

1697. July 30.

INCORPORATION of TAYLORS in the Canonate *against* ELIZABETH DAIKERS.

No 143.

THE deacon, box-master, and Incorporation of the Taylors of the Canonate being debtors to Elizabeth Daikers in 500 merks by bond, and being charged, they suspend that she is minor; and though she be lately married, yet Gib, her husband, is a highland man, having nothing, and if the marriage dissolve within year and day, the tocher returns, and he has no right thereto, and so he cannot validly discharge.—THE LORDS found her sufficiently authorised by her husband as curator to her, and that the right of administration and *jus exigendi* was in him, and these uncertain events could not hinder his uplifting, and therefore found the letters orderly proceeded.

Fol. Dic. v. 1. p. 397. Fountainball, v. 1. p. 790.

1708. July 6. LADY INVERGELLY *against* HER HUSBAND.

No 144.

MRS ISOBEL ELLIS, Lady Invergelly, gives in a petition, craving the custody and delivery of her only son from Robert Lumisden of Invergelly, his father, in respect of his tenderness, and that she could attend his health better than any other, and that his education at schools and colleges was neglected, and that she was willing to maintain him out of her own aliment, during her separation. THE LORDS, considering he was a youth come to age, and *in familia*, thought the father had the only right to keep and educate him; and therefore refused her bill.

Fol. Dic. v. 1. p. 397. Fountainball, v. 2. p. 448.

1760. June 26.

COLIN, DUNCAN, and MARGARET CAMPBELLS, *against* JOHN CAMPBELL of Ardnave.

No 145.

A widow, having children, married a second husband, and dying without issue of that marriage, her children, as her executors, brought an action against her

KATHARINE CAMPBELL was first married to John Campbell of Killinallian, by whom she had several children; and after his death, to John Campbell of Ardnave; of which marriage there was no issue.

Ardnave, the second husband, got some money, and other effects, with his wife, which had been left her by her first husband; and, on the other hand, he settled her in a life-rent annuity, and other provisions, in case of her surviving.

This marriage having dissolved in September 1748, by the predecease of the wife, Colin, Duncan, and Margaret Campbells, her children of the first mar-

riage, brought an action, as executors *qua* nearest of kin to their mother, against Ardnave, for the half of the goods in communion. Their right to insist in it was not disputed; and the defender having been ordained to exhibit an account of these goods, which he did by way of charge and discharge, the pursuers made an objection to this account, founded on the following state of facts.

In the year 1741, during the subsistence of this marriage, one Alexander Campbell, a relation of the defender's, had died, and left the defender his executor and universal legatar, with the burden of paying his debts and some legacies. These debts and legacies amounted to about L. 1000 Sterling; for all, or most of which, the defender gave his own bills to the creditors and legatees. The effects and debts owing to the defunct amounted to above L. 1200 Sterling; and as most of these debts were owing by bills or open accounts, the defender converted the whole into bonds, bearing interest, and secluding executors. All this was done from the 1741 to the 1745.

The defender was likewise himself creditor to several persons by bills and small accounts, particularly to James Campbell of Ballinaby, in L. 73:11:9; for which sum he took a bond, secluding executors, dated 5th September 1748, and payable in five days thereafter, his wife being then on death-bed. About the same time, also, he disposed of a number of cattle then on his farm, to Gillies of Duchra; from whom he got a bond, dated 20th September, and payable five days thereafter.

The defender, in making up his account of the goods in communion, took credit for the bills which he had granted to Alexander Campbell's creditors and legatees, as so many moveable debts owing by him; but refused to charge himself with the bonds which he had taken from Alexander Campbell's debtors, or the two last bonds above mentioned, taken in September 1748; as the whole of these are bonds bearing interest, and consequently heritable *quoad* the interest of husband and wife.

Objected by the pursuers in the *first* place, The defender cannot be allowed to exhaust the goods in communion, by the bills which he granted to Alexander Campbell's creditors and legatees. These bills ought to be paid out of Alexander Campbell's executry, which is more than sufficient for that purpose. At least, *2dly*, If the bills are brought *in computo* to restrict the wife's share, the bonds, which came in place of the executry-funds, ought likewise to be brought *in computo* to enlarge it. For it would be unjust to load the wife with her share of Alexander Campbell's debts, while the husband pockets all his effects. This was probably what the defender had in view when he changed the security, by taking bonds, bearing interest, from Alexander Campbell's debtors, in place of the former bills and open accounts, while, at the same time, he gave bills for the debts and legacies owing by him. But the law will give no countenance to a device of this kind, calculated plainly to frustrate or diminish the wife and children's right to their share of the goods in communion. The husband's power of administration of these goods, is indeed very ample during the

No 145.
husband for half of the goods in communion. The defender having exhibited an account, it was objected, that being executor to a relation, with the burden of paying his debts, he had granted bills for these debts, and taken bonds, secluding executors, for debts due to that relation, by bills and open account; that he had also taken bonds secluding executors, for moveable debts due to himself; and that he had sold the stocking of his farm, and taken bonds for the price. Found, that the defender was liable to account only for the bonds he had recently before his wife's death, taken for his moveable debts, and for the price of the stocking.

No 145. marriage; but where he does any deed manifestly fraudulent, and having no other tendency but to disappoint the legitim or *jus relictae*, the Court of Session is in use to give relief; Grant *contra* Grant, No 142. p. 5943.; February 1728, Henderson, *voce* LEGITIM. And, 3dly, For the same reason, it seems clear, that the two last bonds taken from Campbell of Ballinaby and Gillies of Duchra, in September 1748, and made payable five days after date, with an evident and most unfair intention of abridging the wife's interest in the moveables, when she was lying *in extremis*, ought to be brought *in computo* of the goods in communion.

Answered for the defender, The creditors and legatees of Alexander Campbell were satisfied with his bills, in place of taking immediate payment of their money. This happened as far back as the year 1744; and the defender did not then dream of any such claim as the pursuers are now insisting in. Supposing no bills had been granted, the legacies and debts of Alexander Campbell, being simply moveable, would still have affected the goods in communion. And with regard to the bonds which the defender got from the several debtors, it was surely a most proper act of administration, to convert debts simply moveable into bonds bearing interest. At the same time, the defender is not bound to account for the reasons of his conduct in this respect. A husband has the sole and unaccountable management of the effects in communion during the marriage; and though he cannot disappoint the wife or children by any settlement to take effect at death, which is all that is proved by the decisions quoted for the pursuer, there is no doubt, that every alienation by him of these goods, or act of management concerning them, while the marriage subsists, is good against every person whatever.

'THE LORDS found the defender liable to account for the two last bonds; and repelled the objection as to the rest.'

Act. *Rob. Campbell & Lockhart.*

Alt. *Ferguson.*

I. C.

Fol. Dic. v. 3. p. 282. Fac. Col. No 223. p. 411.

1763. June 16.

STRACY TILL, &c. *against* ROBERT JAMIESON.

No 146.

An assignment of a debt by a woman to her father, for supporting him in old age, granted before her marriage, though not

A LEGACY of L. 200 Sterling being left to Margaret Jamieson by her uncle John Hamilton merchant in Glasgow, she being in good business as a mantuamaker, assigned the same to her father Robert Jamieson, in order to support him in his old age. The assignment bears date 7th June 1759: and, on the 17th of August the same year, she was enticed into a marriage with Robert Mason linen-draper in Northallerton, who, in a month after the marriage, became bankrupt, and a commission of bankruptcy was issued out against him. The commissioners of bankruptcy executed, as usual, an assignment to the