

William Morison, of Preston Grange, Esq; *Appellant*; Case 58.  
 Sir William Scott of Thirlestayn, William  
 Nisbet of Dirleton, and John Scott of Har-  
 den, a Minor, by his Guardian, - *Respondents*.

Fountain-  
 hall,  
 25 Feb.  
 1697.  
 19 Nov.  
 1702.  
 30 June  
 1704.

19th Feb. 1719-20.

*Husband and Wife.*—A bond, with a clause of annual-rent, is granted blank in the creditor's name, but delivered to a wife, during the subsistence of her marriage: the husband entails his real estate on the grantor of the bond, and also conveys to him all his personal estate, but was not privy to said bond: in a competition between the executor of the husband, and the executor of the wife, the husband's executor is preferred to said bond: and the wife's executor is ordered to refund what had been paid to her, in her widowhood.  
*General Disposition.*—A general disposition of a man's personal estate, made in favour of one who had, without the husband's knowledge, granted a bond to the wife, did not release this bond.

SIR John Nisbet of Dirleton, deceased, having issue only one daughter, disposed of her in marriage to Sir William Scott of Harden. Of this marriage there was no issue; and Sir John Nisbet settled his whole real estate, worth about 3000*l.* per ann. and also conveyed all his personal estate, *acquisita et acquirenda*, to the respondent William Nisbet, passing by his daughter.

Soon after, in March 1688, the respondent, William Nisbet, executed a bond for 40,000 merks, Scots blank in the name of the obligee, with a clause of annual-rent; and delivered it to Lady Nisbet, the second wife of the said Sir John Nisbet, during his lifetime, or to one Bennet, of Grubbet, on her behalf. This Lady Nisbet was not the mother of Lady Scott, Sir John's daughter.

Sir John Nisbet dying soon after intestate, an agreement was entered into between the respondent William Nisbet and the said Sir John's widow, whereby she delivered up to him the said bond for 40,000 merks, to be cancelled; and he executed a new bond to her for 30,000 merks in lieu thereof. Mutual releases were then given, and she at the same time executed a deed, whereby she obliged herself, that in case Lady Scott, Sir John's daughter, should be found to have any right to the said bond of 40,000 merks, that she should then deliver up to the respondent William Nisbet the said second bond for 30,000 merks.

Upon this new bond the respondent William Nisbet made one payment to the widow of 6000 merks in 1691, and another of 3141*l.* 10*s.* Scots in 1693: and, for the widow's further security and payment of the said bond, he obliged himself to communicate and convey to her two dispositions, by which Sir John Nisbet had made over to him the respondent all the estate that he then had, or should acquire during his life.

Lady Scott of Harden was afterwards confirmed executrix to her father Sir John Nisbet; and, with consent of her husband, brought an action before the Court of Session against the respon-  
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dent William Nisbet, and the widow of Sir John, for payment to them of the said 40,000 merks. Soon after the commencement of this action the widow died, and the appellant, her brother and executor, was made party to the same.

In this action the respondent William Nisbet, in January 1697, was examined upon oath as to the circumstances of the transaction; and deponed, that the said bond for 40,000 merks was granted to the said Sir John's lady during her marriage, and that after the said Sir John's decease, his widow delivered him up the said bond of 40,000 merks, which he cancelled, and in lieu thereof executed a new bond to her for 30,000 merks, of which he had paid some part. The Court, by interlocutors on the 6th and 11th of February 1697, decerned against the respondent William Nisbet for the said 30,000 merks in favour of Lady Scott and her husband, and found that William Nisbet might have a deduction of what sums he had paid on the said bond, reserving a power to Lady Scott and her husband to claim the sum so to be deducted, from the appellant, as executor of his sister Lady Nisbet, to whom these payments had been made; and also decerned for the other 10,000 merks, which made the complement of the first bond.

The appellant afterwards insisted that the bond for 40,000 merks was assigned by Sir John Nisbet, the husband, to the respondent William Nisbet, by a general assignment made to him of all his personal estate, goods, and effects, *acquisita et acquirenda*; but the Court, on the 19th of February 1697, "found that the  
" bond was not transferred by the disposition granted by the said  
" Sir John Nisbet to the respondent William Nisbet, but that the  
" same did belong to the Lady Scott as executrix to Sir John  
" Nisbet." And upon the 25th of same month, the Court "pre-  
" ferred the Lady Scott and her husband to the appellant as to  
" the sums in the said bond owing by the respondent William  
" Nisbet." The decree of the Court was sued to execution against the respondent William Nisbet, and he was thereby compelled to pay to Lady Scott and her husband the sum of 21,267 merks, which with the sums formerly paid by him to the widow was in full of the bond for 30,000 merks and interest; and Lady Scott with consent of her husband granted a discharge to the respondent William Nisbet for the money so paid to them, with absolute warrandice from them their heirs and executors jointly and severally.

Lady Scott and her then husband, further, brought their action against the appellant for the sums received by his sister the widow; and the Court, by two interlocutors of the 19th of November 1702, and 10th of July 1707, "Ordained the appellant to  
" refund the said two payments of 6000 merks and 314*l.* 10*s.*  
" Scots."

Sir William Scott of Harden dying, his widow was afterwards married to Sir William Scott of Thirlestayne, her second husband.

The appeal was brought from "several decretal orders of the Lords of Session of the 19th and 25th of February 1697, the 19th of November 1702, and 10th of July 1707."

Entered,  
14 April  
1714.

The appeal was presented on the 14th of April 1714, and the two interlocutors of February 1697 were then only appealed from; the two others were afterwards added. Great alterations took place afterwards in the situation of the parties, before the appeal was finally discussed. Lady Scott, the daughter of Sir John Nisbet, died, and the estate of Harden having come to the heir of entail, of the Highchester branch, was possessed by two minors successively: much delay was occasioned by making these different persons and their guardians or curators parties to the appeal; though the different steps taken are not of importance enough to be more minutely taken notice of.

At the time of hearing the appeal, Lady Scott, the daughter of Sir John Nisbet, was dead, Sir William Scott of Thirlestayne, her surviving husband, being her personal representative; John Scott of Harden, the minor, was the heir of entail, and personal representative of Sir William Scott of Harden, the first husband of Lady Scott, Sir John Nisbet's daughter.

*Heads of the Appellant's Argument.*

The bond for 40,000 merks was designed by the giver, for the lady herself, exclusive of the husband's right: and the bond was calculated for that purpose, viz. by leaving the obligee's name blank, as was then allowed by the law of Scotland, as blank indorsements on bills now are in England; by a clause of annual-rent, which regularly excludes the *jus mariti* as to the principal sum; and by depositing the bond in a trustee's hand, not to be delivered to the lady till after her husband's death, for non-delivery of evidents suspends conveyance of property at any time. It was therefore straining both against the design of the parties, and the law, to make the said bond for 40,000 merks any part of Sir John Nisbet's estate.

If it had been in *bonis defuncti*, (as it was not,) yet the deceased having by two deeds disposed to his heir of entail, all that he had or should acquire during his life; and that disposition having been made over to the appellant's sister in security, it is evident, that Lady Scott and her husband could have no pretence of title to it, by virtue of their confirmation. And further, in both dispositions Lady Scott is expressly excluded, as being already provided for.

It was objected, That the said bond for 40,000 merks could not be said to be contained in either of the dispositions in favour of the heir of entail, because Sir John Nisbet could not be supposed to know of it. But in all deeds of a testamentary nature, as these are, a general clause is thrown in of purpose to comprehend what may not fall specially under consideration for the time, and it were of too dangerous consequence to explain such clauses, with relation to what might or might not be in contemplation at the making of them. Indeed, it is certain; Sir John could not think

think of the bond in question, when he made those dispositions; for it was not in being till near a year after the last of them.

It was objected further, that the last general disposition obliges the heir of entail to employ the sums for particular uses; and, therefore, that he could not apply it for other purposes, by his agreement with Lady Nisbet. That, indeed, may concern the heirs of entail, but no ways the Lady Scott, and her husband, from whom the estate real and personal is expressly conveyed: and even the heir of entail cannot hinder William Nisbet, from giving bond to whom he pleases.

The respondents have contended that whether these decrees, be reversed or not, the appellant can never recover his money, because of some private transactions between Sir William Scott of Harden and his lady; by which, notwithstanding Sir William had right to the sums in question, yet Sir William had agreed that these sums should belong to his lady; and that the appellant, had released all demands upon her. But, as to the private transactions between Sir William Scott of Harden, and his lady, the appellant humbly conceives these can never affect him: and as for the release to the lady, it is only for a part of the sums claimed, and in it the appellant's actions and claims, and even this appeal are expressly reserved against all the other respondents for the remainder thereof; and if the respondents have this or any other matters of discharge of the sums claimed by the appellant, the proper time to object them will be when the appellant brings his action in Scotland, for the payment of his money, which he cannot do till these decrees be set aside.

*Heads of the Argument of the Respondent William Nisbet.*

This respondent having paid the money by the decree of the Lords of Session to the said Lady Scott and her husband, where the right of both the parties contending for it was in issue he ought at all hands to be safe, nor should the appellant have any remedy against him especially since Lady Scott and her husband, upon the respondent's payment of the money, gave him a discharge thereof with absolute warrandice; and the appellant has, pending this appeal, released the said Lady Scott, who by her discharge was obliged to indemnify the respondent. Besides, Sir John Nisbet's widow under whom the appellant claims, obliged herself to indemnify this respondent in case decree should be given in favour of Lady Scott; so that the appellant as representing his said sister, can have no claim against the respondent, since that indemnity granted by her must be binding upon the appellant.

*Heads of the Argument of the Respondent John Scott.*

Sir John Nesbit deceased, could never be supposed to have assigned the bond for 40,000 merks, since he knew nothing of it, and it was kept secret from him. The first deed of assignment of his personal estate expressly relates to an inventory, to be left by him, of the bonds due to him; and though an inventory was actually made, yet that bond not being mentioned, the assignment could not possibly convey it

it to the respondent William Nisbet. It is true, the second deed of assignment is in general terms, and has no relation to an inventory; but that does not alter the case; because, as that was only a continuation of the former conveyance, it must receive the same interpretation by reason of the assignor's ignorance, so it was granted with an intention and design to have the sums conveyed, applied for purchasing land to be entailed after the same manner with his other estate. If this bond, therefore, was assigned, then it ought to be laid out, according to the directions in that deed; which plainly shews that Sir John Nisbet had no such thing in view by the assignment. This will effectually exclude the widow, or the appellant, who claims under her; for if the bond was assigned to the obligor, it was thereby extinguished, and the appellant can claim nothing by it.

The money paid by the respondent William Nisbet, to the deceased, Sir William Scott and his lady, was applied entirely to the separate use of the lady, and securities taken for the same in her own name; and she, after Sir William's death, received payment thereof. If, then, the appellant had any action, it must be against the said lady or her estate: but pending this appeal, the appellant has released the said lady, and her husband the respondent Sir William Scott of Thirlestayn of this appeal, and the grounds thereof, and of all demands against them or either of them in their own right, or as possessing any part of the estate heritable or moveable, belonging to the deceased Sir William Scott of Harden.

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On the part of the respondent Sir William Scott there was set out the release or discharge granted by the appellant, reciting the interlocutors from which he had appealed; and that the respondent and his said wife had paid him the sum of 15,000 merks; therefore the appellant exonerated, quit-claimed, and simpliciter discharged this respondent and his said wife, their heirs, executors, and successors whatsoever, for themselves, or as intromitting with any part of the estate heritable or moveable that belonged to Sir William Scott of Harden, by whatever right or title, of all actions, pursuit, instance, and execution whatever, competent, or that might be competent to the appellant, his heirs, executors, and successors, of and concerning this appeal, and grounds whereupon the same proceeded and was founded; and of the said appeal itself, and grounds thereof, whole heads and articles of the same, with all that had followed or might follow thereupon; and of all other claims and demands whatsoever that the appellant or his forefairs had or might have, any manner of way, against this respondent and his said wife and their forefairs, reserving a power to proceed against the heirs of Sir William Scott of Harden, and the respondent William Nisbet. And the appellant bound and obliged him, his heirs, executors, and successors whatsoever, to warrant, acquit, and defend his said discharge to be good, valid, and sufficient to this respondent and his said wife and their fore-

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fairs,

said, for their exoneration of the premises at all hands, and against all deadly as law will.

Judgment,  
19 Feb.  
1719-20.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several decretal orders complained of in the said appeal be affirmed.*

For Appellant, *Tho. Lutwyche, Dan. Forbes.*  
For Respondent Wm. Nisbet, *Ro. Dundas.*  
For Respondent John Scott, *Rob. Raymond.*  
For Respondent Sir Wm. Scott, *Will. Hamilton.*

Case 59. The Commissioners and Trustees of the forfeited Estates, - - - - - *Appellants ;*  
James Duke of Hamilton and Brandon, a Minor, by his Curators and Commissioners, - - - - - *Respondent.*

26th Feb. 1719-20.

*Forfeiture under the Act 1 Geo. 1. c. 20.—Thirlage.*—An act of parliament gives to subject superiors the forfeited estates of their vassals: the Earl of Linlithgow being attainted, forfeited to the Duke of Hamilton a mill held of his Grace as superior; but the earl having thirled part of his estate, held of the Crown, to this mill, this thirlage was not forfeited to the Duke of Hamilton.

BY an act of parliament 1 G. 1. c. 20. it is, inter alia, enacted,  
“ That if any subject of Great Britain, holding lands or tenements of a subject superior in Scotland, has been or shall be guilty of such high treason, or treasons” (as are mentioned in the act) “ every such offender, who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures of high treason; and his lands or tenements held of any subject superior in Scotland shall recognise and return into the hands of the superior, and the property shall be, and is hereby consolidated with the superiority, in the same manner as if the same lands or tenements had been by the vassal resigned into the hands of his superiors, *ad perpetuam remanentiam.*” The act likewise contains this farther clause, “ And for preventing of frauds or collusion in order to evade this act, be it further enacted, that if the superiors, vassals, or tenants, to whom the lands, mines, mills, woods, fishings, and tenements above-mentioned are declared and ordained to belong, shall not, within six months, to be reckoned from the time of the attainder of the offenders, respectively obtain themselves in seise, or do diligence, really and without collusion, for attaining possession, in every such case the forfeiture shall belong to his majesty, his heirs and successors.”

By