

1751. *January 15.*

No 402.

A person being pursued for his wife's debt as a gainer by the marriage, prescription was run from the contraction, but not from the dissolution thereof, and during the subsistence the wife had been pursued, and he for his interest. It was found prescription was not run.

MONTGOMERY of Magbyhill *against* MURRAY of Blackbarony.

THOMAS HUNTER of Hagburn had issue a son Thomas, and three daughters. Margaret married to John Peters of Whitslead, writer to the signet, Elizabeth married to Mr William Wallace of Islington advocate, and Katharine married to William Lauder writer.

Thomas Hunter younger disposed the lands of Hagburn to Mr William Wallace, on his back-bond to accompt for the value, which he assigned for a debt of his father's to John Peters; whose son Alexander Peters obtained Mr Wallace in 1652 decerned to accompt.

Mr Wallace suspended; and the question resolved into a count and reckoning, in which he stated 2500 merks as paid to Katharine; but it appearing that L. 1000 thereof was still due, and that he had paid 1000 merks after intending the process, and Mr Peters claiming a preference to Katharine's debt, as founded on a voluntary bond of provision by her father, after contracting the debt which was the onerous cause of his assignation; the LORDS, 1662, taking these sums into the accompt, found Mr William Wallace was super-extended of the value of the lands, and that they therefore belonged to him irredeemably; but found the said 2500 merks due, and paid to Katharine, "ought to be suspended in a multiplepointing, against the charger on the one part, and the said Katharine and her spouse on the second part, and the creditors of the said Thomas, or any others the suspenders pleased, on the third part, to the effect the said parties might dispute their right; and that the suspender might make payment to the party who should be found to have best right thereto, and decerned."

This was obtained by William Montgomery of Magbyhill, assignee by Peters of Whitslead; but Mr Wallace having never raised the said multiplepointing, William Montgomery of Magbyhill, son to the former, obtained the like decret in 1709, against Alexander Murray of Blackbarony, and Margaret Wallace his spouse, as representing Mr William Wallace her father; and the multiplepointing being raised by them, and afterwards transferred against the present William Montgomery of Magbyhill, the LORDS, 10th February 1715, on report of the Lord Cullen, preferred Magbyhill; and the LORD ORDINARY, 12th February that year, "decerned the Lady Blackbarony and her husband to make payment to him accordingly; and found them both liable in once and single payment."

This preference was opened by a petition for the Representatives of Katharine Hunter, and lay over till Magbyhill wakened the process, and 20th December 1750 and this day, obtained his preference confirmed; and insisting for payment, it was *pleaded* for the present Blackbarony, That he did not represent Margaret Wallace; and though he represented Blackbarony, yet he, in

the decret to raise the multiplepointing, being concluded against and decerned for his interest as husband, and having raised it for his interest accordingly, and the marriage betwixt them having been long since dissolved, he was not, nor is his heir further liable.

No 402.

Answered, He was *lucratus* by the marriage.

Replied, This ground of subjecting him to the debt is prescribed.

Pleaded for Magbyhill, There is no prescription run; for, *first*, The claim upon his being *lucratus* did not arise till the dissolution of the marriage: Creditors of a wife do not know of the settlements made by her in her marriage-contract, and ought not to be repelled by the negative prescription from that term; as if from thence they had been negligent of recovering their debts: It is only on the dissolution of the marriage it can appear whether the husband was *lucratus* or not, as gain may accrue during the subsistence; and *2dly*, If the prescription shall be reckoned from the marriage, it is interrupted by the proceedings against Blackbarony: He was pursued for his interest, which comprehended all the interest in him, and all the *media* whereon he could be made liable as husband: A wife dying during process, if a husband answer, that his interest is at an end, it may be replied he is *lucratus*; and in a suspension, after a wife's death, of a charge during her life, this answer being made to the reasons of suspension, there was found no necessity to put the charger to a new pursuit, 20th March 1627, Knows against Kneeland, No 76. p. 5862.

Pleaded for Blackbarony, Creditors are sufficiently called upon to look to their interest by the marriage itself, which is notour; and the ground of action arises against a husband from the time of celebration, or from the gain accruing: This ground is entirely distinct from that of a husband's being liable for his interest; for that only regards the interest arising to him from the communion of goods and debts, and is ended by the dissolution of that communion: He may be summoned for it by an incident diligence, upon which summons no decret can pass against him, and therefore he cannot be decerned as *lucratus*.

THE LORDS, 20th December 1750, found that the action against Blackbarony, as *lucratus* by the marriage, was not prescribed.

Act. Lockhart.

Alt: Macdoul.

Clerk, Pringle.

D. Falconer, v. 2. No 181. p. 216.