

1665. December 23. Dame RACHEL BURNET against LEPELERS.

By contract of marriage betwixt Mr John Leper, and his father, and Dame Rachel Burnet on the other part, both father and son were obliged to employ L. 20,000, upon security, for the liferent use of the said Dame Rachel, who, with concurrence of Preston, her present husband, pursues the sisters of the said Mr John Leper, as heirs, and otherways representing him, and their husbands, for their interests; and likewise Dr Balfour's wife, only daughter of one of the sisters, as heir to her father and mother, against whom there was decreet of registration obtained, during their lifetimes together, and on this ground, that the defunct's husband did, by contract of marriage, disposition, or otherways, obtain right to the portion of his wife, one of the sisters, and heirs, and therefore is liable in payment *in quantum lucratus est*. It was *alleged* for Dr Balfour and his wife, That she was willing to renounce to be heir to her mother; but as for the other passive title, as representing her father, who was *locupletior factus*, it is no ways relevant, for marriage is a cause onerous, and tochers are granted *ad sustinenda onera matrimonii*, and therefore are never counted fraudulent deeds, or without an onerous cause; nor do they fall within the act of Parliament 1621, against fraudulent alienations; neither was the defender's father liable, though there was a decreet of registration against him, because before any execution the marriage was dissolved. It was *answered* for the pursuers, That that member of the libel stands relevant; because the defender's mother being heir to her brother, the contracter could not transmit her estate to her husband without the burden of her brother's debt; and it is a most unquestionable ground in law and equity, *quod nemo debet cum alieno damno locupletari*, and therefore creditors are still preferred to portions of children, though given for their tocher.

THE LORDS found that member not relevant, that decreet was obtained against the husband and wife *stante matrimonio*, seeing it received not execution; and as to the other member, they thought, that if there were but a moderate and ordinary tocher, proportionable to the burden of the marriage, it would not infer repetition, or if the tocher was great, or an universal disposition of all the heir's right, they thought the husband would be liable, in so far as it was above a proportionable tocher, and therefore, before answer, ordained the contract of marriage to be produced, and the pursuer to condescend if there was any other benefit accresced to the husband by his wife than by virtue of the contract.

It was further *alleged* for the Lady Pitmedden, one of the sisters on life, That she could only be liable for her own sixth part, as one of the six heirs-portioners. It was *answered*, by our law, That all heirs were liable *in solidum*. There was several decisions alleged on either hand, on 7th Feb. 1632, Home *contra* Home, *voce* SOLIDUM ET PRO RATA, where the Lords found the heirs-portioners liable

No 78.

A decreet of registration obtained against a wife, and her husband for his interest, cannot be put to execution against the husband after his wife's death.

No 78. but for their own share; another, February 15. and March 21. 1634, Watson *contra* Orr, *voce* PASSIVE TITLE, whereby one of the daughters having a disposition of the whole estate, was found liable for the whole debt; and another, January 24. 1642, Scot against Hart, *voce* SOLIDUM ET PRO RATA, where one of the heirs-portioners having disposed her share to the other, and thereby being insolvent, that other was found liable *in solidum*.

THE LORDS having considered the case, found the heir-portioner liable, *primo loco*, only for her own share, until the rest of the heirs-portioners were discuss'd, but determined not whether these who were *solvendo* should be liable *in solidum*, albeit the debt exceeded their portion, or only entirely for their own share, and for as much more as the value of their succession could amount to. See SOLIDUM ET PRO RATA.

Fol. Dic. v. 1. p. 390. Stair, v. 1. p. 329.

* * * Dirleton reports the same case :

IN the case betwixt Leper, and Dame Rachel Burnet, and the Laird of Preston her present husband, these questions were agitated and decided,

1^{mo}, If a husband get in tocher with his wife, being an heretrix, more than an ordinary and competent tocher, which he might have gotten with another, the husband and his heirs will be liable, after the marriage is dissolved by the wife's decease, *in quantum lucratus est*, for the wife's debt; and the *lucrum* will be considered to be the benefit he has gotten above an ordinary tocher.

2^{do}, The Lords inclined to think, that though a decreet of registration was obtained against the wife and her husband for his interest, the husband will not be liable, the marriage and his interest ceasing; and that an ordinary tocher being *ad sustinenda onera*, is not *lucrum*.

3^{tio}, Heirs-portioners are liable for their own part; reserving action in case any of them become irresponsal; and if the creditor, having done diligence, cannot recover their parts, he may have recourse against the rest.

4^{to}, It was moved (but not decided), Whether, the others being *non solvendo*, the responsal heir should be liable for their proportion *in solidum*? Or only for what he has gotten of the defunct's estate?

Dirleton, No 10. p. 5.

1668. February 25. LORD ALMOND *against* THOMAS DALMAHOY.

No 79.
A husband
was charged
and denounced
upon a

THE Lord Almond pursues a declarator of the escheat of Thomas Dalmahoy, who *alleged* absolvitor, because he was denounced upon a bond granted by the Dutchess of Hamilton, wherein he being only charged as husband for his interest, and denounced at the market cross of Edinburgh, and pier and shore of