

No 12.

death, these circumstances ought, as to her, to infer a *perceptio*, or *separatio a solo*; and this the more especially, that the Duke was in the knowledge of the bargain, and saw the execution of it carried on for a above a year, without objecting.

In this case, it appeard, that the Countess had been rather premature in disposing of this wood; for, in a proof allowed by the Lord Ordinary, it came out, that the common age in that country for cutting woods was from 20 to 30 years; whereas she had sold it at the age of 18 years. But the Court did not seem to lay any stress upon this circumstance; and several of the Lords gave their opinion, that the liferentress had no right at all to dispose of the woods; and therefore that no action could lie against the Duke. But as the question concerned only such part of the woods as remained standing at the Countess's death, there was no interlocutor on the general point.

THE LORDS sustained the defence for the Duke, and assoilzied him; but found the Executors of the Countess liable to the pursuers in damages, with interest thereon, from the term of Martinmas, after the interruption by his Grace; and found expences due.

For the Duke, *A. Pringle.*For the Executors, *Ja. Erskine.*Clerk, *Kirkpatrick.*

S.

*Fac. Col. No 49. p. 72.*1766. *January 14.*

ALEXANDER PIRIE, Factor *loco tutoris* to JAMES JUSTICE, against MRS MARGARET MURRAY, and her Tenants.

No 13.

Tacks granted by a person, whose liferent infertment was limited to a certain sum, found good, notwithstanding the lands yielded a greater rent than the sum to which the right was restricted.

In a contract of marriage entered into between Mr James Justice and Mrs Margaret Murray, Sir James, the father of Mr Justice, became bound to resign the Mains of East Crichton, and certain other lands therein mentioned, in favour of Mrs Margaret Murray in liferent, and warranted these lands to be worth 2000 merks of yearly rent. In this contract there was also a procuratory of resignation, providing, that the lands over which Mrs Murray's liferent was constituted, should be resigned in her favour for new infertment, so far as the same extended to her liferent annuity of L. 100 Sterling. And it was also provided, that she should enjoy the full mails, profits, and duties of the same, in so far as might be extended to the foresaid sum of L. 100 Sterling. The contract contained likewise a clause of warrandice, whereby the lands were warranted free of all burdens whatsoever, in so far allenary as might be extended to her yearly liferent above mentioned; and she was likewise assigned to the rents of the same, in so far as might be extended to her liferent of L. 100 Sterling. This contract likewise concludes with a precept of sasine precisely in the same terms, and expressly restricting her right to L. 100 Sterling.

Some time after the marriage which followed upon this contract, the estate of Crichton was sold, with the concurrence of Mrs Murray, and the lands of Justice-hall were purchased. The disposition to these lands provided, that they should

pertain to Mrs Murray in liferent, and should be in implement and satisfaction to her *pro tanto* of her liferent provision of L. 100 Sterling.

This marriage was afterwards dissolved by a sentence of divorce, on account of the adultery of Mr Justice. In consequence of which, Mrs Murray brought a process before the Court of Session, for implement of the articles in her marriage contract, The summons in this action libelled expressly for her liferent annuity of L. 100 Sterling, and decret was pronounced against Mr Justice precisely in the same terms.

The lands of Justice-hall were a good deal short of this provision, and Mrs Murray entered into a composition with her husband's creditors, whereby she accepted of the sum of L. 367 Sterling in full of any claim she could have for the yearly deficiencies of her jointure; by which composition, her right over the lands of Justice-hall came to be restricted to a certain sum; whereas, before the date of this agreement, she was entitled to the whole rents.

Mr Justice died without having appointed tutors to his son; and, in consequence of an application to the Court, Mr Pirie was named factor *loco tutoris*. Immediately after his nomination, he discovered, that the lands of Justice-hall would yield considerably more rent than Mrs Murray was entitled to draw in virtue of her liferent provision; computing the composition she had accepted from her husband's creditors in place of its shortcomings. Upon which, he insisted in actions of removing against those tenants who possessed by tacks from Mrs Murray. In support of this action, he *contended*, That Mrs Murray's right over the lands of Justice-hall, was restricted to a certain annuity by her contract of marriage in manner above mentioned. That, if she had entered into no composition with her husband's creditors, she would have been entitled to draw the whole rents of these lands, as they could never have amounted to her provision of L. 100 Sterling. But, as she had accepted of a certain sum as the value of the inlakes of her provision, she had no right to intromit with the rents, any farther than what would extend to her liferent annuity, the composition for the shortcomings being considered.

It was *contended*, on the other hand, by Mrs Murray, That, though the sum she was entitled to draw was confined to L. 100 Sterling, and was expressed in her contract of marriage as a restricted liferent, and a liferent annuity; yet her right was a locality, and her powers over the lands, in which she was infeft, as ample as those of any proprietor. She likewise observed, that the assignation to mails and duties in her contract of marriage, empowered her to set, and raise tenants, use warnings, prosecute removings, and to do, during all the days of her lifetime, whatever her husband or his father could have done.

'THE COURT found the tacks granted by Mrs Murray were good, reserving to the pursuer power to insist, in case she should receive more rent than she was entitled to draw.'

Act. *Wight et Arch. Cockburn.*

A. C.

Alt. *Montgomery et Alex. Murray.*

*Fac. Col. No 30. p. 53.*