

legitima potestate as to the affecting of his part, and granting of bonds to that effect.

No 39.

Reporter, *Justice-Clerk.*Clerk, *Gibson.**Dirleton, No 402. p. 198.*

1678. July 29.

HERIOT *against* LYON, &c.

No 40.

IN a reduction at George Heriot's instance against Hary Lyon, &c. of their bonds, as given *in lecto*, alleged they were but the renewing of old bonds, or else granted for counts of work wrought.—THE LORDS sustained them; but declared they would consider the counts if exorbitant, since it is not like the defunct *in lecto* did it; and also take their oath in supplement on the truth of the work.

Fol. Dic. v. 1. p. 214. Fountainball. MS.

1683. February 27.

EARL OF LEVEN *against* MONTGOMERY.

No 41.

THE Countess of Leven, with consent of her curators, having entered into a contract of marriage with Mr Francis Montgomery, wherein she provided him in liferent to the barony of Inchleslie, in case there should be no children of the marriage, or in case the children should decease before Mr Francis, that was declared to be in satisfaction of his courtesy of the whole estate: As also, by the said contract, it is provided, that in case he should have children surviving himself, he was to have the liferent of the whole estate, only he was to pay the current annualrent of the debt; and, by the contract, the Lady, with consent of Mr Francis, was empowered to burden the estate with 10,000 merks, for providing her house with plenishing; and Mr Francis was obliged, after the decease of the Viscount of Kenmore, to apply 50,000 merks, which was his portion, for payment of the debts; and in case the marriage should dissolve without children, the Lady and her heirs were obliged to refund the said 50,000 merks to Mr Francis after her decease, according to the terms of the said contract. The Lady, with consent of Mr Francis, granted bond to Lauchlan Leslie for 10,000 merks. The Lady, upon death-bed, ratifies the foresaid contract of marriage upon oath, and also the foresaid bond for 10,000 merks, which she had granted upon death-bed; she also, upon death-bed, grants a discharge to Lauchlan Leslie her chamberlain of his intrusions with the by-gone rents of the lands, and at the same time dispones her half of the moveables, which were in common betwixt her and Mr Francis, and delivered to him all her jewels, and particularly a jewel which was gifted by the King of Sweden to General Leslie her grandfather as a token, and which her grandfather did legate to the family, with a

The Lords refused to sustain a deed on death-bed, disposing on moveables, *in quantum* prejudicial to the heir's relief of moveable debts.

No 41.

prohibition not to alienate, but that the samen should remain with the family of Leven. The now Earl of Leven being served heir of tailzie to the said Countess, has intented reduction of the said contract of marriage, and of the said 10,000 merks bond, and a declarator, that the bygone rents and moveables, belonging to the Lady the time of the marriage, should not belong to the said Mr Francis *jure mariti*, but should be applied for payment of the moveable debts which were due before the marriage; and also concludes a reduction of the discharge and disposition foresaid, as being to the prejudice of the heir's relief of moveable debts, and concludes that the King of Sweden's jewel may be delivered back, as being provided to remain with the family; and that the other jewels, being of several kinds, did fall to Leven, as being heirship, at the least as being *paraphernalia*, belonged only to the wife's executors, and consequently were liable for her debt, and so to relieve Leven the heir of moveable debts. There is also a contrary declarator pursued at Mr Francis's instance. The reason of reduction insisted on by Leven, was against the contract, that the samen was granted in the Lady's minority to her lesion; and whereas it bears, that the barony of Inchlesly was provided to Mr Francis in lieu of the courtesy, curators could not transact in relation to a contingent event, the courtesy not being likely to have fallen out, she being a sickly Lady and affected with a rupture, who, by the judgment of physicians and skilled women, was not fit for marriage; and that the transaction was not equal, being only in the case, that either there should be no children, or that the children should die before the father; but in case the children should live, then he was to have the liferent of the whole estate without restriction.—THE LORDS found, that the Lady and her curators might provide Mr Francis her husband to a competent liferent, and might transact in relation to the courtesy; and that this provision was not exorbitant. The *second* reason of reduction was against the 10,000l. bond, as granted likewise in her minority, and to her lesion, seeing Mr Francis, being her husband, ought to have provided the moveables for the house; and that the heir could not be burdened therewith, seeing there was sufficiency of bygone rents in the hands of the tenants and chamberlains, which ought to have been applied for furnishing of plenishing; and that Mr Francis had carried away the moveables bought.—THE LORDS sustained the reason of reduction against the 10,000l. bond, and ordained Mr Francis to discharge the samen, and him to bruik the moveables alleged bought therewith; and declared these moveables should not fall under the division, so as the heir could claim a part thereof, as falling under the Lady's executry, for his relief of moveable debts. The *third* reason of reduction was, that the contract of marriage ought to be reduced, because the curators had omitted to provide thereby, that the bygone rests of rents due by the tenants and chamberlains, which were eight or nine years mails and duties, should have been applied for payment of the Lady's debts, viz. counts and bygone annualfents, and that, by that omission, the same did fall under Mr Francis's *jus mariti*; at the least Mr Francis ought to be liable to the heir for his relief *in quantum factus est locupletior* by the *jus mariti*, and that the *jus mariti* in

law gave the husband only right to the wife's moveables, her moveable debts being first deducted.—THE LORDS found, that the wife's moveables, that fall under the *jus mariti*, could not be burdened with the wife's debt but in a subsidiary way, the heritable estate and executry being first discuss and exhausted, in regard they found the husband not liable after the wife's death for her debts, so long as there was any heritable or moveable estate belonging to her representatives, which might satisfy her debts, the *jus mariti* being equivalent to a general assignation of the wife's moveables to the husband, and which could not be quarrelled at the creditor's instance, so long as there was sufficiency of the estate for payment of her debts. Likeways, in this reduction, Leven craved that the disposition in favours of Mr Francis, by the Lady, of the half of her moveables in common betwixt them, and the discharge granted by her, with Mr Francis's consent, to Lauchlan Leslie, ratified by her upon oath while she was in death-bed, might be reduced, in regard these deeds, being done on death-bed, could only be sustained as legacies, and so could not prejudge the heir of his relief of the moveable debts.—THE LORDS reduced these deeds, in so far as they were prejudicial to the heir's relief of moveable debts, and that, notwithstanding of the ratification by the Lady upon oath, which they found only personal, but that it could not bind up her heir from quarrelling of the same. In this process there was likeways a conclusion of declarator, craving the King of Sweden's jewel foresaid to be delivered to the pursuer, in regard the deceast Earl of Leven left it to the family, with the quality, that it should not be alienate.—THE LORDS ordained that jewel to be restored back, but assoilzied Mr Francis from giving back the rest of the jewels, they being *paraphernalia*; and found, that the Lady might dispose thereupon in favours of her husband, and that the same were not subject to the heir's relief, as other moveables were. See TAILZIE.—HEIRSHIP MOVEABLES.—HUSBAND AND WIFE.

Fol. Dic. v. I. p. 213. P. Falconer, No 54. p. 31.

1688. July 20.

ROBERT PRINGLE against ELIZABETH PRINGLE and RUTHERFORD.

FOUND, that bonds secluding executors cannot be disposed upon *in lecto*, in prejudice of the heir, more than such as bear an obligation to infest.

Fol. Dic. v. I. p. 213. Harcarse, (LECTUS ÆGRITUDINIS.) No 661. p. 189.

1706. July 20.

EDMONSTON against EDMONSTON.

THE deceast James Edmonston gives a bond of provision to Catharine, his daughter, for 5000 merks. She and Mr Steven Oliver, her husband, pursue James Edmonston, her brother, for payment.—*Alleged*, He has raised reduction

No 42.

No 43.

A party, who by a contract of marriage, was bound