No 61.

'reserving a power to myself to revoke this deed whenever I think proper.' This settlement was written on paper not stamped.

After the death of the testatrix, Mrs Amelia Lamont obtained a decree of constitution against the Heirs of Archibald Lamont, who was burdened with the payment of this legacy, the sums bequeathed to her sister being included in the same decerniture with those originally due to herself. On this decreet adjudication followed.

It was therefore objected by the common agent in the ranking, *1st*, That considering the legacy of L. 100 as a burden on the lands, it could not be conveyed by a testamentary deed; and, *2dly*, That the settlement not having been extended on stamped paper, the decreets of constitution and adjudication were ineffectual, and this not only as to the sums bequeathed by Mrs Grizel Lamont, but as to the whole, agreeably to the decision, Apparent Heir of John Porteous *contra* Sir James Nasmyth, 4th February 1784, No 43. p. 132.

Some of the Judges seemed to think, that the right of the legatee was of a moveable nature, but the majority considered it as heritable. This, however, was thought to be of little consequence, as the deed, though purporting to be a testament, contained such expressions as were deemed fully sufficient for the conveyance of a debt, which, though a burden on landed property, was transmissible by assignment. The objection arising from the writing not being stamped, was considered as one that could be removed at any time.

The cause was remitted to the Lord Ordinary, with an instruction to sist process till the deed was stamped. After this was done, the Lord Ordinary pronounced an interlocutor, repelling the objections which had been stated to the claim of Mrs Amelia Lamont. See PERSONAL and REAL.

Reporter, *Lord Justice-Clerk*. Act. *Macleod-Bannatyne*. Alt. *A. Macdonald*. Clerk, *Menzies*.

C. *Fol. Dic. v. 3. p. 267. Fac. Col. No 96. p. 174.*

1790. *January 27.* PRIMROSE YOUNG *against* CHARLES CAMPBELL.

No 62.
The debts of a trading company, although constituted by bonds bearing interest, or secured on land, considered as moveable, in a question between the widow and representatives of a deceased partner.

AFTER the company of Douglas, Heron, and Company, bankers in Ayr, which stopped payment in 1772, had been declared to be dissolved, unless for the purpose of winding up the concerns, the sum of L. 500,000 was, by some of the solvent partners, raised by the sale of life-annuities, for discharging the debts of the Company.

As this method of procuring money soon appeared to be a very disadvantageous one, an act of the Legislature was obtained in 1774, authorising the redemption of the annuities. The money necessary for this purpose was to be raised on personal bonds, bearing interest, and collaterally secured by infeftment on the land-estates of those partners who had applied to Parliament.

No 62. These bonds were declared by the statute to be transmissible by indorsation, and deviseable by will.

Primrose Young was the widow of one of the partners of the Company, who had died in possession of considerable funds falling under the *jus relictæ*. But if the debt arising from the bonds already mentioned, corresponding to his interest in the Company, was to be considered as a burden on his moveable estate, her right would thus be rendered of very little value. In mutual actions brought by her and Charles Campbell, the general representative of her husband, for trying this question, She

Pleaded, In regulating the interests of the widow and kindred of a person deceased, it is an established rule, that bonds bearing interest, and still more those secured on land, as they do not fall within the *jus relictæ* when due to the husband, shall not diminish her share when exigible from him. Thus, it appears, that the sums here due to the creditors of the Company in which the deceased had been engaged, must be a burden on the representatives of the deceased only.

It is true, that this debt originally arose from an agreement, the consequences of which, as long as it subsisted, would have affected the widow's right. This, however, is of no importance. In questions of this kind, it is the situation of things at the death of the husband which is the governing rule. If the partners of this Company, instead of being losers, had made great profits, which, after the dissolution of the co-partnery they had employed in purchasing land, or bonds bearing interest, those acquisitions would have belonged, not to the widows, but to the representatives of the several partners;—a circumstance which clearly shows the propriety of throwing the burden of these transactions, as matters now stand, on the latter, and not on the former.

In the case of money borrowed jointly, by several co-obligants in an heritable bond, although before the loan the money may have been so situated as to descend to executors, and although the debt which it was intended to discharge may have been of the same nature, the claim of the creditor for the whole sums due, as well as that of the several co-obligants, to recover from one another what they may have paid beyond their proportion of the debt, is heritable as to all, and must affect the interest of those claiming their succession in the same manner. The present case must be viewed in the same light; for although the bonds were subscribed only by a few of the members of the dissolved partnership, they must be considered as the deed of the whole, so as to place every one of them on the same footing.

Answered, The right which a partner in a mercantile company has in the property belonging to it, is of a moveable nature, whatever the situation of the effects acquired by it may be. While the company subsists, each partner can only demand his share of those profits which have arisen out of the adventure; and when the company is dissolved, his only claim is for his proportion of the common stock, after payment of the debts affecting it. In both cases, the na-

ture of his right, as well as that of those who, after his death, claim an interest in his effects, must be regulated by the nature of the agreement out of which it arises.

No 62.

There are few mercantile companies, the stock of which does not in part consist of landed property; and in many of them, it is almost entirely composed of money lent out on interest, or secured on land, as was the case of the public banks in Scotland, before the business of negotiating bills of exchange was brought to its present height. It is, however, a settled point, that the shares in these companies, though incorporated by statute, and having a perpetual succession, descend to executors, as indeed was very solemnly determined, 1st July 1735, Sir John Dalrymple *contra* The Representatives of Dame Jean Halket, No 48. p. 5478.

In the case of a bond subscribed by many co-obligants, and containing an obligation to pay interest, or accompanied with heritable security, it arises from the nature of the transaction that the representatives of each *correus* should be obliged to make payment, in the same manner as if every one of them had in a separate writing come under the same engagement. And in the case of landed property, or even bonds bearing interest, acquired by the members of a company which is finally dissolved, the succession of *quondam* partners would doubtless be regulated in the same way as if no copartnery had ever existed. But in the present instance the company, though it has given up trade, must still subsist for the purpose of paying its debts. And as the profit arising from the adventure would have been considered to be of a moveable nature, so as to enlarge the widow's share, justice requires, that a proportion of the loss, if there is any, should also fall on her.

THE LORDS found, 'That the claim arising against the deceased as a member of the partnership of Douglas, Heron, and Company, was of the nature of a moveable debt, affecting the goods in communion between husband and wife; and decerned. *See* No 29. p. 400.

Reporter, *Lord Dreghorn*. For the Widow, *Blair*. For Charles Campbell, *Wight*.
Clerk, *Sinclair*.

C. *Fol. Dic.* v. 3. *p*. 267. *Fac. Col. No* 105. *p*. 196.

No 63.

1794. *December* 5. WATSON *against* M'DONNELL.

A PERSONAL debt, in security of which the debtor had assigned a lease of an heritable subject, in consequence of which the creditor had entered into possession, was found a real right, and incapable of attachment by arrestment.

Fol. Dic. v. 3. *p*. 267. *Fac. Coll.*

*** See this case, No 60. p. 731.