

No 138.

he had been all the years libelled, and many others of before *bona fide* possessor, therefore he ought to be assoilzied from all payment of any bygone duties, in respect of his right standing, which has never been interrupted by warning or otherwise;—THE LORDS repelled the exception, in respect of the relict's infetment of liferent produced, and that she could not be prejudged therein by any disposition flowing from her husband, which the pursuer had no necessity to know or to pursue to be suspended during her lifetime, albeit the defender had acquired his right immediately from Dalgety; and found, that the defender's *bona fides* could not defend him from paying of the duties since the husband's decease, the relict having done diligence by this pursuit so shortly after his decease, viz. within two or three years, for the which the pursuit was sustained, for a quantity modified by the Lords yearly, the years libelled, and the said allegiance was repelled. And it being further *alleged*, That the defender cannot be convened for the duties of the lands libelled the crop and year , which was one of the years pursued for; because the pursuer having warned him to remove before the term, he for obedience of the warning removed, and left the ground void;—and the pursuer *replying*, That that was not enough, except he had come, or sent to the pursuer, and had renounced the right and possession of the lands before notaries and witnesses, and had taken instruments thereupon; otherwise, upon the defender's alleged naked leaving of the ground, the pursuer could never have been *in tuto* to have entered to the possession of the land without danger, especially where the defender was clothed, and clothes himself, as he does, with a title; so that without renouncing by writ, she could never have been freed of danger of ejection. This allegiance was found relevant, notwithstanding of the answer. And the LORDS found no necessity that the defender should have renounced his possession to the pursuer; but found it sufficient to allege and prove by witnesses, that for obedience to the warning, he left the ground waste.

Act. Dunlop.

Alt. Hay.

Durie, p. 834.

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A husband confirmed his wife's testament, and made faith on the inventory. By this he was not excluded from disappointing the wife's legatees, by adding another debt forgot.

1665. December 7. ELIZABETH ANDERSON *against* ANDREW CUNNINGHAME.

ANDREW CUNNINGHAME's wife having left a legacy to Elizabeth Anderson, it was *alleged* by the husband, that his wife's share of the moveables was exhausted. It was *answered*, That he having confirmed his wife's testament, and given up the debts due by him therein, and made faith thereon, he cannot now be admitted to adduce any other debts, especially being so recent before the testament, within three or four years. It was *answered*, That he had only made faith upon the inventory of the goods belonging to him, but not of the debts

due by him, which were only given up to abate the quota ; and albeit it may be presumed that he knew and remembered his own debt, yet *præsumptio cedit veritati*, seeing the creditors now produce their bond instructing the debt, and crave preference.

Which the LORDS found relevant.

1666. *June 9.*—THIS cause betwixt Elizabeth Anderson and George Cunningham, anent a legacy left by the said George's wife to the said Elizabeth Anderson, being debated the 7th December last, the LORDS then found, that George, by confirming his wife's testament, in giving up his debts, to exhaust the free gear, and abate the legacy, did not hinder himself to adduce further debt for a further abatement ; but now, it being further *alleged*, That immediately before the confirmation, the bond he would now add was registrate, and he charged therewith, he could not be ignorant thereof at the time of the confirmation.

THE LORDS altered their interlocutor, and found that having *scienter* omitted that debt, he could not bring it in to the legatar's prejudice.

This was stopped by bill the next day.

Stair, v. 1. p. 323. & 374.

* * * Newbyth reports the same case :

1665. *December 7.*—UMQUHILE Agnes Harvie, spouse to George Cunningham, by her latter-will and testament in *anno* 1645, did leave several legacies therein contained ; which testament being confirmed by her husband, who finding that the debt did exceed the free gear, intented a reduction and declarator, craving that the legacies may be reduced and be declared free thereof. It was *alleged* for the legatars, That they ought to be assoilzied from the reason of reduction ; because the said George having confirmed his wife's testament, notwithstanding of the debts given up at the time, there was considerable free gear remaining, so that having made faith when he gave up the inventory, he ought not now to be heard to quarrel the same upon pretext of his other debts, which he could not but know the time of the confirmation. Whereunto it was *replied*, That seeing the pursuer instantly proves by writ that he was debtor, the time of the confirmation, in greater sums than the inventory confirmed, it is clear that no legacy can be due ; especially seeing, although the said debt had not been given up, yet legatars are obliged to find caution in case of emergency of debts, and compearance was made for James Cunningham of Bonnington the creditor. THE LORDS sustained the reason of reduction, and found that the husband giving up of the inventory, might yet give up any debts owing by him to any of his creditors the time of the making the testament, whereof he ought to have allowance for exhausting the inventory.

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1666. *June 9.*—Agnes Harvie deceasing in December 1645, George Cunningham, her husband, being nominate her executor, gives up as *dominus bonorum* the inventory of his wife's testament in November 1648, and gives up all the debts owing by him, so that there rested of free gear L. 1800; thereafter, John Hamilton, one of the legatars, recovers decret *in foro* against the husband for a legacy left to him by the defunct Agnes Harvie. The said George Cunningham *alleging*, That he was resting to James Cunningham of Bonnington 2000 merks, which he paid in December 1648; after the confirmation of his wife's testament, pursues now a reduction of the said testament to the prejudice of the legatars, upon this ground, that there being a debt due to Bonnington by himself, which he omitted to give up the time of the confirmation, and whilk will exhaust the inventory. There would be no free gear, and consequently no legacy. It was *alleged* for the legatars, That he having given up the testament himself in *anno* 1648, and all the debts owing by him, he cannot now be heard, after so long a time to add any more to the prejudice of the legatars. To this it was *answered*, That he needed not give up any of his debts at all, and that he knew not of Bonnington's debt the time of giving up the inventory; and that as the legatar is obliged to find *cautionem mutianam* in case of emergency of debts, so they can have no legacies till all the debts be paid; and compearance was made for Bonnington the creditor, who craved preference. It was *duplied*, That the husband had given up the inventory *ex certa scientia*, and that he could not be ignorant of the debt owing to Bonnington, being his own deed, and if he omit it, it was done *dolose* to conceal his condition from the world; and that *cautio mutiana* is not taken in this case, where the husband has the privilege of giving up of the debts owing by him when he confirms his wife's testament; and as to Bonnington's compearance, he has no interest, because the debt is already paid him. THE LORDS would not sustain the reason of reduction; but found, that in regard the husband had omitted the giving up of the debt owing to Bonnington the time of the confirmation, it could not now be sustained for exhausting of the inventory to the prejudice of the legatar, and that in regard of his presumptive knowledge of the same, which he had *dolose* omitted in this same action. It was *alleged*, That Bonnington's debt being an heritable debt, it could not exhaust her part of the moveables to the prejudice of her legatars; because, in justice she falling no part of the bond bearing annualrent, she ought not to be prejudged by any bond due to her husband bearing annualrent; so that albeit it had been given up, it could not have exhausted that part which belonged to the wife; but this was not decided.

1666. *June 14.*—In the same process, the Lords would not allow George Cunningham to depone upon his ignorance of the foresaid debt of 2000 merks owing by him, but found that he might give in a condescence of the probable causes of his ignorance, which they would take to consideration.

Newbyth, MS. p. 44. & 61.

* * See Gilmour's report of this case, No 21. p. 5639.