

1681. *January 26.*The COUNTESS of WEEMS *against* The LAIRD of MAY and M'KENZIE.

No. 7.

Whether a
bond had
been granted
in lieu of a
former bond?

The Earl of Weems being creditor to the tutor of Lovat, arrests all sums in the hands of the Laird of May, belonging to the tutor, and pursues him to make forthcoming; who having deponed that he was nowise debtor to the tutor, but by a bond which he produced, bearing 8,000 merks received from the tutor and his Lady, in name of their children, and payable to them for their life-rent use, and to the children between them in fee, which failing, to any other of the Lady's children of her first marriage with the Laird of M'Leod that she should name; and deponed, that after the arrestment, he obtained discharge of this bond, and granted a new bond of the same sum, being 8,000 merks, to Loslin, who was cautioner in the first bond, which second bond was of the same date with the discharge of the first; and there is an assignation by Loslin of the same date, bearing, his name was entrusted to the behoof of Isobel Fraser, daughter to the tutor, and therefore he assigns the bond to her; and she having married Mackenzie, younger of Applecross, did assign the same in favours of his father, who by the contract of marriage provided an estate to her son in fee, and to her in life-rent: Whereupon Weems raised a declarator, that the second bond granted by May was in place of the first, and that the sum being affected by his arrestment, ought to be made forthcoming to him, notwithstanding that the second bond was assigned by Loslin to Isobel Fraser, and transferred by her to Applecross; and that albeit the first bond made the tutor only life-renter, and his children fiars, yet that it was liable for the father's anterior debt, and presumed to be his means. But it being alleged, that the sum did belong originally to the tutor's Lady's first husband M'Leod, and that his son, out of respect to his mother and sisters, transacted to advance this sum upon the terms contained in this bond, the Lords allowed either party to adduce what evidence they could, to show to whom the sum did originally belong, and whether the tutor's Lady had any heritable bonds, from whence the sum might have arisen; whereupon witnesses were adduced, and this right being assigned by the Earl of Weems to the Countess his daughter, and being now heard and considered,

The Lords found by the testimonies, that the sum arose by a transaction between M'Leod and his mother the tutor of Lovat's Lady, and that the money was brought from M'Leod's country to the tutor's house, but was not delivered to the tutor, but to Loslin the Lady's brother, and was lent out to May upon the fore-said first bond; whereupon the Lords found that the money being the Lady's, and moveable, it belonged to her husband *jure mariti*, and that it was not proved that the money was M'Leod's proper money, and that by the transaction he yielded it to be employed upon the terms of this bond, and therefore the money was decerned to be made forthcoming to the Countess of Weems, and she preferred to Applecross, albeit he was a singular successor *bona fide* for a cause onerous in

respect of Weems's arrestment, which as *nexus realis* affected the sum in May's hands, who yet continued debtor.

No. 7.

Stair, v. 2. p. 843.

* * * Fountainhall reports this case :

The tutor of Lovat's Lady having lent out *stante matrimonio* 8,000 merks, payable to her daughter, the Earl of Weems being a creditor to the tutor, on the presumption of law, that it was the tutor's money, arrests it, and now pursues a declarator that the money was truly the tutor's, and so must be effectable for his debt, and the settlement of the fee on his daughter was fraudulent and reducible on the act of Parliament 1621. Answered, The money was truly the daughter's, gifted her by M'Leod her brother uterine, and why might it not have been the mother's, by heritable bonds due to her before her marriage with the tutor, and which, though she had uplifted *stante matrimonio*, it was lawful for her to re-employ for what use she pleased, seeing the uplifting makes not the sum fall under the *jus mariti*. The Lords, by their interlocutor of the 16th January, 1678, before answer, ordained the comuners and witnesses in the bond to be adduced, to clear whether the money did belong to M'Leod or not; and the probation being advised, the Lords found it fell under the tutor's *jus mariti*, and was affectable with the Earl of Weems's diligence, as the tutor's creditor; and whereas, Weems' arrestment was quarrelled, because no action was raised thereon within five years, as the act in the year 1669, prescribes; the Lords repelled this, because the arrestment was before that act, and the Earl's declarator, (which was intended within five years of the arrestment) was in place of a forthcoming.

Fountainhall MS. p. 308.

1687. February. DAVID STERLY *against* DAVID SPENCE.

No. 8.

A person having granted a commission in writ to the supercargo of a ship and loading, to export some goods belonging to the granter of the commission, and to sell them in Holland, and with the prices to buy some other species of goods for his behoof, which being accordingly done, and the commissioned goods returned, the trustee acquainted his constituent by a letter, that they were put in a cellar for his behoof. Thereafter a creditor of the trustee's pinded these goods as belonging to his debtor; whereupon he to whom the letter was written raised a process of spuilzie upon this ground, that the goods pinded belonged to the pursuer.

Alleged for the defender: That possession presumes property in moveables, and the pursuer had no bill of loading of the goods pinded, as belonging to him, nor was he bound to have owned them to be his had they been cast away; so that till delivery, they were to be reputed the supercargo's goods.