

No 36. ing it altogether; this clause therefore operates a restriction of the husband's right, in the case which has happened; and the contract is very accurately conceived, stipulating a return of the property to the wife, in the event of its falling to her on her survivance, as the liferent was in her already; but in case of her predecease, the expression is, that the said sum shall return to the pursuer's cedent.

' THE LORDS, 6th December 1748, found that in this case the husband had right to the liferent of the sum in question; and refused a bill, and adhered.

Act. *A. Pringle.*

Alt. *Ferguson et J. Erskine.*

Clerk, *Kirkpatrick.*

*Fol. Dic. v. 3. p. 219. D. Falconer, v. 2. No 23. p. 29.*

1749. July 28. NAIRNS against The CREDITORS of NAIRN of Greenyards.

No 37.

A person, on condition of succeeding to an estate, was bound to grant a bond of provision, to a younger brother, returnable to the granter, if the creditor died without children. An assignation for rational and onerous causes was sustained in prejudice of this clause.

AGNES NAIRN, Lady Tarsappy, purchased the estate of Drumkilbo to herself in liferent, and to her nephew Alexander Nairn of Greenyards, and to his heirs-male in fee; taking from him an obligation, that on his succeeding thereto, he should dispoise his estate of Greenyards under the burden after mentioned, to John Nairn his brother; and failing Alexander and his heirs, took the estate to John and Robert his brothers in like manner successively; prohibiting the whole heirs to alter the succession, or contract debts.

Alexander, upon his aunt's death, dispoised his estate to John, with the like prohibition as in that of Drumkilbo to him; and, on the narrative, that when the Lady made her purchase destined as above mentioned, it was agreed that Alexander should dispoise to him his said estate, under the burden of 15000 merks to Robert their younger brother, 'with and under the condition and provision after specified;' and that Alexander had accordingly implemented his obligation, therefore he granted to Robert, his heirs and assignees, an heritable bond 25th December 1706, for that sum on the estate of Greenyards, with this provision always, that upon the existence of the condition whereon he was bound to dispoise to him the estate of Greenyards, he should discharge or repay the same; as also 'that failing of heirs of the said Mr Robert his body, the said sum should return to him, his heirs and assignees whatsoever.' Robert Nairn 1729, 'for certain onerous causes, and particularly for that he was educated by Alexander Nairn of Drumkilbo his elder brother at schools and college, maintained by him near two years at Leyden in the study of the law, and ever since that time entertained in his family, except about the space of a year and a half that he was abroad; which obliged him in justice as well as gratitude, to leave to him or his children some proportion of the money he had thereby saved; and for the love and favour he bore to Margaret, Anne, and Jean Nairns, daughters to the said Alexander Nairn, assigned and dispoised to them the sum of 5000 merks, being part of the 15,000 contained in the above heritable bond.'

Robert Nairn died 1737; and a competition arose betwixt his assignees and the Creditors of John Nairn of Greenyards, wherein the Lord Ordinary, 17th July 1747, 'found that the creditor in the bond for 15,000 merks could not gratuitously dispone or assign the said sum, or any part thereof, in prejudice of the clause of return contained in the said bond; and therefore the assignees could have no place in the ranking of the estate of Greenyards; reserving to them to astruct the onerous cause of their assignation as they best could.'

*Pleaded* in a reclaiming bill, The two estates are subject to an entail; but this sum is made subject to none, being granted as a portion without any view of perpetuity, and under no condition, but of ceasing on the event of his succeeding to the estate of Greenyards. It is given to him, his heirs and assignees, so that he had the power of disposing of it; and the after clause of return must be understood in the case of his not so disposing.

*2dly*, Allowing the clause to disable Robert Nairn from an arbitrary disposal, it does not hinder him from doing rational deeds, which this was, and indeed not an adequate remuneration for the favours he had received from his brother, by means of which he was enabled to preserve his patrimony; the facts are notorious and prove themselves, as by his father's testament he was only provided to 1000 merks, and part of the plenishing of his farm and house, and yet he had received a liberal education at home and abroad before this bond was granted him, and afterwards lived continually in his brother's family.

*Answered*, The provisions to the three brothers are evidently parts of a general plan; and as those of the elder brother are subject to a limitation of succession, so is that of the youngest; it is not indeed entailed, in the manner the land estates are, but made subject to such limitations as are ordinarily imposed on a provision of money, which it is acknowledged he could have spent, but not voluntarily disposed of; and the assignation is gratuitous; Alexander, as heir to his father, was bound to educate his brother; and with regard to after obligations, remuneration is not a sufficient cause for evacuating such clauses as this; a similar to which was found to exclude a disposition made to a husband, in name of tocher, Johnston and Napier against Johnston, No 34. p. 4344.; and this assignation bears to be for love and favour, and reserves power to alter.

THE LORDS allowed the pursuers to astruct the onerous cause of their assignation; and having considered the proof adduced, they, 10th January 1749, 'sustained the assignation granted by Mr Robert Nairn; and found the petitioners entitled to the sum thereby assigned.'

On a bill for the creditors, condescending on certain articles of expenses furnished by Robert for his brother's family, to no great amount, and legacies to others of his children to the extent of 3800 merks, and answers,

'THE LORDS adhered.'

Act. R. Cragie.

Alt. Ferguson et Hay.

Clerk, Gibson.

Fol. Dic. v. 3. p. 217. D. Falconer, v. 2. No 90. p. 97.