Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

1806.

RAES v. NEWAL.

For Appellants, *Henry Erskine*, *John Clerk*, *Wm. Adam*.
For Respondents, *Wm. Alexander*, *David Boyle*.

JAMES RAE, Merchant in Dumfries, WILLIAM RAE, Merchant in Kingston, Jamaica, and JOHN RAE, Farmer at Torrorie, - *Appellants*;

MARGARET NEWAL, formerly RAE, Wife of David Newal, Writer in Dumfries, and the said David Newal for his interest, - *Respondents*.

House of Lords, 2d July 1806.

EXECUTRY—RETENTION—DEBT—DISCHARGE.—A daughter raised an action against her brother intromitting with her deceased father's personal estate, for her third share of the executry due her as at his death. The brother refused payment, and claimed to retain her share, for large advances and other sums made to her husband during the father's life. Circumstances in which it was held, that her deceased father having entered into a transaction and agreement, by which he had discharged all these claims for advances, she was entitled to her third share of the executry.

Fergus Rae, whose estate is now in dispute, died intestate in September 1797, leaving issue the appellants, his three sons, and a daughter, the respondent, Mrs. Newal. Their father left heritable property to the amount of £3000 or £4000, and personal estate worth £4693. 11s. 4d.

1797.

James, the eldest son, succeeded to the heritable estate, and, by the law of Scotland, the personal estate behoved to be divided equally among William, John, and the respondent Margaret Raes.

Although James Rae had no interest in the personal estate, yet he improperly possessed himself of that estate, and took upon himself the administration of it for the benefit of his two brothers, they residing at a distance, and conceiving, besides, the idea that the respondent had no right to any part of it.

In these circumstances, the present action was raised by the respondents, setting forth "That as no settlement had "been executed by the said Fergus Rae, the said James

1806.

RAES v. NEWAL.

"Rae, his eldest son, succeeded to the heritable estate, "which is very valuable, and the saids John Rae and Wm. "Rae, and the pursuer Margaret Rae, as the executors and "nearest in kin to their father, acquired right equally "amongst them to the moveable estate, means and effects, "left by the said Fergus Rae, their father, to a great "amount: That the said James Rae, the eldest son, imme-"diately after his father's death, without the consent of the "said brothers and sister, or any legal right or title what-"ever, thought fit to take upon him the sole management "of his father's affairs, intromitted with, uplifted, and dis-"posed of the whole household furniture, debts, and sums "of money, and other means and effects which he died "possessed of, and refuses to render any account thereof, "or to make payment to the pursuer, Margaret Rae and "her husband, of their third share of the said move-"able estate, to which they have an undoubted right by "law." And, therefore, concluding to produce and exhibit an exact inventory of the personal estate, and to hold just count and reckoning with the respondents, and make payment to them of their just equal third share of the said personal estate. The appellant also brought a multiplepoinding.

In defence to the main action, the appellant James admitted, that, after payment of all debts, there was a free balance of funds in his hands of £4693. 11s. 4d., of which the respondent's third amounted to £1564. 10s. 3½d. But he pleaded that he was entitled to retain that sum until the respondents severally fulfilled certain obligations that became vested in him, as the heir of Fergus Rae. Separately, That the respondents were, as in an accounting with the other younger children, bound to deduct or set off the value of an heritable subject that had been purchased by Fergus Rae, and transferred by donation of him to the respondents.

But the circumstances which the respondent stated to meet this defence were:—that the late Fergus Rae had, on the outsetting of all his children, given them large advances to begin with, with the exception of his daughter, the respondent, to whom, on her marriage, he gave nothing; and, in order to put her on an equal footing with the rest of his children, he made a donation to Mrs. Newal of a small piece of ground or field, which he purchased for that purpose, taking the rights from the seller "to and in favour of

1790.

1806.

RAES
v.
NEWAL.

" the said David Newal, and Margaret Rae his spouse, and " the longest liver of them two, in conjunct fee and liferent, " and to the children procreated, or that may be procreated " between them, in fee, absolutely and irredeemably, All " and whole that park or enclosure," &c. There was superadded a clause, providing, that notwithstanding the children of the said David Newal and Margaret Rae are vested in the fee of the foresaid subjects, " yet it shall be in the " power of the said David Newal and Margaret Rae, or " survivor of them, to sell or otherwise dispose of the " same, as they shall see most advantageous for their chil- " dren's behoof, and to divide the price among them in such " shares and proportions as they may think proper."

Having also taken one of the farms on lease belonging to the Duke of Queensberry, on the grassum principle, the deceased Fergus Rae became bound as security in a bill for the amount, £420, as well as a cautioner in relief to his own cautioners, as Collector of Supply for the county of Dumfries.

In July 1796 the respondent, David Newal, became bankrupt, while the negotiation as to the lease was not completed, although the factor had received the bill, and had, in return, become bound to procure the lease. In these circumstances, the Duke directed his factor to declare the proposed lease at an end, and to advertise the farm.

At a meeting of his creditors, James Rae made offer of 5s. in the pound for the respondent, which was accepted of, Fergus Rae the father being present, and consenting as a creditor. It appeared that the appellant James Rae was acting for Fergus Rae in this offer, and by whom all the debts due by the respondent were afterwards paid. In return for this, Fergus Rae, with the consent of James, got an absolute disposition to the lands possessed by the respondent Newal, called Bushybank, and other houses, together with certain debts and personal funds due to him. But no conveyance was sought or granted, of the above enclosure, although the appellant contended that it was comprehended under the above conveyance, and, therefore, until given up, the share of the executry ought to be retained.

After having thus settled with his creditors, he renewed his negotiations for the farm, which had been broken off, and the bill returned by the Duke. He succeeded in obtaining this without any security.

In these circumstances, the respondents pleaded, that

1806. RAES v. NEWAL. Jan. 14, 1800.

whatever debt he owed to Fergus Rae at the time of his bankruptcy must be held to have been discharged, by his acceding to the offer of composition, and by the agreement and conveyances then made and gone into, whereby he had conveyed to him all his heritable and moveable property.

The Lord Ordinary pronounced this interlocutor:—" Find " that the late Mr. Fergus Rae must be held and consider- " ed as having acceded to the measures adopted by the " creditors of the pursuer David Newal, and bound to dis- " charge his own debts alongst with them, for the composi- " tion of 5s. per pound; and, in respect of the whole " circumstances of the case, in particular, of Mr. Rae being " entitled to receive a conveyance of the whole estate, heri- " table and moveable, of Mr. Newal, as narrated in the dis- " position, of date the 5th day of October 1796; therefore, " upon these grounds, repels the general defence pleaded " by the defender, James Rae, in the action of constitution " against him; and, in the process of multiplepoinding, finds " the pursuers, Mr. and Mrs. Newal, entitled to one-third " or share of the executry funds left by the said deceased " Fergus Rae; but, in respect it is said that the whole he- " ritable and moveable property of Mr. Newal has not been " disponed in terms of the obligation come under when the " agreement to pay and accept of the composition of 5s. per " pound was entered into; and that part of the subject has " been and still is retained by Mr. Newal, finds, that the " pursuers are not entitled to hold possession of any part of " the property so conveyed, but must divest themselves, " and make over the same, if there be any such, before " drawing any part of the third of the executry of the late " Mr. Rae; and, in order that the facts with regard to this " point may be ascertained, appoints the cause to be en- " rolled, and parties procurators to be heard at the bar " against the first calling." To this interlocutor the Lord Ordinary adhered on advising several representations.

Jan. 28, Feb. 14, March 8, and May 23, 1800.

Nov. 19, ——

On the other points the Lord Ordinary found: " That " the circumstance of Fergus Rae having bought up the " debts of Mr. Newal at the rate of 5s. per pound, on con- " dition of obtaining an assignation to his funds, does not " bar the pursuers from insisting in this action for a third " share of the executry after his decease: Finds, that the " subject in Dumfries, and the lease of the farm of Tibbers, " were not included to Newal's obligation to assign his " funds to Fergus Rae; and therefore refuses the desire of " the representation, and adheres to the former interlocu-

"tor." To this interlocutor the Lord Ordinary, on advising representations, adhered.

Dec. 4. and 20, 1800.

On further representation the Lord Ordinary pronounced this interlocutor: find "That the respondents, before drawing any part of their third share of the executry, are bound "to assign and make over to the representer (appellant), their "right and interest to the subject in Dumfries; and, with "this alteration, adheres to the interlocutor complained of, "*quoad ultra*, and refuses the desire of the representation." Other six representations for the appellant James were refused, 28th May, 16th and 24th June, and 10th July 1801, 19th Jan. and 3d Feb. 1802.

June 30, 1802.

The appellant James Rae, and also the respondents, put in reclaiming petitions to the Court. The Lords refused the petition for the appellant, and pronounced this interlocutor as to the respondents:—"Having advised this petition, with "the answers, alter the Lord Ordinary's interlocutor re- "claimed from; find that the subjects in Dumfries were not "included in Mr. Newal's obligation to assign his funds; "and remit to the Lord Ordinary to proceed in the cause "accordingly." On further petition they adhered; and found "the pursuers (respondents) entitled to an interim payment "of £1200 Sterling from the petitioner, and decern for pay- "ment thereof, and for £10 Sterling as the expense of the "answers, together with the full expense of extract."

Feb. 8, 1803.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent, Mr. Newal, being largely indebted to the estate of Fergus Rae, after imputing all that was recovered under the conveyances executed by him in Mr. Reid's favour, cannot be allowed to take the third share of the free produce of that estate, as coming to him in the right of his wife, without paying what he is so indebted, or, in other words, the one sum must be set against the other, and an account instituted between the parties on that footing. The respondent, David Newal, does not dispute that this ought to be the course, and must be the consequence, if he is indebted to the estate of Mr. Fergus Rae; but he denies the debt, alleging, in the first place, that Mr. Rae agreed to take 5s. in the pound as a composition, and thereupon to discharge him, and that the sums recovered by Mr. Rae were sufficient to pay that composition, as well as what he advanced, or is alleged to have advanced, to the other personal and unpreferable creditors of the

respondent Newal, and to this the Court has given its sanction, by finding "that the late Mr. Fergus Rae must "be held and considered as having acceded to the measures "adopted by the creditors of the pursuer, David Newal, "and bound to discharge his own debts alongst with them, "for the composition of 5s. in the pound." The only evidence from whence this can be inferred, is the minute of what passed at the meeting of Mr. Newal's creditors held on the 28th July 1796. But the appellants submit that this conclusion is not authorized by the words of the minute, and that the whole circumstances demonstrate that it was not in contemplation, nor could it be the intention of any of the parties to that transaction, that the demands Fergus Rae had or might have upon the respondent Newal, were to be restricted to a fourth part, or that Newal was to be discharged from these demands, when Mr. Rae had got 5s. in the pound. The appellant acknowledges, though the proposal to the creditors was made by him, yet, in so doing, he was acting for his father, Fergus Rae, from whom, accordingly, the money came, which the compounding creditors received, and to whom, accordingly, the conveyances of the bankrupt's estate were made. Fergus Rae may therefore be viewed as having been the actual proposer of this composition contract, by which it appears he proposed "to pay "to the personal creditors a composition of 5s. in the pound "of their respective debts, provided that he was put into the "immediate possession of Newal's funds, so as he might be "enabled to convert the same into money, and that the "creditors, when paid, should accept of the said composi- "tion, in full of their respective debts, and grant to him such "conveyances, or discharges thereof, as should be thought "proper." Here, it will be seen, that there is nothing said about discharging Newal. On the contrary, Mr. Rae stipulates, that on payment of the composition, the creditors should either convey their debts to him, or discharge them, as he thought proper. The other creditors were to take their composition *as in full*, but not from Mr. Newal, it was from Mr. Rae, who was to be put in their place, the reason of which obviously was, that he might keep up the debts, if necessary, against Newal and his estate. But, 2nd, it is therefore quite untenable to suppose this transaction to have been an agreement between Mr. Newal and Fergus Rae, whereby the latter undertook to discharge all his debts, in the above form, upon the former receiving the conveyance to the

whole property, real and personal, belonging to the bankrupt. Mr. Rae did not expressly agree to take the same composition as the other creditors, yet this is the inference which the respondent draws and maintains from his conduct. He did not, by any deed or act, expressly discharge Newal, and surely a discharge of a legal demand is not to be presumed from facts and circumstances, or from the conveyance made by Newal to Fergus Rae. No doubt, the conveyance to the enclosure or piece of ground has never been made, and, therefore, to that extent, he is entitled to set off its value against the claim now made.

Pleaded for the Respondents.—The respondents' title to the third part of the executry claimed by them of Fergus Rae's moveable or personal succession, is unquestionable; and the sum awarded by the interim decree of the Court of Session is below its amount. The objections and counter claims insisted on by the appellant James, are not founded on law, and some of them cannot be set up by him. The agreement between Mr. Fergus Rae and Mr. Newal is fully established by the whole writings and conduct of the parties to have been thus:—That Mr. Rae should obtain, by a conveyance from Mr. Newal, an absolute and irredeemable right to the proper estate of Mr. Newal that belonged to him on 28th July 1796, and, on the other part, Mr. Rae should, as creditor, grant to Mr. Newal, and by a transaction with the other creditors, procure to him a discharge of all the debts he owed at that date, thereby securing to Mr. Newal the enjoyment of whatever property he should acquire subsequently thereto. That such was the nature of the agreement seems to be admitted, and cannot well be controverted. Had Fergus Rae not bound himself as a creditor by that transaction, as well as the other creditors, it would have been unfair in the extreme, and contrary to the *bona fides* of that transaction; for it would be giving him an advantage over the other creditors, which was never intended by that transaction. 2. The conveyance of the enclosure, or small piece of ground, it is well known, the respondents only enjoy a liferent of it, the fee being in their children; besides, by the sound construction of the obligation, the obligation and conveyance extend only to the proper estate of Mr. Newal, and does not extend to the liferent. But, in point of fact, the estate actually conveyed and taken possession of by Fergus Rae, was more than sufficient to indemnify Mr. Rae of all the engagements come under, and of all the advances made

1806.

GRAHAM v. COUNTESS OF GLENCAIRN, &c.

on the respondent, Newal's account, so that the claim now made for an assignment to this liferent estate, and also to his interest in the lease in Tibbers, is wholly untenable, and ought therefore to be rejected and disallowed.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed.

For Appellants, *John Clerk, William Alexander, Geo. Jos. Bell.*

For Respondents, *Wm. Adam, Robert Corbet.*

NOTE.—Unreported in the Court of Session.

[Mor. App. i. Heir Apparent, No. 1.]

WM. CUNNINGHAME GRAHAM, of Gartmore and Finlaystone, - - - - *Appellant;*

ISABELLA, COUNTESS DOWAGER OF GLENCAIRN, and WILLIAM INGLIS, W.S., her Attorney, - - - - - *Respondents.*

House of Lords, 7th July 1806.

ENTAIL—LIFERENT LOCALITY—HEIR APPARENT—ONEROUS DEBTS—ACT 1695, c. 24.—An entail reserved power to the heirs of entail to grant liferent infeftments to their wives, the said provisions not to exceed a fourth part of the rental of the estate, so far as the same was free of former liferents. A liferent locality was granted by Earl John, in favour of his wife. He died without issue, and without having made up his title to the entailed estates. The next heir passed by him as apparent heir, and served heir to his immediate predecessor. In an action raised by the widow of Earl John, under the act 1695, c. 24, to compel him to grant a disposition of the locality lands, it was answered, that the statute did not comprehend such debts as apply to apparent heirs of tailzie or to tailzied estate, but only to fee simple estate, and to such debts as were onerous. Held the Countess entitled to her liferent locality. Affirmed in the House of Lords.

1708.

William, Earl of Glencairn, executed a strict entail of the lands and barony of Finlaystone, containing the usual prohibitory, irritant, and resolutive clauses. The entail reserved power to the heirs of entail "to grant liferent infeftments "to their ladies or husbands, in satisfaction to them of all