

because the value and extent of an *universitas bonorum* disposed can only be understood *deductis debitis*. This case is nowise parallel to a husband's giving his wife a bond or legacy with a faculty to burden his heritage: for there the husband disposes or legates his own; whereas here a wife pactions the return of her own means or value thereof, which must be understood with deduction of debts.

The Lords found, That the debts due by the pursuer, the time she entered into the contract of marriage with the defender's father, are to be deduced off the whole head of the means she brought to her husband; and that the defenders are obliged to restore to her only the half of the free gear. Page 651.

1713. *February 5.* ROBERT BALFOUR, SON to JOHN BALFOUR, Skipper in Kirkaldie, *against* HENRY GREIG.

ANGUS LINKLATTER, in a contract of marriage betwixt Catharine Linklatter, one of his four daughters, and John Balfour, her second husband, having, for himself, and as burden-taker for his said daughter, obliged himself to make her a bairn in his house, and that she should share equally with his other daughters of his lands and heritages, reserving power to himself to use and dispose as he thought fit; and the said Catharine having obliged herself to provide her share of her father's estate to herself, and the said John Balfour, and the longest liver in liferent, and to heirs of the marriage in fee: The father died without making any settlement, and Catharine his daughter, who survived him, neglected to enter heir-portioner with her three sisters. After her death, Henry Greig, her son of the first marriage, procured himself, as come in place of his mother, to be cognosced and infeft in a tenement in Kirkaldie, as one of the four heirs-portioners of Angus Linklatter, the grandfather. Whereupon Robert Balfour, Catharine's heir of the second marriage, pursued Henry Greig, as heir to his grandfather, to denude of that fourth part of the land wherein he was infeft.

The Lords found that Henry Greig, as heir to Angus Linklatter the grandfather, must fulfil his obligation to the pursuer, heir of the provision of the second marriage, and denude of a fourth part of the grandfather's land, unless he instruct where the pursuer is to get the rest made up by the other heirs-portioners, having more than their own shares.

Albeit it was ALLEGED for the defender, 1. The grandfather's obligation to make his daughter a bairn in the house, and that she should share equally with his other children in his lands, did not oblige him to dispoise his lands to his daughters: but imported only, that he was to do nothing to hinder them to share equally. And he having left them to succeed according to law, had performed all that was incumbent on him: especially considering that the reserved power to use and dispose, enabled him to dispoise to a stranger, notwithstanding the provision. It was John Balfour, the pursuer's father, that should have served his wife heir to her father: and seeing *per eum stetit*, that it was not done, no burden-taker for her could be liable. It can never be imagined that

Angus Linklatter took burden upon him, for his son-in-law's serving his wife heir: He was bound only that his daughter, being served, should denude. 2. *Esto* the defender were liable as representing his grandfather, yet since he is but one of four heirs-portioners, he can only be liable to implement a fourth part of his grandfather's obligation. *L. 86. §. 3. ff. de Legat. 1.*

In respect it was ANSWERED—1. As Angus Linklatter stood obliged that Catharine, his daughter, should share equally: so the daughter obliged herself that how soon she fell to have right, she should provide her share to the bairns of the second marriage. The father was bound, as burden-taker for her, to make her obligation effectual. The reserved power to use and dispose, was intended only for alienating to strangers, as his circumstances might require; which not having happened, the obligation in favours of Catharine's bairns of that marriage stands binding. In whomsoever the neglect was, in not entering Catharine heir to her father, the heirs of the marriage ought not to be prejudiced. The *bona fides* in contracts of marriage obligeth the grandfather, as burden-taker for his daughter, to supply that defect; which is still practicable by the defender, his heir. 2. The doctrine is good in the general, that heirs-portioners are liable only *pro virili parte*; but there is this speciality in the present case, that the other three heirs-portioners stand only infeft in their own fourth parts; whereas the defender stands wrongfully infeft in that fourth part which, by the contract, was provided to belong to the pursuer, as heir of his mother's second marriage. The text brought out of the civil, [law] for the defender, doth not come home to this case; for there were several heirs equally instituted, and the testator bequeathed a piece of land belonging to one of them to a third party, which the whole co-heirs were obliged to redeem, or pay the price; whereas here there was no institution of heirs, nor settlement made by the grandfather, but only he provided his daughter's fourth part of his land to the heirs of her second marriage, and thereby in effect disinherited the defender.

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1713. *February 12.* The POOR and KIRK-SESSION of AIR, Supplicants.

THE Lords granted the benefit of the poor's roll to the poor and kirk-session of Air, for prosecuting two depending actions, at their instance, against the magistrates of Air, which they could not otherwise do without encroaching upon the poor's stock.

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1713. *July 24.* The CREDITORS of the deceased ROBERT ROSS of Auchlossin, competing.

IN a ranking of the creditors of the deceased Robert Ross of Auchlossin, and Francis Ross, his son; Arthur Forbes, brother to the laird of Balflug, produced