

No. 136. solving or forfeiting the contravener's right. And though the contrary was established, not only by decisions, but by the opinion universally of lawyers, yet the objection was so far regarded as to occasion a hearing in presence. The established opinion however was more and more confirmed by the hearing; and the Court unanimously found, that an entail wanting a resolute clause of the right of the tenant in tail who contravenes the will of the granter by aliening or contracting debt, cannot be effectual against creditors.

Sel. Dec. No. 146. p. 202.

* * The report of this case from the Faculty Collection is No. 86. p. 15507.

1758. July 12.

CAPTAIN JOHN NOBLE of Farm, *against* ANNE DEWAR, Relict of GEORGE NAPIER of Kilmahew.

No. 137.

A trust-adjudication against an apparent heir under a tailzie, not recorded, a good title to pursue reduction of rights affecting the estate.—An unregistered tailzie a ground for restricting an extravagant jointure to a reasonable provision.

In the year 1687, John Napier of Kilmahew made a settlement of his estate, in favour of himself, and a certain series of heirs, in the form of a strict entail, with the usual prohibitory and irritant clauses; but under an exception, that the heirs of entail might grant life-rent infestments to their Ladies, not exceeding a third of the lands, so far as the same are free, and unaffected for the time with the former life-rents or real debts.

Upon the death of the tailzier, the succession opened to George Maxwell, the eldest son of his eldest daughter; who assumed the name of Napier, and was served heir in general of tailzie and provision to the said John Napier the tailzier, whereby he had right to the unexecuted procuratory in the bond of tailzie.—He thereupon resigned the estate in the year 1694, and obtained a charter from the superior, upon which he was infest. In both the charter and sasine, the whole prohibitory, irritant, and resolute clauses were inserted; but the tailzie never was recorded in terms of the act 1685.

The said George Napier had a son, who married Lady Jean Bruce, and in the marriage-contract the father provided her to a life-rent out of the estate; but the son died in his father's life-time without leaving issue.

George Napier taking advantage of the non-registration of the tailzie, sold off the greater part of the estate; and Lady Jean Bruce having consented to the sale, and to a restriction of her provision, her life-rent was thereby reduced to about £.50 *per annum*. The residue of the estate was also adjudged for considerable debts.—Having become a widower, he entered into a second marriage with Anne Dewar, who brought him no portion; and in the year 1737, when he had no prospect of having children by her, he entered into a postnuptial marriage-contract, whereby he disposed to his wife, in case of her surviving him, the total life-rent of the estate of Kilmahew, with the mansion-house, gardens, and inclosures, and the whole woods growing on the estate, with power to cut and dispose of the same.—

By the same deed, he settled upon her his whole personal estate; and, of the same date, granted her an heritable bond for £.500 Sterling, under condition, that it should subsist only to the extent of his funeral charges, and other privileged and personal debts owing by him at his death, to be paid by her. Upon this contract and bond, infeftment was taken of the same date.

Kilmahew died in the year 1744 without issue, whereby the succession to the residue of the tailzied estate opened to Jean Smith, his grand-niece. Anne Dewar, the relict, intromitted with his whole moveables, and entered to possession of the estate, in virtue of her life-rent provision. She paid Lady Jean Bruce's jointure out of it till the year 1754, when that Lady died; and the total free rent was about £.102 Sterling *per annum*, exclusive of the woods.

Jean Smith afterwards granted a trust-bond to Captain Noble, upon which he obtained an adjudication of the estate against her, as charged to enter heir of tailzie and provision to Kilmahew. Upon this title, he insisted in a process against Anne Dewar, for reducing her life-rent provision, and the said heritable bond, upon the act 1621, as being gratuitous alienations made in defraud of the said Jean Smith, a just and lawful creditor upon the estate, as next heir of entail.

Objected for the defender, *1mo*, The letters of special charge upon which the pursuer's adjudication proceeded, were not side-subscribed, as is expressly directed by act of sederunt, 8th July, 1691.—*2do*, Jean Smith's granting a bond to Captain Noble for his adjudging the estate, is directly contrary to the prohibitions upon which this action is founded; and by the decret of adjudication he is ordained to be infeft in the lands, without any mention of the limitations or irritancies of the tailzie, although by the act 1685, these should be repeated in every conveyance of the estate.

Answered for the pursuer, *1mo*, The act of sederunt does not declare the omission of side-scribing to be a nullity of the diligence; nor was the objection stated, as it ought to have been, before taking a day to satisfy the production.—*2do*, The declared purpose of the trust adjudication is only to found this tentative process; and it is *jus tertii* for the defender to object to the pursuer's title on a ground which could only be competent to an after heir of tailzie.

Further pleaded for the pursuer: Kilmahew's only title to the estate was in quality of an heir of tailzie; and although the tailzie was not recorded, yet the prohibitions and irritancies contained in his own right, must be effectual against himself and his gratuitous disponees.—Marriage is an onerous cause for a rational provision to a wife; but in so far as the provision made exceeds the obligation on the husband, it is gratuitous, and reducible, as *in fraudem creditoris*. A total life-rent of a man's estate is certainly an irrational and extravagant provision for a wife, especially one who brought nothing with her. Here she cannot be presumed to have been ignorant of the entail, as she had been married ten years before the contract. The law points out a terce of the husband's estate as a reasonable provision, and this entail limited the life-rents to be granted to wives to a third of the free rent; which therefore ought to be the rule.

No. 137.

Answered for the defender: The rationality of a wife's provision must depend on circumstances. When a man's estate is reduced to a narrow compass, the whole will not be so suitable, as a third might have formerly been. That was the case here. The whole is not too liberal an allowance for the widow of a gentleman of family and rank. Besides, at the time of granting this provision, and for many years thereafter, the estate was burdened with another life-rent, exceeding the half of the free rent, and the annual-rents of the other debts exceeded the whole rent of the estate; so that she now owes her possession to the tolerance of the creditors. The Court has, in many cases, sustained provisions to a wife beyond the extent of a terce, though made by a husband *obvaratus*, and that although she brought no portion with her; See BANKRUPT, Sect. 10. Regard is to be had to the rank of the husband; and if these provisions have been sustained in questions with onerous creditors, *multo magis* must such life-rent be sustained against an heir claiming under an unregistered entail. The words of the entail cannot determine the extent of the life-rent; because it was not recorded, so not good against the wife, in so far as she is an onerous creditor for her provision; and were it to be followed, she would get nothing, as there is truly no free rent.

Replied, That supposing all the debts were preferable to this life-rent provision, and that the interest exceeded the rent; yet the heir of entail, as creditor in the reversion of the estate, has a good title to reduce a gratuitous settlement, whereby the defender pockets up the rents which ought to be applied for the payment of the annual-rents.

“The Lords sustained the pursuer's title; and found, That the life-rent is to be restricted; and in order thereto, remitted to the Lord Ordinary to enquire into the circumstances of the estate at the time of the marriage-settlement in October 1737.”

Nota.—By a subsequent interlocutor, 3d March, 1759, the Lords found, “That the defender's life-rent is not to be restricted to a third of the free rent of the estate, conform to the entail; but before restricting the said life-rent to any precise extent, ordained a scheme to be given in, showing the amount of the free rent of the estate, after deducting the annual-rent of the debts affecting the same at the expiration of Lady Jean Bruce's life-rent.”

By that scheme, the free rent amounted to £.42. 11s. 5d. Sterling. And,

By interlocutor of the 11th July, 1759,

“The Lords restricted the defender's liferent to 600 merks Scots yearly.”

Act. *Dav. Rae, Tho. Miller.*

Alt. *Ilay Campbell, J. Ferguson.*

Reporter, *Prestongrange.*

D. R.

Fac. Coll. No. 122. p. 225.