Elizabeth Ducheſs Dowager of Hamilton and Brandon, - - - *Appellant;*
James Duke of Hamilton and Brandon, and Alexander Gillies, - - - *Reſpondents.*

Caſe 100.

21ſt *May* 1723.

Fiar and Life-renter.—The Court of Seſſion having found, that a fiar had the right to cut and fell woods growing on part of an eſtate, that was life-rented, the judgment is reverſed.

IN 1693, William, Duke of Hamilton, and Anne, Ducheſs of Hamilton, executed an entail of all their eſtates, ſettling the ſame upon themſelves, and the longeſt liver of them in life-rent, whom failing to James Earl of Arran, their eldeſt ſon, and the heirs male of his body; with ſeveral other ſubſtitutions of heirs, and with prohibitory, irritant, and reſolutive clauſes againſt ſelling or contracting debt; but it contained a power to the ſaid Earl of Arran to grant a life-rent proviſion and jointure, out of any part or portion, or out of the whole lands and barony of Kinneill, Carridden, Abbotſcars, and Lockhouſe (which had formerly been the ſeparate eſtate of the ſaid Anne, Ducheſs of Hamilton, and of which the Earl of Arran was then in poſſeſſion for his maintenance) in favour of a wife or wives whom the ſaid Earl ſhould marry, not exceeding the ſum of 1500*l.* ſterling of yearly rent; provided the ſaid William Duke of Hamilton, if then in life, ſhould be conſenting to ſuch marriage, and ſhould join in the ſettlement of ſuch life-rent, proviſion, and jointure. In July 1694, this entail was duly recorded in the regiſter of entails.

A marriage being intended between the ſaid James Earl of Arran, (afterwards Duke of Hamilton) and the appellant, the Earl, on the 15th of July 1698, executed a bond of proviſion or jointure to the appellant, whereby, after reciting the ſaid entail, and the power thereby reſerved to him, he obliges himſelf to provide and ſecure the lands and barony of Kinneill, with the caſtles, towers, fortalices, houſes, yards, parks, woods, foreſts, fiſhings, &c. in life-rent to the appellant, and to warrant the ſaid lands and premiſes to have been worth, and to have paid for ſeveral years before, and to be worth and pay yearly during the ſaid life-rent the ſum of 1500*l.* And in a marriage-contract of ſame date, this life-rent proviſion was accordingly ſettled in theſe terms.

James, Duke of Hamilton, however, not having been infeft at that period in the premiſes, it became neceſſary that the ſettlement ſhould be confirmed by Anne, Ducheſs of Hamilton, his mother. And on the 30th of March and 20th of April 1702, another

another deed was executed by James, Duke of Hamilton, with conſent of his ſaid mother in favour of the appellant reciting the foreſaid bond and obligation entered into by the ſaid Duke, and in implement and corroboration thereof, diſponing and conveying the ſaid lands and barony of Kinneill, with the parks, woods, and collieries to the appellant in life-rent, in caſe ſhe ſhould ſurvive the Duke, her huſband. Upon this laſt deed ſaſine was taken in favour of the appellant, and duly recorded. And after the death of her huſband in 1712, the appellant entered to and had ſince poſſeſſed the ſaid premiſes granted to her in life-rent.

In January 1722, the reſpondent, the duke, and his curators, entered into an agreement with the other reſpondent, Gillies, to which the appellant was not a party, whereby they ſold and diſponed to the ſaid reſpondent, Gillies, all the growing timber in the wood and parks of Kinneill (adjoining to which was the only houſe which the appellant had upon her life-rent eſtate) conſiſting of oak, aſh, birch, elm, alders, and other timbers, with liberty to cut the ſame at the times in the ſaid agreement mentioned, to the effect the ſaid Gillies might cut down and diſpoſe of the ſame, as alſo the graſs in the ſaid wood before the axe, with power to build houſes in the ſaid parks for the conveniency of the woodcutters; and with an obligation that the gates of the ſaid parks ſhould, during that term of years, be open to the ſaid Gillies at pleaſure, and that he ſhould have free paſſage through any part of the ſaid parks for carrying away the timber, bark, &c. In conſideration thereof the ſaid Gillies bound himſelf to pay 900*l.* at the ſeveral times therein mentioned.

Gillies accordingly cut down part of the ſaid wood; but when ſeveral perſons to whom he had ſold the ſame, came to carry it away, the appellant ordered the gates to be ſhut, prohibited Gillies from cutting any more trees, and would not allow any perſon to go near the ſaid woods, and brought a ſuſpenſion againſt Gillies before the Court of Seſſion.

The reſpondents, the duke and Gillies, thereupon applied to the Court of Seſſion, ſtating the circumſtances of the caſe, and praying that the gates and paſſages might be opened, and that their lordſhips would diſcharge all obſtructions and interruptions to the regular cutting and carrying away of the woods in terms of the foreſaid agreement. The appellant having made anſwers, the Court, on the 12th of July 1722, "found that the reſpon-
" dent, Gillies, ought to be allowed to carry off and diſpoſe of
" ſo much of the ſaid wood and bark as he had then cut, on his
" giving ſecurity to pay the value to the appellant or reſpondent,
" which of them ſhould be found to have beſt right in the event,
" and give ſecurity to fence ſufficiently that ground whereon the
" wood he had cut was growing; and for that effect ordained the
" appellant to cauſe make open the entries and paſſages, that the
" ſaid Gillies might have acceſs to carry off the ſaid cut wood
" and bark in the ſame way as before the ſaid paſſages were of
" late

" late ſhut up and ſtopt, and declared the value of the cut wood " ſhould be ſubject to the making up to the appellant the damages " ſhe had ſuſtained, or might ſuſtain, ſo far as in the event it " ſhould be found ſhe ought to have been *indemnis*, and remitted " to the Lord Ordinary to hear procurators for the appellant and " reſpondents concerning the right to the wood by them reſpec- " tively pretended, and ſtopped further cutting in the mean " time." And after another petition for the reſpondents with anſwers thereto, the Court, on the 27th of July 1722, " granted " liberty to the reſpondent, Gillies, to proceed in cutting down " what remained to be cut of that year's diviſion, upon giving " ſecurity as aforeſaid."

The reſpondent, the Duke, alſo brought his action of declarator to have it found, that he only had a right to cut the ſaid wood; and after defences for the appellant, and a hearing in preſence, the Court, on the 25th of January 1723, " found that the ap- " pellant, the life-rentrix, might uſe the woods of Kinneil for " her proper uſes, and for keeping in repair the houſes on the " lands of Kinneil, which ſhe life-rents; but that ſhe had no " right to cut or diſpoſe of the ſaid woods by ſale or other- " wiſe, and remitted to the Lord Ordinary to proceed ac- " cordingly."

The cauſe being accordingly heard before the Ordinary, his lordſhip, on the firſt of February 1723, " found that the appel- " lant muſt allow the reſpondent and the ſaid Alexander Gillies, " and the perſons employed by him, free paſſage in cutting and " carrying away the ſaid wood and timber thereof, and to proceed " in cutting of the ſaid wood, and executing the haill powers " granted to the ſaid Alexander Gillies by the contract made " concerning the cutting of the ſaid wood, carrying away the " timber thereof, and the whole other powers in the ſaid contract " contained, and diſcharged the appellant to obſtruct or hinder " the ſame; and found and declared, at the reſpondents' inſtance, " conform to the concluſion of the ſaid ſummons of declarator " againſt the appellant, and the interlocutor of the Lords in pre- " ſence, and ſuſpended the letters at the appellant's inſtance " againſt the ſaid Alexander Gillies, and decerned in the above " terms; but found that the reſpondent muſt make up to the ap- " pellant what prejudice ſhe ſhall ſuffer in the graſs, through " cutting and carrying away the ſaid wood and timber thereof, " and by the ſtraying of cattle through the keeping of the gates " and paſſages open; and that he muſt either leave ſo much of " the woods ſtanding as may anſwer the uſes competent to her as " life-rentrix, in terms of the interlocutor in preſence, or furniſh " her with other timber in place thereof."

The appeal was brought from " an interlocutory ſentence or " decree of the Lords of Seſſion of the 25th of January 1723." Entered 28 Feb. 1722-3.

Heads

Heads of the Appellant's Argument.

The appellant having the lands and barony of Kinneill, and parks and woods ſecured to her for life, the Duke of Hamilton (*a*), who has the reverſion, cannot enter thereupon, or cut or diſpoſe of any wood growing upon the ſame without her conſent. And the appellant is in a much ſtronger caſe than if ſhe had only a life-rent in the lands; becauſe the very woods themſelves are expreſsly made over to her in life-rent, which ſhe is adviſed does entitle her to cut and diſpoſe of thoſe woods in a proper courſe, if the ſame happen to be fit for cutting during her life, becauſe otherwiſe the conveyance of the woods can have no meaning at all; and conſequently for the duke to diſpoſe thereof, is to take to himſelf part of the profits to which the appellant is entitled.

If the appellant be not entitled to cut or diſpoſe of the ſaid wood for her own uſe and profit, yet at leaſt the reſpondent can have no power during her life to cut the ſame, and thereby not only to deprive her of the ornament and ſhelter the ſaid wood gives to her dwelling-houſe, but to render the park (to which her right is undoubted) uſeleſs and unprofitable to her for a term of years, that may be as long as her life. But the decree ſeems inconſiſtent with itſelf, ſince it finds that the appellant may uſe the woods for her proper uſes, and for keeping in repair the houſes on the lands which ſhe has for her jointure; and yet decrees, that the Duke of Hamilton may cut or diſpoſe of the ſame woods by ſale or otherwiſe.

It was contended for the reſpondent, that the late Duke of Hamilton, by the entail of his eſtate, was ſo tied up, that he could make no jointure to a lady exceeding 1500*l.* per annum, and that the rent of the barony of Kinneill, over and above the woods, extends to that ſum; and therefore that the appellant cannot be underſtood to have got a right to cut and diſpoſe of the woods. But the appellant's right flows from Anne, Ducheſs of Hamilton, who was under no limitation, as well as from the late duke. And the limitation in the entail concerns only the rents of lands, but there is no reſtriction as to the power of diſpoſing of woods. If the rents of the appellant's life-rent eſtate were higher (as they are not) than the ſum which the late duke was empowered to grant by way of jointure, the reſpondent may take his remedy ſo far to avoid the ſettlement by due courſe of law, but cannot ſeize the appellant's park, deſtroy the wood, and render it uſeleſs on pretence her jointure is too large. But the decree over-rules this objection; for it preſuppoſes and admits that the appellant has a life-rent in the woods, though it deprives her of the benefit of it.

(*a*) It is nowhere ſtated in either of the Caſes, whether or not the appellant was the reſpondent, the duke's mother; but from Douglas's Peerage it appears that ſhe was ſo.

Heads

Heads of the Respondents' Argument.

As the law does not give the mere life-renter any power of cutting woods, so the inserting of the words "*the woods*" in the bond of provision is only in course of stile, amongst other pertinents of the estate granted, and cannot give any power inconsistent with the right of the life-renter: the import can only be that the appellant may have the use of them for necessary repairs; especially since a life renter is, by several acts of parliament in Scotland, directed to find security not to cut the woods. The wood in question is not underwood, or *silva cædua*, to be cut by yearly proportions, but is such a wood as is cut only once in 40 or 50 years: woods of that kind are *pars soli*, and do not belong to the life-renter, that would be giving the appellant an advantage that was not at all intended for her. 1491, c. 25. 1535, c. 15.

The late Duke of Hamilton had no power to settle a jointure but what was given to him by the deed of entail; in that he is restricted to settle a jointure out of *the lands and barony of Kinneill*, without any mention of woods; and if therefore the inserting the woods in the bond of provision, could be construed to be of any import, they are beyond the power which the duke had, and consequently of no effect. The late duke by the said entail, could not provide a jointure exceeding 1500*l.* per annum; and the appellant has so much exclusive of the woods, consequently there is no reason for the appellant to claim the profit of these woods.

The appellant contended, that this entail was not compleated in the late duke's person by infeftment, and the late duchess, (whose the estate was,) having joined with the duke in this bond of provision to the appellant; whatever they granted to her ought to be effectual, especially since infeftment was made to her prior to any sasine upon the entail. The act of parliament 1685, concerning entails does indeed require the irritant clauses to be inserted in the procuratories of resignation, precepts of sasine, &c. but no where declares them of no force if no infeftment is made; on the contrary it expressly says, "That the original entail once "produced before the Lords of Session judicially, and recorded "in the register appointed for that effect, the entail so insert "shall be real and effectual not only against the contraveners and "their heirs, but also against their creditors and other singular "successors, whether by legal or other conventional titles." And the consequence is, that this settlement being recorded is binding upon the appellant. Besides, the appellant had full notice of this entail; it is expressly recited and taken notice of in her bond of provision, and the jointure granted in pursuance of the power thereby given to the late duke; if then he had no power to settle the woods, as he had not, then the appellant can have no claim thereto.

Nor will it alter the case, that the late Dutchess of Hamilton joined in the settlement upon the appellant; she was but a life-rentrix at that time, and she conveys nothing but only consents to the settlement made by her son. It is to be remarked that the appel-

appellant has brought no action to have her right to cut the woods eſtabliſhed.

Notwithſtanding the ſettlement of a jointure, the fiar has a power to cut the woods, becauſe otherwiſe the woods upon the eſtates that are life-rented might become altogether uſeleſs, and decay, by not being cut when at a proper growth; and indeed this is the caſe of the woods in queſtion, for if they are not cut they will in a little time be good for nothing. It is the undoubted law of Scotland, that the fiar has the power of cutting the woods; thus the learned Craig L. 2. Dieg. 8. pag. 189. Says "Neque enim "unquam tertia terræ impedimento fuit Domino, quo minus "univerſam ſuam Silvam vendere potuit, quod nuper inter Ram- "ſeum de Dalhouſſie, & Mariam Ballandinam, prædeceſſoris "ſui conjugem, factum vidi." He likewiſe ſays, "That even the "grantee of the life-rent eſcheat has no power to cut woods:" and thus the judges determine in all ſuch like caſes.

Since the reſpondent, the duke, has a right to cut, he muſt alſo have the uſe of the ways and paſſages, becauſe neceſſary to his right; but the decree has abundantly provided a ſatisfaction to the appellant for any loſs ſhe may ſuſtain thereby, which ſatisfaction is to be paid in the firſt place out of theſe woods.

As theſe woods will neceſſarily decay and grow good for nothing if not now cut, ſo it would ſeem unreaſonable that had the appellant any right to hinder the reſpondent from cutting them, ſhe ſhould do it, under the notion of the pleaſure of the woods in a place where ſhe has not been two months in ten years, that ſhe has been in poſſeſſion of the eſtate; and the reſpondent would be as far from deſtroying the pleaſure of that place as the appellant; but he juſtly apprehends that if the wood be not cut, the pleaſure will be deſtroyed, eſpecially as one-ſixth of the whole is now cut. If the reſidue be cut, in a very few years it will be more pleaſant than now.

The reſpondent is very far from calling in queſtion, or endeavouring to diminiſh the appellant's jointure. His father had a power of ſettling 1500*l. per annum*; and the appellant is in poſſeſſion of that income, excluſive of the woods. The reſpondent did before the Court agree, that ſhe ſhould have 1500*l. per annum*, and if there ſhould be any deficiency in the rental, that he ſhould make it up to the appellant.

Judgment, 21 May 1723. After hearing counſel, *It is ordered and adjudged, that the ſaid interlocutory ſentence or decree be reverſed.*

For Appellant, *Ro. Dundas. P. Yorke.*
For Reſpondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*