

No 68.

A clause of entail, empowering the heir of tailzie to provide wives or husbands in liferent, to the extent of a third, found sufficient to empower the first institute, and the next apparent heir jointly, to settle a third upon the wife of the said next apparent heir.

1756. January 28. HoustON of Johnston *against* STEUART NICOLSON.

LADY SCHAW entailed her estate of Carnock, and certain annuities, which were afterwards found to amount to L. 2026, in manner mentioned in the decision, *voce* TAILZIE, upon her daughter Lady Houston as institute.

This entail contains a clause, declaring, ' That the said Lady Houston, *her heirs of tailzie*, shall have power, each of them, to provide their respective husbands and wives in a competent liferent out of the foresaid estate, not exceeding a just third of the rents thereof, by way of locality, *which is to be in full to them both of courtesy and terce.*'

By an after clause in the end of the entail, she appoints her daughter to employ the *annuities* to buy lands and annex the same to the entailed estate ' and take the rights to herself and the heirs of tailzie, under the same *provisions, conditions, declarations, clauses irritant and resolute, above expressed.*'

In the year 1744, Sir John Houston, apparent heir to Lady Houston in the estate of Carnock, was married to Miss Cathcart; and, in the contract of marriage, Lady Houston disposed to Sir John her estate of Carnock, and Sir John granted his Lady a liferent infestment of a third of the said lands, and became bound to pay her a further annuity of 1600 merks yearly: ' And for her further security of the said annuity, Lady Houston assigned to her a third part of the yearly interest of the L. 2026, at that time lying in Lord Napier's hands, upon heritable security.' And on the other part Miss Cathcart ' assigned to Sir John her bond of provision of L. 2000, L. 500 thereof to himself simply, for his own behoof, and the other L. 1500 to him in trust, for her security of the liferent annuity of 1600 merks yearly, and of the provisions stipulated to the daughters of the marriage; and after these are satisfied, to Sir John for his own use and behoof.'

Lord Napier having paid up the L. 2026 to Lady Houston, she lent it out to sundry debtors upon personal bonds; and having executed a general disposition of all her effects to Mrs Cunningham of Enterkin, she burdened her with employing the L. 2026 in terms of the entail.

Lady Houston and Sir John being both dead, Mr Houston of Johnston, Sir John's executor, brought a process, concluding, That Mrs Cunningham should lay out the L. 2026 in terms of the entail, to the end that a new right and security might be granted to Sir John's widow, to the extent of a third part of the interest of that sum, and that Steuart Nicolson, the heir of entail, should be decerned to relieve him, the pursuer, of the said annuity to that extent.

Pleaded for the heir, *imo*, Lady Houston had no power by the entail to burden the lands with any annuity. She was married, and the mutual provisions betwixt her and her husband ascertained before the entail was made: This faculty of granting liferents is therefore confined to *heirs of tailzie*; no such power is given, or meant to be given, to her the *institute*.

2do, The faculty of burdening with the liferent extends only to the *entailed estate of Carnock*; for it is declared, That a locality of a third part of that estate shall be in *full* of both courtesy and terce. And, if this money were fixed down under such a burden, the purpose of the entailor to have it laid out in purchasing lands must be disappointed.

3tio, This faculty could not be used by Lady Houston in favour of the wife of her son. The heirs are allowed to provide their *respective husbands and wives* in liferents, but not the husbands or wives of their apparent heirs.

4to, Sir John, by his contract of marriage, is clearly the principal debtor in the additional annuity of 1600 merks; Lady Houston's interposition in favour of the young Lady is only for her *further security*; it cannot relieve the principal debtor or his representatives. On the contrary, Sir John's executor must relieve and disburden the L. 2026, as Sir John has left enough to pay all his debts.

Pleaded for Mr Houston in answer to the *first*, Lady Houston acting in concert with her son Sir John, who was an heir of entail, and was empowered by the entail to give his wife a liferent, did not exceed her powers in granting the security now in question.

To the *second*, The L. 2026 is to be settled under the same *provisions* and *conditions* with the estate of Carnock.

To the *third*, That Lady Houston could dispoise her whole estate to her son, who was *alioqui successurus*; she might therefore, *a fortiori*, give this liferent to his widow. *Qui potest majus potest minus*.

To the *fourth*, No traces of a *principal* and *fidejussory* obligation can be discovered in this marriage contract; there is a personal obligation upon Sir John, and a real security granted by Lady Houston, and the personal obligation must be absorbed in the real security. If it were not so; in every heritable bond the heir of the debtor would be entitled to a relief against the executor, as these bonds, in their usual style, always begin with a personal obligation to pay; and, for the creditor's *further security*, the debtor becomes bound to infest him in particular lands; yet unquestionably such bond belongs to the heir of the creditor, and must be paid by the heir of the debtor.

It was further *insisted* for Mr Houston; That Sir John, by surviving his mother, became creditor in this entailed money, which vested in him without a service; and as after his mother's death, he had undoubted power to grant this liferent provision to his Lady, his succession as *jus superveniens* must operate *retro* to render valid that liferent provision which his mother, with his consent, in his own marriage contract, had granted.

To this it was *answered*, Sir John's survivance could not establish a right in him to this entailed subject without a service. And, *separatim*, *jus superveniens* to a consentor will not confirm the right consented to, although it may be otherwise *ubi jus supervenit* to the principal dispoiser.

THE LORDS found, That Lady Houston had power to provide the wife of her son, the apparent heir, in his contract of marriage, in a jointure to the extent

No 68. of a third part of the entailed money, and that the Representatives of Lady Houston are bound to implement the said obligation.'

Act. *Craigie, Lockhart et Wallace.* Alt. *Ferguson et Stewart.* Clerk, *Forbes.*
W. S. *Fol. Dic. v. 3. p. 129.* *Fac. Col. No 182. p. 271.*

See TAILZIE.

S E C T. XII.

Importing an Obligation, or only a Faculty.—Pre-emption.— Redemption.

1755. *February 18.*

NINIAN JAFFRAY, and Others *against* The DUKE of ROXBURGH.

No 69.

A village was erected by a charter into a burgh of barony, with power to the baron to levy certain tolls, and apply them to the uses of the burgh. The tolls having been constantly levied, this was found to import an obligation to apply them; altho' the clause had been omitted in the baron's charter for more than a century past.

Reversed on appeal.

IN the 1614, the Crown granted a charter of the barony of Halydean, comprehending the town of Kelso, to Robert Lord Roxburgh in liferent, and to William Ker his son in fee.

This charter erects the town of Kelso into a burgh of barony; and contains the following clause: 'Cum plena potestate Willielmo Ker forum publicum hebdomadatim tenendi, et annuatim duas liberas nundinas, infra dictum burghum celebrandi, custumas et divorias earundem recipiendi et levandi, ac easdem ad commune bonum dicti burghi applicandi.'

In the 1634, the Crown granted a new charter to the same Robert Lord Roxburgh, wherein the clause aforesaid is repeated; but, in a charter granted to him in the 1647, the customs are simply and absolutely granted; and all the subsequent rights of the family of Roxburgh have been taken in terms of the charter 1647.

Jaffray and others, feuers and inhabitants of Kelso, raised a process of declarator against the Duke of Roxburgh; concluding, that his Grace should, in terms of the charters 1614 and 1634, granted to his predecessors, apply the customs aforesaid for the common good of the burgh.

Objected for the Duke of Roxburgh; *imo*, The pursuers could, at most, have had only a personal right of action on the charters 1614 and 1634: now these charters have never, since the 1647, been a title of possession; and, of consequence, no action can lie on them. Further, the family of Roxburgh has, by the positive prescription, acquired an absolute right to the customs under the charter 1647, and the subsequent charters and infeftments; *2do*, The terms of the charters 1614 and 1634, supposing them to be still in force, import not an obligation to apply, but only a faculty of applying; and so have they been ex-