

No 51.

1724. July 29.

JANET LOTHIAN *against* GEORGE MARTIN.

A WIFE having assigned to her husband in the contract of marriage the sum of 4000 merks in name of tocher, the LORDS, 'in regard the prestations on the husband's part were the mutual cause of the pursuer's assigning to him her portion, and that the husband, by reason of his insolvency, was incapable to fulfil these prestations; therefore found and declared, that the wife had a preference to all her husband's creditors, in so far as concerned such part of her portion as remained unuplifted, for her security.' See MUTUAL CONTRACT.

*Fol. Dic. v. I. p. 310. Rem. Dec. v. I. subjoined to No 29. p. 62.*

\*.\* Edgar reports the same case :

THE deceast George Lothian, father to the pursuer, made a conveyance of his whole effects in favours of his wife and children, and named certain persons as trustees and curators for them, directing the trustees to pay to his several children, named in the deed, certain sums of money (particularly to the pursuer 4000 merks) at their several marriages or majorities, with annualrent thereafter. The interest of the whole portions was to go to his wife for the maintenance and education of the children, till the respective terms of payment. The deed likewise contained a clause, 'That, in case of any of the children's decease, the portions were to accresce equally among the survivors.'

The pursuer, during her minority, was married to John Lindsay, merchant in Edinburgh, without any contract of marriage; but, about two years thereafter, she entered into a post-nuptial contract with consent of the trustees, by which, 'In contemplation of the marriage already solemnized, and assignation underwritten, granted by the said Janet Lothian, the husband obliged himself to provide 4000 merks of his own proper means, and employ the same, with the 4000 merks afterwards assigned, in trade and merchandizing, or to settle the same upon heritable security or lands, and to take the rights thereof in favours of himself, and the said Janet Lothian, in conjunct-fee and liferent, for her liferent use allenary, and to the children of the marriage in fee; for the which causes she assigned to her husband the 4000 merks left her by her father, and all sums, with the annualrents thereof, bygone and in time coming, that had fallen or should accresce to her through the decease of any of her brothers or sisters.'

Mr Lindsay died bankrupt, leaving two children; and some part of his wife's 4000 merks, with certain shares of what fell to her by the decease of her brothers and sisters, continued *in medio* unuplifted.

The defender Mr Martin having arrested these sums, and raised a furthcoming in the husband's lifetime for payment of L. 100 Sterling, he insisted in it against the children; and, at the same time, the pursuer brought a reduction of

the assignation made by her in the contract of marriage, as *causa data causa non secuta*, her husband not having it in his power to make good to her the provisions stipulated in her favours.

It was *pleaded* for her, That in all contracts where the reciprocal obligations of parties are expressed as the causes of one another, the disability or unwillingness on the one part was a good exception against performance on the other; and for this the authority of my Lord Stair was adduced, lib. 1. tit. 10. § 16. and likewise two decisions, one observed by Falconer, 11th January 1682, Creditors of Telfer against Campbell, 'where the wife was found preferable to the husband's Creditors in her own tocher for security of her liferent;' another in the year 1721, Creditors of Selkrig against Selkrig, 'where the wife had disposed in her contract of marriage certain sums *per verba de præsenti*, and yet was preferred to the heir or creditors, unless her liferent was made good to her.' See these cases, *voce* MUTUAL CONTRACT.

It was *answered* for the defender, *imo*, That this contract did not consist in mutual obligations; for since the wife had assigned *per verba de præsenti*, her part of the contract was performed, and she relied upon the faith of the husband for the performance of his; and therefore had no preference upon the subjects disposed to her husband's creditors, farther than the priority of diligence might entitle her to. *2do*, The nature of this contract being *facio ut facias*, the dominion was transferred to the husband, and could not revert to the wife but by some deed of his or of the law; for in contracts of this kind, by the civil law, *condictio causa data non secuta* did not take place.

As to the decisions brought in support of the reduction, it was *answered* to the *first*, That, in that case, neither party had implemented, and therefore it remained in the terms of mutual obligations. And to the *second*, That the husband had disposed to his wife for her security his whole effects *per verba de præsenti*, which effectually gave her a security upon what she had conveyed to him in her contract.

The defender *contended* farther, That, by the special tenor of the contract, by the nature of the subjects assigned, and as the effect of his diligence, he ought to be preferred; for the husband had a power to employ the common stock in trade, and therefore his creditors, in that way, were preferable: That the debts assigned by the contract, especially such as fell to her by the substitution in her father's will, did not bear annual rent, and so belonged to the husband *jure mariti*: That the debts and sums in question were arrested by the defender, and a forthcoming raised in the husband's lifetime.

*Replied* for the pursuer to the *first*, That although the prestation on the wife's part was an assignation *per verba de præsenti*, yet it being for a mutual cause, and the subject *in medio*, there could not in such a case be a difference betwixt an actual assignation and an obligation to assign; nor does an assignation *per verba de præsenti* show or presume, that *fides habita fuit* for the performance. To the *second*, That the defender's own objection of the right of dominion's being transferred to the husband, showed that the contract was *do ut des*, in

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which, by the civil law, there was *locus pœnitentiæ post dationem ex uno latere interpositam*; and even though granting an assignation were a *factum*, yet it was such a one as *infectum fieri*, and a decret of reduction would make the dominion revert to the wife.

As to the defences from the tenor of the contract, &c. it was *answered*, That the wife was no partner in trade with the husband; and since part of her money remained unuplifted, she ought to be preferred to his creditors: That the whole sums disposed by her father bore annualrent, and were ordered to continue so till they were uplifted for the ends and purposes specified in the disposition; so that nothing fell under the husband's *jus mariti*, but the annualrents due before his decease. And, *lastly*, That an arrestment being only an inchoate diligence against a personal subject, it could not put the arrester, when he came to insist in his furthcoming, in any better condition than the person for whose debt he arrested.

THE LORD DUN Ordinary, in regard the prestations on the part of the husband were the mutual cause of the pursuer's assigning to him her portion, and what should accresce to her by the death of her brothers and sisters, and that the husband, by reason of his insolvency, was incapable to fulfil these prestations, found and declared, that the pursuer had a preference to all her husband's creditors, in so far as concerned such part of her portion, and of what did accresce to her by the death of her brothers and sisters, as remained yet unuplifted, for her security, and making effectual to her her liferent-provision conceived in her favours by the contract.

To this interlocutor the LORDS adhered, with regard to such subjects as fell not under the *jus mariti*; but found that she had no preference to such subjects as fell under it.

Act. Ch. Areskine.

Alt. Ja. Boswell.

Clerk, Mackenzie.

Edgar, p. 113.

1772. July 23.

MARGARET, COUNTESS DOWAGER of Moray *against* JOHN BAIN STEWART and Others, Tacksmen and Tenants in Glenfinglas.

No 52.

Tacks may be let by a fiar, notwithstanding of a prior liferent by way of locality granted by him in a contract of marriage.

By contract of marriage between James late Earl of Moray, and the Countess, dated April 19th 1740, she was provided, in the event of her survivance, to the liferent of certain lands in the way of locality, and particularly of the lands of Glenfinglas; and, upon the precept of sasine therein contained, the Countess was infeft upon the 23d of April 1741, and her sasine was duly registered.

In July 1767, the Earl died, when the Countess's liferent-right took place; and, some time thereafter, she brought a process of removing against the tenants of the said lands, in which decree was allowed to pass; but the tenants