

and bairns of the marriage, tailzied the same to his heirs-male, with other substitutions.

James Strang, the tailzier's eldest surviving son, insisted in a reduction of the tailzie, as in defraud of the obligation in the contract of marriage, and highly irrational, in as far as his father became bound to give his estate to heirs whatsoever, and had only given it to him and his heirs-male; and had, by substitution, preferred his own daughter to the daughter of his son; he had prohibited the heirs to contract debt; and had not allowed them to provide wife or children; and obliged them to use the name of Strang, and design themselves portioners of Meikle Earnock; and yet he had not prohibited them to sell the estate: An heir is laid under an irritancy if he shall marry a woman by whom he has had a natural child; which is no irritancy upon an heiress: This estate extends only to L. 537 Scots yearly, burdened with L. 8000 of debt.

Answered; That the estate was provided to the heirs and bairns of the marriage, which was to be understood equally amongst them; so that the eldest son having got the whole by the tailzie, could not quarrel it: A father obliged to give his estate to his eldest son, is not disabled from giving it him under a tailzie; nor is the proprietor of a small estate disabled from tailzieing it, more than if it were a large one; where there was so much debt, it was reasonable to prohibit from contracting more; and, at the same time, to allow the heir to sell in case of necessity.

Replied; A provision of a land estate, to the heirs and bairns of a marriage, gives the right to the heir.

THE LORDS sustained the reasons of reduction.

Act. R. *Craigie & Boswell.*

Alt. *Millar.*

Clerk, *Pringle.*

Fol. Dic. v. 4. p. 189. D. Falconer, v. 2. No 224. p. 269.

1751. July 25.

Sir JOHN DOUGLAS *against* DOUGLAS.

SIR WILLIAM DOUGLAS of Kelhead being obliged, by his contract of marriage, to secure his estate in favour of himself, and the heirs-male to be procreated thereof; which failing, the heirs-male to be procreated of any other subsequent marriage; which failing, the eldest heir-female of that marriage, without division; which failing, the eldest heir-female of any subsequent marriage, without division; which failing, his heirs and assignees whatsoever; disposed the same, by an entail, to himself in liferent, and to John Douglas, his eldest son, and the heirs-male of his body, in fee; which failing, with other substitutions, and under conditions, as after-mentioned.

Sir John Douglas, the institute, raised a reduction of this tailzie, as in defraud of the obligation in his father's contract of marriage, whereby he was bound to

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defraud of the tailzier's contract of marriage, reduced,

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Found in conformity with the above.

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give him the estate free, and had only given it him under a tailzie; and had thereby preferred his daughters, in case of failure of heirs-male, to the daughters of his son, who were, as the heirs-female of his marriage, substituted immediately to the heirs-male of his body; he had disabled the institute from altering the order of succession; from burdening the estate with debts; and had obliged him to purge all debts of his father's contracting, or his own, before his being entered or infeft in the lands; and, at the same time, to procure himself timeously infeft, and not to suffer the lands to lie in non-entry: He has obliged him to cause all the prohibitory and irritant clauses of the tailzie to be inserted in the rights to follow thereupon; which is not in his power, as the bulk of the estate holds of a subject, who is not obliged to insert in his charters clauses prejudicial to his own casualties: The heirs have only power of providing their wives with an annuity to the extent of 2000 merks Scots, or of 1000 merks, if there shall be another annuity subsisting on the estate; and 'to burden the said estate and lands with any sum not exceeding 20,000 merks Scots, for providing their daughters, or younger children; and declaring further, that the provisions so to be granted to the younger children shall be expressly burdened with their assuming and using the surname of Douglas; otherwise the said provision of such of the said younger children, who shall not use the said surname, shall be void and null;' so that even the daughters, under the forfeiture of their share of this provision, are burdened with using the surname. Whatever may be held in general of a father's having it in his power to tailzie an estate, which he is bound to give the heirs of his marriage, when it is opulent, and he does not prefer any other heirs to those in whose favour he stands obliged; in this case, it was not allowable, as the estate, of about L. 380 Sterling yearly, descended to Sir John, burdened with an annuity to his mother of 2000 merks, and with the charge of the tailzier's younger children, to whom aliments were granted, to the value of L. 1000 Sterling; and Sir John himself had necessarily contracted debts, for the maintenance of his own family, for which his father had granted him no suitable allowance.

THE LORD ORDINARY, 11th July 1751, "Having considered the tailzie, and several clauses therein, particularly that clause, whereby, notwithstanding, that, by Sir William Douglas, the maker, his contract of marriage, he was bound, on failure of heirs-male of his body, to provide the estate to the eldest heir-female of the marriage, he, in the tailzie, preferred his own daughters then existing; which failing, any other lawful daughter or daughters of his body, to be born after that date, in their order, to the pursuer's daughters; sustained the reasons of reduction of the tailzie."

On bill and answers, the LORDS adhered.

Act. Ferguson.

Fol. Dic. v. 4. p. 189. D. Falconer, v. 2. No 226. p. 273.

* * See 23d January 1747, *Ker against Kers*, No 116. p. 12987. and 17th July 1751, *Strang against Strang*, *supra*.