

1665. December 15. Mr JOHN ELEIS *against* KEITH.

THERE was a bond of 6,000 merks granted by Wishart parson of Leith, and Keith his spouse, to Mr John Eleis, containing an obligation to infest him in an annualrent out of any of their lands, with a procuratory. The wife had then the lands of Benholm belonging to her heritably, lying in the Mairns. Mr John having inhibited her husband and her, she sold the lands before the inhibition was published at the head burgh of the Mairns; and having thereafter right to a sum of 10,000 merks, for which she was infest under reversion, in other lands, an order of redemption was used, and the money consigned. Mr John Eleis pursues a declarator, to hear and see it found and declared, that the said Keith was obliged to infest him in an annualrent out of her lands, which she had fraudulently disposed contrary to her obligation, and therefore was now obliged to infest him in other lands, or to pay the sum, as damage and interest; and that therefore any other lands or rights belonging to her, might be affected for his payment, and particularly the wadset now in question. Compearance was made for the defender's grand-child, who had a right from her grand-mother to the wadset, who *alleged, first*, That the bond bearing an obligation for debt granted by the wife, *stante matrimonio*, was null. It was *answered*, That albeit the personal obligation were null, yet the obligation to infest in an annualrent granted by a wife is valid, either against her heritage or liferent, and alleged several decisions therefor. It was *answered*, That the wife might do so, if she had borrowed money for her own use, or were principally bound to infest in an annualrent, but this obligation being in security of her personal obligation with her husband, the principal obligation being null, the accessory is also null.

THE LORDS repelled the allegiance, and found the obligation to infest valid, albeit accessory, because deeds and obligations of wives not to affect their persons, but estates, are valid; and albeit she had not been bound for the principal debt, she might either have effectually disposed an annualrent, or which is all one, obliged herself to infest in an annualrent out of her heritage, *et utile per inutile non vitiatur*.

It was further *alleged*, That this wadset, or sum disposed to her oye, could not be affected, because her oye was the youngest of many oyes, and did no ways represent her.

THE LORDS sustained this member of the declarator also, upon the act of Parliament 1621, against dispositions between conjunct persons, without a cause onerous, which they found, might either be a ground to reduce the same, or to declare the same to be affected, as if the right were in the disponent's person. Herein it was also libelled, that this wadset, albeit acquired after the inhibition, yet seeing it lay in the same shire, where the inhibition was published, the grand-child's right was reducible upon the inhibition.

No 191.

A bond granted by a wife during her marriage, with her husband's consent, containing an obligation to infest, with procuratory, was found null as to the personal obligation, but sustained as to the obligation to infest, though it was pleaded, that the principal being null the accessory could not subsist.

No 191.

‘THE LORDS thought so, because inhibitions being personal prohibitions, reach both *acquisita* and *acquirenda*, by the person inhibited, in the shires where it is published.’ See INHIBITION.

Fol. Dic. v. 1. p. 400. Stair, v. 1. p. 327.

* * * Newbyth reports the same case :

IN an action of declarator *ex capite fraudis*, pursued at the instance of Mr John Eleis elder; against Mr Alexander Woods, Francis Keith, and others, defenders, who were in life, and of transferring a declarator against their predecessors to hear and see it found and declared, that the sums of money that were due by heritable bonds to Elizabeth Keith, and affected with inhibitions against her, and re-employed after execution of the inhibition at the market cross of Edinburgh, but before the same was executed at the market cross of Stonhive, or before the inhibition was registered, that the same was affected with the foresaid inhibition and apprising led at the pursuer's instance; and that therefore, albeit the same be lent out and re-employed in other hands, yet seeing the said sums are come in place of the first sum, and of the lands of Benholm, against which inhibition was served, the same ought to be declared to belong to the pursuer, notwithstanding of any assignation made by the said Elizabeth Keith to Jean Wishart her grand-child, or of any discharge or renunciation granted since the said inhibition. THE LORDS found, that a woman cloathed with a husband, and subscribing an heritable bond bearing an obligation to infest in an annualrent, and containing a procuratory of resignation, sufficient against the wife, *quoad* the denuding of her, but not valid, *quoad* personal execution; as also they found, that she could do no deed in favours of any conjunct person without an onerous cause, in prejudice of the foresaid former obligation.

Newbyth, MS, p. 46.

* * * This case is also reported by Dirleton :

IN the case betwixt Mr John Eleis and Mr Alexander Keith and Wishart, it was found, that Elizabeth Keith, spouse to Mr William Wishart minister at Leith, having by bond, granted by her husband and her, obliged herself to pay to the said Mr John, the sum of 6,000 merks; and for his further security, to infest him in certain lands pertaining to her; which bond contained a procuratory of resignation; the said bond, though null as to the obligation to pay the said sum, was valid as to the right of the lands; and that the said Elizabeth, having thereafter disposed the said lands in defraud and prejudice of the said Mr John, was liable to the said Mr John; and upon that ground, the LORDS

found the said Mr John as creditor to the said Elizabeth, might question any fraudulent rights made by her to his prejudice. No 191.

Dirleton, No 6. p. 4.

* * * Gilmour also reports this case :

1666. *January*.—MR WILLIAM WISHART parson at Leith, and Elizabeth Keith his spouse, gave bond to Mr John Eleis advocate, for 6,000 merks; whereupon he uses inhibition against them, they being dwelling at Leith for the time, and the inhibition is used against them legally where they dwell, and at the market cross of Edinburgh; but before it could be served at the head burgh of the Mairns, where their lands lay, the very next day they dispone the lands of Nether-Benholm, whereof the said Elizabeth was liferentrix, to Mr Alexander Keith her own son-in-law for 50,000 merks, whereof 10,000 merks he was to retain for his own tocher, 26,000 merks was to be paid to creditors; and Mr Alexander gave an heritable bond for the surplus 14,000 merks, to the said Elizabeth, which sum she uplifts, and employs a part thereof upon the lands of Brotherton, in the hands of Francis Keith; the right whereof she assigns to Jean Wishart her grand-child, without an onerous cause; whereupon the said Mr John Eleis pursues an action of reduction *ex capite doli*, as well as upon the inhibition, to hear and see it found, that the said sum was a part of the price of the lands disposed by the said Elizabeth, after the inhibition was intimated to herself, and that she was in *mala fide*, in prejudice of the pursuer, being a lawful creditor, thereafter to uplift the price to employ and assign it to her grand-child; and that it should be declared, that the said sum should be affected with the pursuer's debt by comprising, or any other legal diligence. It was *alleged*, That the bond made by the said Elizabeth with her husband to the said pursuer was null, in so far as it might be obligatory against her, because it was subscribed by her *stante matrimonio*, during which time she could not oblige herself. It was *answered*, That albeit the bond was null, in so far as concerned the obligatory part to pay; yet in so far as it contained an obligation to infest in an annualrent, or procuratory of resignation, it was valid and sufficient against her; just as she, being heretrix, might with her husband's consent dispone the lands irredeemably, or any annualrent furth thereof. Like-as, the bond bears a clause for resigning an annualrent. *Replied*, That the debt not being her own, but her husband's, she might lawfully dispone the lands whereof she was heretrix, before the inhibition was completely served against her at the market cross where the lands lay; specially, seeing the price was applied for the payment of just debts, except what was assigned to her grand-child, for her necessary provision. *Duplied*, That Elizabeth having secured the pursuer by a disposition and obligation to infest and resign *ut supra*, she could do nothing to her oye, a conjunct person, without an onerous cause,

No 191. to prejudge him, though there had been no inhibition served ; far less after inhibition intimated to herself, though not executed at the head burgh where the lands lie.

THE LORDS repelled the allegiance and reply, in respect of the answer and duply.

Gilmour, No 181. p. 131.

No 192. 1683. December. MARGARET MARSHALL against GEILLES FERGUSON.

Found in conformity with the above.

A WIFE, with consent of her husband, having obliged herself to pay 500 merks by bond, containing an obligation to infest the creditor by way of annualrent in lands she was heiress of, the creditor after the husband's decease pursued a poinding of the ground.

Alleged for the wife ; That she could not (*stante matrimonio*) oblige herself personally, either as principal or cautioner, for payment of sums ; nor could the infestment, which was but consequential and accessory to the personal obligations, militate against her, she having revoked the same, especially there being no judicial ratification.

Answered ; Wives may dispoise *principaliter* rights standing in their person, without necessity of judicial ratification. And though the act 83. Parl. 11th James III, mention the case of a wife denuding herself of her liferent, by consenting to her husband's disposition of the fee, and ratifying the same upon oath, the act requires not that to be done, but narrates only *speciem facti*. And though the personal obligation cannot operate against the wife, she cannot except against the real right, which she might validly dispoise, and consequently wadset ; nor can the real right here be understood as accessory to the personal obligation, but must be considered the same way as if it had proceeded by way of contract of wadset.

' THE LORDS repelled the defence, and sustained process for poinding of the ground.'

Fol. Dic. v. 1. p. 400. Harcarse, (STANTE MATRIMONIO.) No 878. p. 248

No 193. 1686. February 2. & 3. BEATRIX SOMERVELL against ALISON PATON.

Found in conformity with Elies against Keith, No 191. p. 5987. and with the above.

BEATRIX was provided to a liferent in her contract with umquhile Lawrence Johnston ; and Paton, her mother-in law, proprietrix of a tenement, being obliged to infest her son Laurence, and the said Beatrix his spouse in that tenement, and being now charged to do it, she suspended on these reasons ; *imo*, That this obligation to infest was relative to another obligation on her in that same contract, to pay her son 4000 merks ; but that principal obligation is *ipso*