

of fraud in entering into the lease were not relevant to go to proof. The case was appealed.

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After hearing counsel, it was

Ordered and adjudged that the interlocutor of the Court of Session be affirmed.

GOVAN
v.
SIMPSON.

For Appellant, *R. Dundas, C. Yorke.*

For Respondent, *Alex. Forrester, Al. Wedderburn.*

ALEXANDER GOVAN OF GIVAN, - - - *Appellant ;*

AGNES SIMPSON OF GOVAN - - - *Respondent.*

House of Lords, 26th March 1759.

POSSESSION ON AJUDICATION—REDEMPTION—HERITABLE CREDITOR—ASSIGNATION.—Held that though possession had followed on an adjudication, the legal of which was expired, but no infestment had followed, that the right was still redeemable, and that when such preferable heritable creditor gets possession of the estate, over which his own and other securities extend, a second creditor, who offers payment of the preferable debt so secured, is entitled to come in his place, and demand an assignation to his debt: also held, that this doctrine applied to a widow who had her liferent jointure secured over the estate, and that she was in the eye of law a creditor, entitled to such an assignation on offering payment.

By marriage articles between the respondent and her deceased husband John Govan, she was secured, in consideration of the portion she then brought her husband, in a liferent of one half the lands of Mains belonging to him. Subsequent thereto he engaged in trade, and contracted debt, among others to his brother Robert, to the amount of £388. 10s. 7d. chiefly secured by adjudication, but partly also by heritable bonds.

After John Govan's death in 1732, his brother, under his adjudications, entered into possession of the estate of Mains, and continued the same for 25 years, without the respondent, the deceased's widow, obtaining one fraction of her liferent jointure. In these circumstances, after the legal of the adjudication was expired, and after this possession had followed, she raised an action of mails and duties in 1751, founded on her liferent infestment, against the appellant. In defence, it was stated in bar of the action, that he possessed the lands by virtue of an heritable bond and infestment, granted by the respondent's husband, to which she consented, for 3000 merks, and also for another bond for 1400 merks, for which

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the security of the heritable bond was enlarged. And, 2d, That his adjudication taken for that and the other debts was a good title of possession, and gave a preferable right.

The defender was ordered to produce his adjudication and grounds of debt, and also an account of his intromissions with the rents. After various procedure and questions of accounting had, the case came ultimately to this point: Whether, on Agnes Simpson or Gordon paying the whole sums due to the adjudger, she was entitled to assignation of these heritable debts; in other words, to a conveyance of the adjudication, to the effect of keeping them up against the heir entitled to the estate?

Jan. 17, 1758. The Lords of Session “ found that Alexander Govan “ ought to assign to Agnes Simpson the adjudication at his “ instance, upon her making payment to him of the sums “ which shall be found remaining due to him, and that with “ this quality, that the adjudication shall be redeemable at “ any time by the heirs of the deceased John Govan, upon “ payment to her of the sums which she shall pay to Alex- “ ander Govan, and annual rents thereof; and remit to the “ Lord Ordinary to settle the accounts between the parties.”

March 2, 1758. On reclaiming petition, the Court adhered, allowing the appellant possession of the lands till Martinmass next, and grass to Whitsunday.

Against these interlocutors the present appeal was brought.

Pleaded by the Appellant :—The respondent’s action was for payment of the arrears arising upon the liferent jointure of a half of the lands, and her title and the scope of her action go no further. The adjudication under which the appellant holds the lands being expired, the appellant is now absolute proprietor of the lands in question, and is entitled to hold the same, subject to the respondent’s liferent over one half of them, against all and sundry except the heir, to whom he is willing to concede the power to redeem. The widow may have the liferent of the one half, and to this she is now welcome; but beyond this she has no right to insist as a mere liferenter in the assignation she demands. The respondent’s right is not that of a creditor, and consequently she is not entitled to plead the equities of one. But even were she to be viewed as such, and had she an adjudication of the lands as a creditor, she could only have redeemed the appellant’s prior adjudication during the currency of the legal, during which time only it was subject to redemption, but after the legal is expired, she was foreclosed. She is there-

fore not now entitled, on paying the appellant the debt due, to a conveyance of these heritable debts, or to the possession.

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MACALISTER

v.
DUN.

Pleaded by the Respondent.—By the law of Scotland, where a preferable creditor gets possession of the estate of a common debtor the next creditor, on payment of principal, interest, and costs, has a right to come into the place of the preferable creditor, who, on receiving payment of his debt, is bound to grant an assignation thereof to such second creditor so paying to him. The Court below has proceeded on this principle. The preferable creditor has got possession here, which he has retained for 25 years, to the exclusion of the respondents, who having got the amount of his debt ascertained, and being willing to pay the same on such assignation, is entitled to have such a recourse and security granted her. And it is no answer to this to say, that she is not a creditor, because she is in every sense and view of law, a creditor, and the expiry of the legal is completely set at rest by the admission that the heir is entitled to redeem.

After hearing counsel, it was
Ordered and adjudged that the said interlocutors be affirmed, with £100 costs.

For Appellant, *C. Yorke, A. Wedderburn.*

For Respondent, *Al. Forrester.*

Not reported.

ANGUS MACALISTER	-	-	-	<i>Appellant ;</i>
JANE DUN	-	-	-	<i>Respondent.</i>

House of Lords, 2d May 1759.

MARRIAGE—CONSTITUTION OF MARRIAGE.—Circumstances in which marriage held to be constituted by cohabitation and acknowledgment.

THE respondent was the daughter of John Macdonald of Ardnacross, a gentleman of good family. She afterwards married John Dun, a writer in Edinburgh, who died about a year thereafter, leaving her a widow. Soon thereafter a connection was formed with the appellant, and declarator of marriage was raised by her in the following circumstances. The summons set forth, that after her husband's death, being invited into Argyleshire, to visit her relations the Mac-