

Case 35. John Murray of Conheath, - - Appellant;
 Forbes,
 16 June
 1710. James Murray his younger Brother, Trustee
 for Elizabeth Maxwell their Mother, - Respondent.

28th July 1715.

Fiar.—The proprietor of an estate, burdened with apprisings, dying, leaves two sisters, whose husbands enter into a submission for themselves, and as taking burden upon them for their wives, with a person who had or appeared to have right to some of these apprisings: by the decret arbitral, they are decreed to be conveyed to the husbands and their wives, the husbands paying the price: the wives were fiars of these apprisings, and not the husbands.

SIR John Maxwell of Conheath, in 1636, made a settlement of his estate to Alexander Maxwell his son, and the heirs male of his body, *quibus deficientibus heredibus suis masculis, successoribus et assignatis quibuscunque.* In terms of this settlement, a charter was taken from the superior, upon which infestment followed.

This Alexander Maxwell left issue a son John, (who died without issue), and two daughters, Elizabeth Maxwell, mother of the appellant and respondent, who married Gilbert Murray their father, and Margaret Maxwell, who married Alexander Maxwell of Park. Various apprisings had been obtained over the lands of Conheath; the rights to some of which were acquired by George Maxwell of Carnfalloch. This George Maxwell having entered to possession, and taken away the charter chest and writings belonging to the estate, the said Gilbert Murray of Urr, and Alexander Maxwell of Park, the husbands of the said Elizabeth and Margaret, whose brother was now dead, for themselves and in name of their wives, commenced an action against George Maxwell of Carnfalloch, before the privy council, complaining of his forcible entry into and possession of the estate, and carrying away the charter chest and writings. Mr. Maxwell was ordered to put the said charter chest and writings into the clerk's hands, but a transaction took place between the parties which put an end to this action.

On the 25th of January 1677, a submission was entered into, which set forth, that the said Gilbert Murray and Maxwell of Park, for themselves, and as taking burden upon them for the said Elizabeth and Margaret, their wives, elected one of the arbiters, and the said George Maxwell elected the other, to whom they referred all actions then depending, or that should arise between the parties concerning the lands of Conheath and the incumbrances thereon. This submission was subscribed by the said Gilbert Murray and Maxwell of Park, the husbands, but not by the wives. On the first of February thereafter the arbiters pronounced their decree, whereby they ordained the said George Maxwell to make over and surrender all the decreets of apprising upon the lauds of Conheath, to which he had any right or title in favour of
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the said Gilbert Murray and Alexander Maxwell, and their wives, equally between them; the said Gilbert Murray and Alexander Maxwell paying 6100 merks Scots to the said George Maxwell, and performing some other conditions contained in the said decree. In obedience thereto the said Elizabeth and Margaret, with consent of their said husbands, by a writing subscribed by them, granted a real security over the said lands for the sum mentioned in the decree arbitral, to the said George Maxwell; but before the transaction was completed in this shape, and before George Maxwell had divested himself of any right in his person to the said lands, Gilbert Murray died. After his death, George Maxwell made over and conveyed the titles in his person to the said Alexander Maxwell, husband to the said Margaret, pursuant to the said decree arbitral, (Margaret having previously, as the respondent states, conveyed her moiety to her husband). The disposition mentions, that the said Alexander had paid the full sum awarded; and reserves one half of the incumbrances to be redeemable by the heirs of the said Gilbert Murray, or by the said Elizabeth his widow, or either of them, who had best right thereto.

In 1695 Elizabeth, the mother, conveyed all her right to the said lands and to the said decree arbitral, to her son, the respondent James, in trust for her own use. In May 1696, the appellant, who was a travelling chapman in England, executed in favour of the respondent James, who was bred to the law, a factory or power of attorney, giving full power to the respondent James to recover, receive, and obtain all lands, tenements, or rents, or any other thing whatsoever pertaining and belonging to the appellant as heir to his father, and to transact and compound all matters relating thereto, with a proviso of being accountable to the appellant; and this factory also mentioned, that it should be without prejudice to the respondent of any acquisitions made or to be made by his own industry.

Soon after the respondent James redeemed an apprising on the said lands in the person of one Maxwell of Miltoun. And he entered into a contract of division with the said Alexander Maxwell of Park, by which the lands of Conheath were divided between them, and the half of the money which had been paid and expended by the said Alexander Maxwell, was repaid to him by the respondent. In this contract the respondent took burden upon himself both for his mother and for the appellant his brother, for any right competent to him.

The appellant afterwards brought an action against the respondent before the Court of Session, to compel him to account for the rents and profits of the said lands from the year 1696, and also to make over to the appellant the decrees of apprising, which the respondent had acquired, and which the appellant contended did descend to himself as heir. After sundry proceedings, relative to the import of the letter of attorney or factory and the decree arbitral, the court, by several subsequent interlocutors, decreed in favour of the appellant.

A petition was afterwards presented in the name of Elizabeth Maxwell, the mother, setting forth that the right she had granted to the respondent was only in trust for her use, and praying that the interlocutors might be reversed at her instance: And at the same time the respondent put in a petition acknowledging his own right to be in trust only; and he insisted upon sundry acts done by his mother, both prior and subsequent to the decree arbitral, inferring her right of fee. The court, on the 10th of July 1713, “found, that the wives of Gilbert Murray and Alexander Maxwell, and not their husbands, were fiars of the apprisings and other rights decreed by the decree arbitral to be conveyed to the husbands and their wives.” Sundry petitions were given in for the appellant, but the court, on the 28th of July and 12th of December 1713, and 23d of July 1714, adhered to their former interlocutor.

Entered,
23 May,
1715.

The appeal was brought from “several interlocutory sentences and affirmances thereof by the Lords of Council and Session, bearing date the 10th and 28th days of July and 12th of December 1713, and 23d of July 1714.”

Heads of the Appellant's Argument.

Though the husbands had no antecedent right before the award, yet they might have purchased the lands or the apprisings that affected the same *Tanquam quilibet*, having on their own personal credit undertaken the price; and the appellant's father having died before the price was paid does not alter the matter, since it was paid thereafter by the appellant, his heir, or by the appellant's trustee, out of the profits of his estate. The husbands entered into the submission for themselves, and as taking burden upon them for their wives, but the wives do not subscribe the same or consent to that agreement; and though the decree arbitral ordains the apprisings to be conveyed to the husbands and their wives; yet it also ordains the husbands to pay the price. By the law of Scotland this will admit of no other interpretation, but that the husbands and their heirs should have the fee, and the wives the life-rent, as in the case of a bond made payable, or deed granted to a husband and wife.

(On the part of the appellant, various other facts are stated as tending to shew that the fee of the estate was not in the wives; but these facts being traversed or denied by the respondent are not here stated on either side).

Heads of the Respondents' Argument.

The husbands signed the submission in name of their wives, and as taking burden for them, and elected the arbiters expressly for their wives; and the sum to be paid is awarded against the husbands and in name of their wives. George Maxwell, too, the party on the other side is ordered to divest himself of all his pretended right, &c. to the husbands and the wives as parties submitters. Though the wives had not hitherto subscribed, yet in pursuance of the decree arbitral, they with consent of their husbands

bands granted a real security for the sum awarded upon the said lands belonging to the wives, and of which they were then in possession. And the husbands, subsequent to the decree arbitral, did acknowledge, in several writings under their hands exhibited to the Lords of Session, and mentioned in the decree, that the property was in the persons of their wives; and in particular the said Alexander Maxwell took a conveyance for his wife before George Maxwell would convey to him, which, if there were any room for doubt, is sufficient to explain and prevent any question as to the property of the said lands. Though the said real security, granted by the wives with their husbands consent, was not accepted of by the creditor, yet it was undeniable evidence of the sense and meaning of the parties. And no part of the money was ever paid by the appellant's father, but on the contrary by the respondent, in name of his mother, as her trustee, and it cannot be pretended that ever the respondent had any of the appellant's money.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutory sentences and affirmances thereof in the said appeal complained of be affirmed.*

Judgment,
28 July,
1715.

For Appellants, *J. Fekyll. W. Lechmere.*
For Respondents, *Tho. Lutwyche. David Dalrymple.*

William Habkin, Belt-maker in Edinburgh, *Appellant*; Case 36.
Roger Hog, Merchant in Edinburgh, - *Respondent.*

19th August 1715.

Annual Rent, Costs, and Expences.—Two tradesmen having contracted to clothe a regiment, and to divide equally under a penalty the sums to be received by virtue of an assignment of off-reckonings delivered to each of them: one of them afterwards receives a new assignment of off-reckonings, and a sum of money from the Treasury, and refusing to pay a balance due to the other, the Court ordained the person receiving the money, which, they found, fell under the first assignment, and their mutual contract, to pay the balance due to the other, which however was restricted to a smaller sum than was claimed: but the Court having refused him damage and interest; upon appeal the judgment is reversed, and the respondent is ordered to pay to the appellant the principal sum found due to him, with the interest thereof, from the time the respondent received the remainder of the money; and the Court is ordered to cause the costs and expences of the appellant in the action to be taxed and ascertained and forthwith paid to him by the respondent.

No specific sum being here awarded, proceedings afterwards upon the complaint of the appellant, relative to the taxing of his expences by the Court of Session, and resolutions and orders of committees and of the House thereon: a sum allowed to the complainant for his subsequent expences, in taxing costs.

IN January 1705, an agreement for cloathing a regiment of guards in Scotland was entered into between Lieutenant-General Ramsay, the Colonel of the regiment, of the one part,