annualrent; but found him liable for the bygone annualrents of the same, and in time coming during the standing of the marriage.