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terlocutor, 12th January 1725, it was found proved by the defender's oath, that he promised to fulfil and implement his father's disposition or destination to his brother, notwithstanding of any informality therein, and not to quarrel or impugn the said nullity; as also, That he promised and offered to renounce his right to the lands in question; and that the quality adjected to his oath was found extrinsic; and albeit the defender reclaimed against this judgment, and, upon a deliverance, before answer, was examined before two Ordinaries, and again ordained to be re-examined before the Lords in presence; yet no judgment was given on these proceedings, but the cause taken up on a different medium, and to a different effect not relative to the foresaid interlocutor; and that the defender was assoilzied only in consequence of advising the proofs and debate upon this last part of the proceedings; and in respect it was not denied the pursuers of the reduction were then minors, found the reasons of reduction relevant to lay open the decreet *ad hunc effectum*, to hear parties how far the foresaid interlocutor ought to be altered or adhered to, upon the facts and circumstances alleged in the said decreet, and the proceedings had in consequence of the reclaiming petition against the said interlocutor; but declared, that the rest of the interlocutors in the foresaid decreet were to stand *tanquam res hactenus judicata*." And this day, they "refused a reclaiming bill, and adhered."

Act. *W. Grant.* Alt. *L. Craigie & Scrimgeour.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. p. 29.

1747. *February* 19.

STEWART of Stewarthall *against* BARBARA SCOT, and ANNE STEWART, Relict of Mr COLIN MACLAURIN, and her Children.

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Two parties claiming right to the same subject, and the debtor being decerned by decree-arbitral to pay to the one, and after by decree of the Court of Session to the other, who was no party to the submission, he called them both in a new process, where it was pleaded neither of the decrees

MR WALTER STEWART, advocate, by his contract of marriage with Barbara Scot, became bound to secure to her in liferent, and to the heirs of the marriage in fee, the conquest of the marriage, not exceeding 20,000 merks Scots, as also to secure to himself and the children, the sum of 4000 merks, besides the said conquest, under this burden, "That because the said Barbara liferented the conquest restricted to 20,000 merks, whereby the child or children of the marriage had no fund of aliment above the said sum of 4000 merks, which was not liferented; therefore she was bound and obliged that she should either aliment the child or children of the marriage, until their respective marriages or majority, or otherwise should renounce or assign her liferent, or so much thereof, as, with the foresaid sum of 4000 merks, should be equivalent to the extent of the foresaid full provisions, in favours of the heirs or bairns of the marriage;" to wit, the whole 20,000 merks to a son, or three or more daughters, but restricted to fifteen, if there should be but two, and ten, if one daughter.

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could be reduced: It appearing the claimant on the decree-arbitral derived right from the other, the Lords were of opinion, that though their decree could not be reduced, yet the claimant upon it could not take the subject which was evicted, but behoved to cede it to the claimant on the decree-arbitral, whom they preferred.

Mr Stewart, some time afterwards, upon the narrative, "That it had pleased God to encrease his fortune to the sum of 15,000 merks above what it was at the time of his marriage, and to bless him with Anne Stewart his daughter of the same; therefore became bound and obliged to pay to the said Barbara Scot, during all the days of her lifetime, under the condition and provision after-mentioned, and no otherwise, the annualrent of the said sum of 15,000 merks, beginning the first term's payment at the first term after his decease, and so forth termly thereafter during her lifetime; as also, to pay to the said Anne Stewart his daughter, and the heirs of her body, in the event she should be the only child of the marriage, the sum of 10,000 merks, and that at the terms following, viz. the sum of 4000 merks thereof at the first term after his decease, and the remaining 6000 merks thereof at the first term after her lawful marriage, or after her attaining to the age of twenty-one years compleat, which of them first happened."

At some distance in the deed follows this clause: "It is hereby expressly provided and declared, that the said Barbara Scot shall, by her acceptance hereof, be bound and obliged to aliment and educate the said Anne Stewart, and any other child it shall hereafter please God to bless us with, whether son or daughter, until the said Anne Stewart, and the other child, which, at the pleasure of God, my said spouse shall yet bring forth to me, shall attain to their respective majorities or marriages, and thereafter shall renounce in favours of the said Anne Stewart, and the child yet to be born *respective*, as much of the foresaid annualrent payable to my said spouse in liferent, as shall answer to their respective portions above-mentioned, deducting the foresaid sum of 4000 merks not liferented by my said spouse, and which is payable at the first term after my decease, whereby my said childrens' portions may be free and unburdened in all time thereafter." And lower, "For the better enabling my said spouse to aliment, I hereby declare that she shall have right to uplift the annualrent of the said 4000 merks not liferented by her, at least shall be only obliged to aliment that child having right to the said 4000 merks for the time, so far as the annualrent thereof falls short of the aliment."

The marriage dissolved by the death of Mr Stewart, leaving Anne, the only child thereof, minor, who resided with her mother; and she, besides her liferent, received the interest of the 4000 merks, for which she granted a discharge, 25th July 1722, "as having right thereto by the bond of provision;" but considering that it was not her interest to accept of the bond, as the conquest amounted to no more, she granted two following discharges, 13th June 1728, and 12th June 1729, bearing, "That she had right to the annualrent by her contract of marriage, and that her daughter had right to the same by the bond of provision."

The young Lady became major in the year 1731, and 7th July 1733, upon the narrative of her parents' contract, and the option thereby given to her mother, either to aliment her to her majority, or to renounce her liferent of the

No 353. 6000 merks, and of her mother's having alimented her, and thereby expended more than the interest of the 10,000 merks provided to her the daughter, of which claims she had given her a discharge of that date; "She assigned to her mother the annualrents of the foresaid 10,000 merks since the same fell due, until the term of Whitsunday then last bypast, saving always and reserving to her the said Mrs Anne Stewart, the foresaid whole provision of 10,000 merks, and interest thereof from and since the said term of Whitsunday; and Barbara Scot having received payment of the interest of the whole 24,000 merks down to Whitsunday 1733, the 26th November 1733, granted discharge therefor, "as having right to the interest of 4000 merks, in virtue of the bond of provision, and in virtue of the said assignation."

Anne Stewart was married to Mr Colin Maclaurin, Professor of Mathematics in the College of Edinburgh; and, in her contract of marriage, 18th July 1733, "with the special advice and consent of Barbara Scot, her mother, she disponed to him the principal sum of 10,000 merks Scots and annualrents thereof, from and after the term of Whitsunday last bypast, provided to her as the only child of the marriage between her parents." As also, "all and sundry conditions and provisions conceived, or that any way might be interpreted in her favours, by virtue of the said contract of marriage betwixt her said father and mother, or in virtue of any deeds made by the said Mr Walter Stewart in her favour."

Mr Maclaurin desired to have his money, and Archibald Stewart of Stewarthall, son of the former marriage, and heir to Mr Walter, declining to pay, as the widow was by her contract of marriage entitled to the liferent of 6000 merks thereof, the matter was submitted, and the arbiter pronounced a decreet, declaring, that it appeared to him, from Mr Walter Stewart's contract of marriage with Barbara Scot, and his bond of provision in favour of his Lady and daughter, that it was his intention his Lady should renounce her liferent of 6000 merks, making part of the 10,000 provided to his daughter, after his said daughter's attaining to majority, or being married, and that Barbara Scot had accepted of it, and homologated the said bond of provision; but in respect she was no party to the submission, finding he had no power to give any decerniture in that point so as to affect her, but finding that Anne Stewart and her husband for his interest, were entitled to be paid by the heir the full sum of 10,000 merks, with the annualrents from the said Anne Stewart's majority or marriage, reserving his claim of relief or retention of the annualrents of the 6000 merks in question from Barbara Scot, as accorded of the law; and upon this decreet, Mr Maclaurin received payment of the full portion, with interest, from Martinmas 1731, the term after his wife's majority.

Barbara Scot insisting for her full liferent, Mr Stewart raised a declarator against her that she had accepted of the bond of provision, by which she was obliged to renounce in favour of her daughter; and upon a production of the first and last discharges above-mentioned, the Lords found, that she could not

demand the interest of the full 10,000 merks, and at the same time her daughter the payment of the sum; and therefore that she was obliged to repeat the interest of 6000 merks received by her, from her daughter's majority to her marriage, and since also paid to Mr Maclaurin; but upon production of the two intermediate discharges, they found, 27th July 1742, "There was no evidence that the defender had accepted the bond of provision, and therefore, that she was not bound to restrict her claim of liferent of 20,000 merks by her contract of marriage, nor renounce her liferent to the extent of 6000 merks, part of her daughter's provision." No 353.

A decreet was extracted on this interlocutor during the vacance; and thereupon Mr Stewart summoned her, together with her daughter and her husband, in a new process, contending that he could only be found liable in single payment of the same sum, to wit, the interest of the 6000 merks, which Mr Stewart never intended should be payable to his daughter, but upon her mother's renouncing so much of her jointure, and had granted the bond expressly with this provision. That this proposition had all along been held as a principle by all parties, and acknowledged in the whole discharges granted by the Lady, even those wherein she anxiously avoided accepting for herself the bond of provision, but which discharged the interest of the 4000 merks, "And that by and attour the sum of 6000 merks of her daughter's portion, liferented by her as a part of the said sum of 20,000 merks." That from Martinmas 1731, to Whitsunday 1733, when she had right to the interest by assignation from her daughter, as well as her contract of marriage, she had not insisted for double payment, as knowing it was but once due; and the same thing was supposed in all the interlocutors pronounced in this cause, and particularly that whereon she had extracted her decreet found she was not obliged to renounce her liferent of that sum, part of her daughter's portion; that therefore, either the decreet-arbitral behoved to be set aside, which it might be, if the decreet of session behoved to stand, since the 25th article of the regulations 1695 only forbid the reducing decreets-arbitral except for iniquity, but every objection that could be proponed against a contract was equally good against them. Suppose, therefore, the pursuer to have granted bond to Mr Maclaurin, upon the narrative that his mother-in-law had renounced so much of her jointure, this bond could not have subsisted upon its being found that she had still right to the whole; and neither can the decreet, as it neither was the arbiter's opinion nor intention, that the sum was twice to be exacted.

2do, The decreet cannot be objected to cut the pursuer out of his right; for a decreet pronounced for want of evidence will not bar a contrary judgment upon a further production: And hence it is said, that competent and omitted may be objected to defenders, not pursuers. The assignation by Anne Stewart to her mother was indeed in the process, but had certainly been produced by mistake, since it evidently shewed she had assigned to her mother the interest falling due between her own majority and marriage, and had afterwards

No 353. taken payment of it herself; but this had been overlooked till after the extract; however, Mrs Maclaurin's contract of marriage, assigning the sum to her husband, and to which Barbara Scot was consenting, was only produced on a diligence in this second process, and is *noviter veniens ad notitiam.*

Pleaded for the defenders, That neither the decreet-arbitral, nor decreet of Session could be set aside, as neither were liable to have iniquity objected to them. Besides, there was no iniquity committed by either or both, nor any inconsistency betwixt them; the arbiter had indeed delivered an opinion contrary to what was found in the decreet; but there was no contradiction betwixt the decernitures, both of which were just, as would appear when the purport of the deeds was considered; that the assignation by Mrs Maclaurin to her mother had all along been in process; and it could not be supposed, that in it, when they were only clearing accounts between themselves, there was any intention of the mother's renouncing her jointure in favour of the heir; that her signing her daughter's contract of marriage was no more than putting a piece of respect upon her; and besides, she might well consent to her conveying to her husband all claims competent to her upon any deed of her father's, since this claim was perfectly consistent with her own retaining her full jointure, for that indeed the bond of provision, in so far as it gave the mother the liferent of 15,000 merks, was under the burden of her renouncing so much in favour of the children; which provision she had never accepted of, as by her contract of marriage she had right to the liferent of the conquest, to the extent of 20,000 merks, which it exceeded: and so it was more for her interest to hold by that; but the giving a sum of 10,000 merks to the daughter was absolute, and clogged with no condition; nor could these words in the beginning of the clause, which gave the liferent, "Under the condition and provision after-mentioned, and no otherwise," affect the bond for the principal sum, though the clause for it immediately followed the other, as the condition referred to, of the Lady's alimenting and renouncing, stood at a considerable distance in the deed, after several other clauses, and was only conceived binding upon herself. Mr Stewart's inclinations indeed appeared to be, that his Lady should renounce, but as possibly she might not, he had designed in all events to give to his daughter a portion of 10,000 merks, payable at her majority or marriage; and in this, the only thing that he had done in her favour was, the obliging his heir to advance interest during the Lady's life, if she should chuse to insist on her contract of marriage.

Observed on the Bench, That by the decreet, the mother was found to have right to the interest of the 6000 merks; but in case of an eviction from her, she could not claim it; and she having consented to the conveyance in her daughter's contract, it was evicted, and thus justice could be done to the parties, without any necessity of reducing the decreet.

The Lords found, That 6000 merks, part of the 10,000 merks provided to the daughter of the marriage by the marriage-contract, and appointed by

the bond of provision to be paid to the daughter at her marriage, was part of the 20,000 merks provided by the contract in liferent to Barbara Scot his spouse; and that it was not the intention of Mr Walter Stewart, that his heir should pay annualrent for the said 6000 merks after the marriage or majority of the daughter, unless Barbara Scot should renounce her liferent of so much of the 20,000 merks as corresponded to the said sum of 6000, and should so disburden the 6000 of her liferent thereof; but found, That Barbara Scot having in the contract of marriage betwixt Mr Colin Maclaurin and Mrs Anne Stewart, only daughter of the marriage, specially consented to Mrs Anne Stewart's assignation of the 6000 merks, and annualrents thereof from Whitsunday 1733 years, that the same was thereby disburdened of Barbara Scot's liferent, and that Barbara Scot had no right to the annualrents of the said 6000 merks.

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Reporter, *Drummore*. Act. *H. Home*. Alt. *Maitland*. Clerk, *Hall*.

D. Falconer, v. 2. No 170. p. 223.

1763. *June* 17.

WILLIAM VILANT of Middlefield *against* JOHN BLACKWOOD, Tenant in Middlefield.

No 354.
A decree *in foro* cannot be reduced, either upon reasons competent and omitted, or upon grounds formerly proponed and repelled.

JOHN BLACKWOOD succeeded to his father in a nineteen years lease of the lands of Middlefield, which was to expire at Martinmas 1759; and, being desirous of continuing in his farm, he applied to William Vilant, the proprietor, and, upon payment of L. 16, received a letter from him in the following terms: 'Sir, 'In regard you have instantly paid me the sum of L. 16 Sterling, for my granting to you a tack of my lands of Middlefield, for the space of eight years from 'and after Martinmas 1759, I hereby promise to subscribe a tack to you in the 'above terms, in eight days hence; you always being obliged to pay me the 'same rent you pay my mother, who liferents the same. In witness whereof, 'I have wrote and subscribed this at Edinburgh, the 12th day of June 1754 'years.'

At this time John Blackwood also accepted a bill for the L. 16, which was lodged in the hands of Blackwood's agent, to remain with him until the lease should be extended.

Soon after, a scroll of a tack was drawn and sent to Vilant; but he having *objected*, That inconveniencies might arise, in case his mother, who liferented the lands, should not approve of the lease, another tack was extended, containing this special proviso, That, if the liferentrix would not accede to it, Blackwood's entry should be delayed till the first term of Martinmas after her death.

Mr Vilant having refused to sign this tack, Blackwood brought a process against him before the Court of Session; in which Vilant did not pretend that there was any condition in the bargain, respecting his mother's approbation of