

No. 93. could not regulate the endurance of the lease, but only the extent of the recourse in case of eviction. The only event provided for by the exception from the warrantice, was the recourse competent in case of eviction. It was, therefore, to be held the only one in view of the parties at the time; and, as to remote consequences, they either were not in view, or, if in view, had not been provided against; and, not having happened, could at no rate enter into the question.

“The Lords sustained the reasons of suspension.”

Act. L. *Advocate, M^cQueen.*

Alt. D. of *Faculty.*

Clerk, *Ross.*

Fac. Coll. No. 107. p. 286.

* * This case was appealed. The House of Lord, 6th May, 1774, ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed with £.100 Sterling costs.

1778. *August 5.*

SIR WALTER MONTGOMERY-CUNINGHAME *against* JOHN MONTGOMERY-BEAUMONT.

No. 94.

Provision by a wife to her husband, out of lands settled under a prohibition to alter the succession, sustained, although the annuity exceeded the free annual produce of the estate.

James Montgomery of Lainshaw executed a deed settling his estate, failing heirs of his own body, upon his sister Elizabeth, then married to Captain Montgomery-Cuninghame, and a series of heirs in succession. The deed contained a prohibition on the heirs to alter the order of succession, “or to do any other act or deed, directly or indirectly, whereby the same may be any ways altered.

On the death of Mr. Montgomery without issue, the succession to his estate was taken up by his sister Mrs. Cuninghame, under this deed. Her husband died, and she entered into a second marriage with John Beaumont; during the subsistence of which, she executed a bond for an annuity of £.300 in his favour during his life, payable out of the estate of Lainshaw.

Upon her death, Sir Walter Montgomery-Cuninghame, her eldest son of the first marriage, succeeded to this estate. Finding it deeply burdened with debts, he brought a reduction of this bond of annuity, as falling within the prohibition to alter in the settlement of the estate.

Pleaded for the pursuer: The prohibition to alter in the settlement, is a good title for voiding every gratuitous deed in contravention of it; Stair, Inst. B. 3. T. 3. § 39.; Ersk. B. 3. T. 8. C. 23.

The bond of annuity under challenge is a deed of this kind; for, *1mo*, it is gratuitous. There is no kind of obligation on a wife to make a provision to her husband; L. 33. D. De Don, inter Vir et Ux. But although this annuity to the husband should be considered in the same light as a post-nuptial settlement on the wife by a husband, it must be held as purely gratuitous, in so far as it is immoderate, and unsuitable to the situation of the estate. In this case, the estate is so

deeply involved, that there would be no reversion to the heir if the bond were sustained, and even not enough to pay the annuity itself.

2do, It is in contravention of the prohibition to alter the succession. The defender's right of annuity is a right by infestment in the estate. If this bond is good, it is only after his death that the pursuer would succeed to the enjoyment of the estate.—The heir, therefore, is effectually denuded of the use of his lands, which is an alteration of the succession to every beneficial purpose.

Answered for the defenders : Limitations in the settlement of estates operating to lessen, or defeat a vested interest of fee, are unfavourable. And on this principle it has been justly established, that all acts, not expressly, and in legal technical language, prohibited, are within the powers of an heir of entail, as well as effectual against the estate. Thus, it is a fixed point, that a mere prohibition to alter, such as the present, does not tie up the heir from burdening the lands with debt, or even selling the whole estate. Not only would the purchasers, in such a case, be safe, but the price would be the unlimited property of the heir who sold it ; for the heir in possession has the same right to found on the want of precise and express terms as the creditor or purchaser.

Mrs. Montgomery's powers over this estate, therefore, went much further than to the executing of this deed. She might have sold the whole of it, and made a present to her husband of the price. She has only burdened it with a temporary right in his favour, which not being expressly prohibited, she had full power to grant, notwithstanding the prohibition to alter the succession.

2do, This deed is not gratuitous, in the proper sense of the word, proceeding on no antecedent obligation. Husband and wife are under mutual obligations to assist and provide for each other. It has been repeatedly decided, that provisions to husbands in post-nuptial contracts of marriage, are not reducible as *donationes inter virum et uxorem*; McGill, November 22d, 1664, No. 77. p. 5696; Chalmers, January 25th, 1710, NO. 265. p. 6056; Stirling, July 31st, 1716, No. 326. p. 6111.

Observed on the Bench : If the merits of the cause depended upon the rationality of the deed, it would be proper to delay the decision till the real value of the estate was known ; but that is unnecessary, as the deed does not counteract the prohibition in the settlement, and will be good though it exhaust the whole estate.—The Court were of opinion, that there was a natural obligation on the wife to provide the husband when in her power ; and the husband, in such provision, will not be considered as a stranger.

The Court “ repelled the reasons of reduction ;” and adhered on advising a reclaiming petition and answers.

Act. James Boswell, Ross.

Alt. Ilay Campbell, Buchan-Hepburn.

Fac. Coll. No. 42. p. 73.