

and usual marks, he was entitled to retain the same till he was paid the account for bleaching of both parcels of cloth; for it was on account of the second parcel's being impignorated for the price of bleaching both that he delivered up the first parcel; and as possession of moveables presumes property, he was bound to inquire no further, but might reasonably rely on the security of the second parcel; and there was here no *furtum*, or *vitium reale*, in virtue of which Mr Lesly could pretend to seize the cloth from one who held it for so onerous a cause.

Answered for Mr Lesly, That the presumption of the cloth's belonging to the Arnots must yield to the truth, Mr Lesly having proved it to be his property; and it was not in the power of the Arnots to take the property of his cloth from him, or lay a burden thereon without his consent. The Arnots put their names in his cloth without his knowledge; and if they have thereby deceived the suspender, and induced him to give up the first parcel, each piece of which he might have retained till payment of the bleaching thereof, he has himself to blame for trusting them, but that cannot prejudice a third party.

THE LORDS found the letters orderly proceeded.

Act. *Dav. Gram.*

Alt. *Ja. Erskine.*

Clerk, *Murray.*

B.

Fol. Dic. v. 3. p. 150. Fac. Col. No 33. p. 53.

1754. July 11.

MRS BURROUGHS and her Sisters, *against* SIR ARCHIBALD GRANT.

CAPTAIN BURROUGHS of London married Mary Cartwright, second daughter of Henry Cartwright of the same place. By the marriage-articles it was agreed, that the Lady's fortune, which was L. 1500, with a like sum of the Captain's, making together L. 3000, should be settled in trust; the produce to the husband for life; and, in case the wife should survive him, to her for life; and, in case of no issue, the property of the whole to the survivor.

There having been many dealings between Sir Archibald Grant of Monymusk in Scotland, and Captain Burroughs, in the year 1733 they fitted an account, upon which there appeared a balance of L. 3810:9s. due to Captain Burroughs; in satisfaction of which, the Captain agreed to accept of a bond for L. 2000; and thereupon the parties discharged each other.

Of even date with this discharge, Sir Archibald executed, at London, an heritable bond in the Scots form, for the said sum of L. 2000, upon his estate in Scotland.

Soon thereafter Captain Burroughs executed, at London, an assignment in the Scots form; wherein he acknowledged, that the said Henry Cartwright had made payment to him of certain sums of money; and therefore assigned him the said heritable bond for L. 2000; and thereupon Mr Cartwright was infest;

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No 131.
Retention found incompetent against an administrator in England, pursuing in Scotland, for a debt due to the deceased, on account of counter-claims against the deceased.

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but it afterwards appeared, that this assignment was entirely in trust for the use of the marriage above-mentioned.

Sir Archibald Grant and Captain Burroughs continued their dealings together ; particularly certain joint concerns in some mine-adventures in Scotland.

Captain Burroughs having died without issue, his wife, who was his executor, proved his will in England, and intromitted with all his effects.

Mr Cartwright being also dead, Mrs Burroughs and her two sisters, as co-heiresses to him, brought an action in the Court of Session in Scotland, against Sir Archibald Grant, for payment of the said bond.

Alleged for Sir Archibald, That the bond having been conveyed by Captain Burroughs to Henry Cartwright, not for value advanced, but only in trust and security for the sum of L. 3000, which Captain Burroughs was obliged to settle in trust for the use of the marriage, the sisters of Mrs Burroughs had no concern in the matter, as co-heiresses to their father ; and that Mrs Burroughs having intromitted with her husband's effects, to an extent far beyond the sum of L. 3000, the bond for L. 2000 reverted to be part of Mr Burroughs's estate.

Upon this state of the case, *pleaded* for Sir Archibald, That Mrs Burroughs, as her husband's executor, must be accountable to Sir Archibald, as her husband's creditor, for certain large advancements he had made in relation to the mine-adventures ; and her demand must be liable to retention until she account : That this was material justice, and was established both by the civil and Scots laws.

2do, That even supposing this L. 2000 bond were to be considered the proper claim of Mrs Burroughs in her own right ; yet it has been found, in many cases, that when an executor sues for a debt due to himself, compensation may be pleaded against him upon sums due to the defender by the deceased, even though such sums were legacy. *See* the cases of 12th November 1628, Williamson against Tweedie, No 62. p. 2613. ; and 15th June 1666, Stevenson against Hermishiels, No 65. p. 2615. Such being the case, although it was true that the pursuer could not be brought to an account, in the first instance, in Scotland, yet, when she is suing there, her suit may be properly encountered by reconvention. *See Voet. tit. De Judiciis*, § 78. and White against Skeen, *voce* FORUM COMPETENS.

Replied, among other things, for Mrs Burroughs ; That, even upon the supposition that the bond of L. 2000 was assigned in trust for the uses of the marriage, it had now, in terms of the articles, accrued to her by the death of her husband without issue ; her demand is therefore under her own right, not as her husband's executor ; and therefore cannot be compensated by any debt alleged due by her husband to the defender. *See Voet. tit. De Judiciis*, § 81. et 82. where he limits and explains the doctrine of § 78. saying, *Non etiam adversus omnes actores reconventionem institui posse constat*, &c. ; and the cases of Williamson and Stevenson are not parallel.

2do, An executor in England, who has intermeddled with English assets only, cannot be compelled, even by reconvention, to account in Scotland, where she cannot be properly discharged. In the case of White against Skeen, the administrator in England sued the heir in Scotland, for relief of a debt due by the defunct; which is entirely different from this case; because there the administrator sued not in his own right. Besides, in a case between the Marquis and Marchioness of Annandale, similar to that of Skeen, the House of Peers gave a different decision. See FORUM COMPETENS.

The COURT having desired to see the opinion of counsel learned in the laws of England, upon this last point;

Those for Sir Archibald Grant gave their opinion, That had Sir Archibald given a mortgage over an estate in England, and this suit been brought against him there, he might have brought a bill, in equity, against Mrs Burroughs and her sisters, to discover for what consideration this L. 2000 mortgage was assigned; and also against Mrs Burroughs, to discover how far she was otherwise satisfied of her demand of L. 3000 out of her husband's estate; and thereupon the Court would decree an account with Sir Archibald, and stay proceedings upon the bond: That unless this be allowed to Sir Archibald, when sued in Scotland, justice cannot be done him; for, when he comes to take his remedy against Mrs Burroughs in England, she may be insolvent, and not to be found.

One of the counsel for Mrs Burroughs, a gentleman of the greatest eminence in the law, gave it as his opinion, That if the trust was made out, Sir Archibald might set up his demands on Mr Burroughs against this demand for L. 2000, and so have an account of all dealings between them; and if this account should become necessary incidentally to a question properly before the Court of Session, he did not see why the enquiry might not be made, making all the allowances which would be made in England: He added, that in England, every person who has a claim upon an estate, has a right to call an executor to an account; and no body is bound by what is done in a cause to which he is no party.—The other counsel for Mrs Burroughs was of opinion, That she cannot be compelled by the Court of Session (if that Court proceeds by rules analagous to the course of the Court of Chancery in England) to enter into an account, till proper foundation is laid for the demand by a legal proof of it: That this must be done by a cross-suit; without which he thought it could not be done; but not by reason of the locality of the probate of the will or of the effects.

These opinions being reported to the Court of Session, the case seemed very intricate; and it was said, that Mrs Burroughs not only could not be properly discharged here, but, How could she account here by the law of England? How could she show here what claims were against her in England; or what allowances she was entitled unto by the law there? Or how could she bring her husband's English creditors to account here?

THE LORDS, on the 28th of July 1752, *inter alia*, 'Found it competent to the defender to plead retention to the extent of the annualrents of the bond during

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Mr Burroughs's life : Found the pursuer Mrs Burroughs, who administrated the effects of the deceased Mr Burroughs her husband, in England, is not bound to account here for her intromissions, in virtue of that administration ; but to the end Sir Archibald Grant may have a competent time to constitute the debts owing him by Mr Burroughs, and bring the pursuer to account for her deceased husband's effects in a proper Court in England, stopt procedure in this action, both for principal and interest, to the 12th November 1754.'

And after hearing a reclaiming petition and answers, wherein the arguments above-mentioned were handled at great length ; and after hearing the Lord Ordinary's report touching certain facts relative to Sir Archibald Grant's accounts with Captain Burroughs, and Captain Burroughs's accounts with Mr Cartwright ;

THE LORDS, *inter alia*,¹ Found, that there is no sufficient evidence, that the sum covenanted by the marriage-articles was satisfied in whole or in part by Cartwright's intromissions with Burroughs's effects, further than to the extent of L. 1040 Sterling, applied to the purchase of L. 1000 capital in South-Sea stock ; and found it competent to the defender to plead retention against the bond pursued on to the extent of the annualrents during Mr Burroughs's life ; but found it not competent to the defender to plead retention on account of Mrs Burroughs's being administrator of her husband's effects in England, and of the defender's counter-action against her before this Court, for recovery or allowance of his claim against her deceased husband. *See FORUM COMPETENS.*

Act. R. Craigie, A. Lockhart.

Alt. Lord Advocate, J. Ferguson, A. Macdowal.
Clerk, Forbes.

Fac. Col. No III. p. 163.

* * * This case was appealed :

The House of Lords ORDERED, That the interlocutors, and parts of interlocutors, complained of by the original appeal (*viz.* those which found Sir Archibald entitled to plead compensation to the extent of the annualrents which fell due during Mr Burroughs's life) be reversed, and those complained of by the cross-appeal be affirmed.

1773. August 6. JAMES CLARK *against* ISOBEL BUCHANAN.

No 132.
Compensation found not pleadable upon an open account, against which

CLARK brought an action, in 1771, against Isobel Buchanan, as representing her husband, James Muir, surgeon in Glasgow, for payment of a bill of L. 20 Sterling, granted by him to the pursuer, 22d November 1757, payable one month after date.