

intromissatrix or executrix, after pursuit moved against them, should be ever liable to the annual thereafter, ay and while payment be made of that which was owing the time of the defunct's decease.

No 39.

Clerk, *Gibson*.*Fol. Dic. v. I. p. 368. Durie, p. 445.*

1632. February 17.

KINNAIRD against YEAMAN.

IN a contract of marriage betwixt umquhile David Yeaman and Margaret Kinnaird, the said David is obliged to employ 2000 merks, received in tocher, with other 3000 merks of his own, to his said spouse in liferent; whereupon, after his decease, his executors being charged to employ the sum at the relict's instance, and to pay to her all the annualrents thereof, of all terms since the husband's decease; which being suspended, that these deeds were only prestable by the heir, specially anent the paying of annualrent since the husband's decease, which they *alleged* was not prestable by the executors, but by the heir of the defunct; as also, that since the contract, the husband had infest the charger in some tenements in Dundee, the yearly mails whereof should be allowed to her *pro tanto* in the first end of the provision of that contract;—THE LORDS found the executors of the defunct subject to the creditor, as well as the heir, both to pay the annualrents since the decease of the husband, who was obliged, as also to employ the principal sum; and that the creditor might convene therefor, either the heir, or executors of the defunct; and therefore, seeing the creditor, viz. the relict, had chosen the executors, the LORDS found them liable thereto, according to the free goods of the testament, which was so found, albeit the executors were the defunct's bairns, and so who ought in law to have not only the naked office as strangers, who are subject to count, and have only a naked administration, but they, being bairns, have also benefit by the executry, and which they alleged ought not to be taken from them, by compelling them to pay heritable debts, which should affect the heir, and not deprive them, not only of the executry, but of all bairns part of gear for these heritable debts, which nevertheless was repelled, seeing the creditors might seek either the heir or executors, without prejudice always to them to seek their relief therefor against the heir *prout de jure*. And it being controverted, if the executors should ever be holden to employ the money to the relict again, how often it should happen to be lifted, as the relict *alleged* ought to be found should be done, the LORDS decided not this point, but ordained the executors once to employ, and when the same should happen to be lifted, and that the question should then arise at the relict's instance for the employment thereof, they should then consider thereof; whereby it may appear, that if the fee of the money pertain to the heir, and not to the executor, after the liferentrix's decease, that *eo*

No 40.

An executor found liable to pay the annualrents of debts contracted by the defunct, and becoming due after his death. The contrary found, Inglis against Fraser, No 39. p. 5468.

No 40.

casu the re-employment should fall upon the heir, and not upon the executors. But the LORDS found, that they ought not to be burdēned with the annualrent for the broken term, subsequent to the defunct's decease; nor for an whole complete year after that term, seeing that space and term was given to the executors to gather in the defunct's goods, for the which space they were found not subject to pay any annualrents. Also, the LORDS allowed the yearly rent of the land, wherein the wife was infeft by her husband, to be in satisfaction of the first end of this employment now acclaimed *pro tanto*; albeit the same bore, 'Not to be granted to her for satisfaction, nor for the cause of this contract;' but that the charger *alleged*, that the said infeftment was granted to her conform to a bond granted to her by her husband, for infefting her therein, which made no relation to the contract; likeas her infeftment has no relation thereto, and so the contract ought to have full effect, notwithstanding of the infeftment; which was repelled; and the said infeftment, albeit depending on that posterior bond, was found ought to satisfy the contract *pro tanto*.

February 24.—It being *alleged* by the executors, that the defunct, after the contract, had infeft this charger, then his wife, in two booths in Dundee, the rent whereof must compensate *pro tanto* this implement now craved, and must produce liberation to the executors of so much of this contract as the same extends to, and must be found satisfaction *pro tanto*: And the charger *answering*, That that infeftment cannot liberate any part of this contract, because the same depends upon a preceding bond granted by the husband after the contract, whereby he was obliged to infeft her therein for her lifetime, bearing, 'to be done by him for love and favour,' and having no relation to the contract, or that it was made for implement thereof; and which bond and infeftment following thereon must be effectual, besides, and by and attour the contract, seeing the husband who might have given it hath also given it, and hath not revoked it before his death, and therefore is good in itself.—THE LORDS, nevertheless of this bond, which was the cause of the infeftment; seeing the same had no other cause therein but the husband's love and favour, found, albeit it was never revoked, that the same ought to be understood to be done for satisfaction of the contract of marriage *pro tanto*, and that so much of the employment ought to be defaulted, as correspondent to the yearly duty of the booths, *quia nemo præsumitur donare quamdiu est debitor*; but this case and decision may have its own doubt and scruple; for, although *debitor non præsumitur donare*, yet that holds in cases where the deed done, and that which is satisfied, hath no express mention of any cause at all, in contemplation and respect whereof it bears to be done, and where the fulfilling and satisfaction is indefinitely made, *quo casu* the fulfiller is to be presumed rather to have done it for his own liberation of his preceding debt, than that he should have given that, and remained still debtor; but this presumption ceases, where the fulfilling depends upon another cause, expressed by him who was obliged, and upon his obligation, whereby he hath

bound himself to give that infestment for love and favour, and whereby he hath not left place to presume upon a donation, or against the same, or to leave place to ascribe that to his liberation, which himself hath *specifice* exprest, and ascribed to his donation; attour albeit he had not so exprest the same, yet if the husband be of a competent substance, it may be in law affirmed, that that infestment should not be interpreted to be done for implement of his contract, which he hath not so interpreted himself; whereas if he had been of a mean estate, and that he had not exprest a special cause himself, *eo casu* it might have tholl'd a more favourable construction, viz. that it might have been ascribed to the fulfilling of the contract:—As also in this case controverted, this decision may be thought more hard, because the infestment foresaid, and bond whereupon it proceeded, was conceived for infesting of this woman in liferent, and the special bairns therein named, which were then procreated betwixt them heritably, (for this woman was his second wife, and he had no bairns of a prior wife), for whose provision chiefly this infestment was expedite; so that these bairns being heritably provided to these booths, whether the wife had her liferent thereof or not, it was all alike to the executors charged; for if she had not the same, the bairns provided thereto will have the full right thereof, both liferent and property; and as the infestment of property would not exclude the bairns provided thereto to seek the fee of the sums whereof now the relicr craves the liferent; and as if they were seeking the same, they would not be excluded from the fee by giving of that infestment, which would not be admitted against them as any part of implement of that contract *pro tanto*, no more it ought to be admitted against the liferenter, for any part of liberation of her liferent of the whole contract, yet it was so decided *ut supra*. See PRESUMPTION.

Act. *Stuart & Gibion.*

Alt. ———

Clerk, *Hay.**Fol. Dir. v. 1. p. 368. Durie, p. 621, & 624.*1634. *March 22.*WRIGHT *against* LAUDER.

JAMES WRIGHT being infest heritably in some tenements in Lauder, by disposition of — Ker of Redpeth, pursues a removing; and the defender's *alleging* a prior disposition of his liferent made by him, albeit without sasine, by virtue whereof one of the defenders was in possession, the LORDS preferred the prior disposition without sasine, where it was clothed with possession, albeit there was not a liferent in the disponent's person, distinct from the property, but that he was then fiar; neither was it respected, what the pursuer alleged, that the defender's disposition of the liferent made to him, was not clothed with possession, before the pursuer's acquiring of the heritable right, as he replied it ought to be, seeing both the parties rights were made within these two or three

No 41.

A prior disposition of liferent without sasine was preferred to a posterior right to the fee.