

No. 94. ported by words merely contrary to intention, ought not to be sustained in a Court of equity.

“ The Court accordingly decreed.”

Sel. Dec. No. 93. p. 125.

1756. January 28. HOUSTON *against* STEWART NICOLSON.

No. 35.

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

Fac. Coll.

* * This case is No. 68. p. 2338. *voce* CLAUSE.

1757. January 19.

The EARL of BUCHAN *against* His FATHER'S CREDITORS.

No. 36.

Personal creditors of an heir of entail, purchasing the real debts affecting the estate, if entitled to apply the rents to pay the personal debts, to the prejudice of the next heir of entail ?

In 1664, Sir James Stuart of Strathbrock executed an entail of his estates of Strathbrock and Kirkhill, containing the usual prohibitory and irritant clauses.

Upon the death of Sir James and his male-issue, the succession devolved upon Katharine Stuart, Sir James' youngest daughter, who had intermarried with Henry Lord Cardross.

At the time this succession opened, the estates stood charged with debts to a considerable extent, which had been contracted by the maker of the entail, and his son the first institute, who was not bound by the prohibitions in the entail ; and these debts were soon after made real against the estate by adjudications, and charter following thereon.

David, late Earl of Buchan, succeeded to the entailed estate after the death of the said Henry Lord Cardross, and Katharine Stuart, his father and mother ; and he having also contracted considerable debts, which could not affect the entailed estate, his creditors proceeded to diligence against him, by adjudging his life-rent of the estate, and arresting the rents. This brought on a competition, in 1733, among the several creditors, and produced a sequestration, which continued till the Earl's death in October 1745. The creditors were classed, and afterwards preferred as follows.

1st, The real creditors of Sir James Stuart, the maker of the entail, and of his son, the first institute.

2^{dly}, The son of the late Earl of Buchan, for an annuity of £.300 Sterling, which had been assigned to him out of the rents, under the designation of Lord Cardross, by his father the late Earl, for an onerous cause ; in virtue of which he

had been in possession several years before the rents had been affected by the other creditors. No. 36.

3dly, The creditors of the late Earl, who had affected the rents by their adjudications or arrestments after Lord Cardross had entered into possession of the annuity above-mentioned.

The greatest part of the real creditors in the *first* class, and afterwards the Earl of Buchan, who had been preferred in the *second* place for his annuity, obtained warrants upon the factor for payment of their principal sums and annual-rents.

The personal creditors of the late Earl in the *third* class, foreseeing, that the effect of these warrants would be, to carry off the rents of the estate in the factor's hands, which had fallen due during the late Earl's life-time, applied to the Court by petition, setting forth, That their competitors, the real creditors, were absolutely secured upon the fee of the entailed estate; that therefore it was emulous in them to deprive the personal creditors of the *interim* rents during their debtor's life, which was the only fund of their payment; and concluding, that the real creditors ought, in so far as they shall recover payment out of the rents during the late Earl's life, to assign to the personal creditors, thereby to enable them to recover their debts against the estate itself. The Lords, upon advising this petition, and answers for Lord Cardross, on the 1st December 1738, found, That the preferable creditors ought not to assign, in so far as concerns the entailed estate.

The personal creditors being thus disappointed, were advised to transact with the real creditors; and accordingly purchased their rights which affected the fee of the entailed estate; and having thus acquired the real debts, they waved their preference on the rents which had become due preceding the year 1745, during the late Earl's life, and then in the factor's hands, amounting to £.2600 Sterling, and claimed these rents in virtue of their adjudications, while the preferable debts were left standing out, as an effectual burden upon the entailed estate.

Compearance was made for the present Earl of Buchan, and it was pleaded for him, *1st*, That the real creditors could not assign their debts to the personal creditors; That they were barred by the above recited interlocutor, 1st December, 1738, which was a *res judicata*; *2dly*, That as the real creditors had been preferred by an interlocutor in July 1737, and, in consequence of that interlocutor, had obtained warrants upon the factor for their payment, they could not wave this preference, in prejudice of the present Earl of Buchan, the heir of entail.

Answered, to the *first*: The import of the interlocutor in December 1738, was no more than this, That the Court did not think fit to interpose to oblige the heritable creditors to assign their debts to the arresters; but it was not intended by the interlocutor to restrain the real creditors in the free disposal of their property, which was a thing beyond the power of any Court to do. The question was not, Whether they had power to assign to any person they pleased upon payment? which could never admit of a doubt, but, Whether they could be forced to do it? which the Lords did not think they could, as the circumstances of the case then stood.

No. 36.

To the *second*, That it was a general maxim of the law of Scotland, That a creditor might proceed to all sort of diligence, whether real or personal, against his debtor's estate; and he might either stop short, or convey his debt; and the purchaser might, in the same manner, pass from any part of his diligence, provided he did it not emulously, to the prejudice of a fellow creditor, without advantage to himself. In the present case, the personal creditors waved the preference given to the real debts that were in their persons upon the rents of the estate, in order that they might apply them to the payment of their personal debts, for which these rents were the only fund: That no rule of law or equity could oblige them to use the rights they had acquired to their own prejudice; and it was competent to them to apply their diligence so as they might save both debts, if they could; as was determined by the Court, February 22d, 1715, Brigadier Preston against Colonel Erskine, No. 27. p. 3376.

“The Lords found, That the creditors were entitled to apply the rents in question to the payment of the personal debts due to them, after payment of the annual-rents of the heritable debts affecting the entailed estate incurred during the life of the deceased David Earl of Buchan.”

Act. *A. Pringle.* Alt. *Ferguson.* Reporter, *Kilkerran.* Clerk, *Forbes.*

G. C.

*Fac. Coll. No. 10. p. 18.*1757. *February 16.*THOMAS HAMILTON of Fala *against* The VISCOUNTESS of OXFURD.

No. 37.

If an heir of entail in possession is entitled to cut trees, though the value of them is offered by the next heir?

Upon some differences betwixt the Viscountess of Oxford, then eighty years of age, and Thomas Hamilton of Fala, next heir of entail to her Ladyship in the estate of Oxford, she advertised a sale of all the planted timber round the mansion-house, and upon the estate.

Mr. Hamilton presented a bill of suspension. Her Ladyship did not allege the plantations lessened the yearly value of the ground.

She did not allege she had any dislike, in point of taste, to the plantations.

She did not allege she was to be a gainer by forcing on the sale; for Mr. Hamilton made offer of the price of the timber, provided she would allow it to remain uncut.

Pleaded for the Viscountess: She was not debarred by the entail from cutting the plantations; and as entails admit of no latitude of interpretation, she was at liberty to do whatever she was not debarred from doing.

Answered for Mr. Hamilton: A distinction is to be made betwixt the end of a tailzie, and the means of supporting it. The end is, the preservation of a family; the means are, prohibitions on the heir to alienate, and bars upon the creditors to attach: The end is the object of favour in law; the other the object of disfavour: The latter, for that reason, has always had a literal interpretation; but, for the same reason, the former should have a liberal one.