1735.

ROXBURGH
*v.*
KERR, &c.

JOHN, DUKE OF ROXBURGH, - - *Appellant;*

CHRISTIAN KERR of Chatto, and CHARLES KERR, Esq. her husband, and Captain WILLIAM ELLIOT of Wells, - - - - } *Respondents.*

18*th March* 1735.

TAILZIE.—An estate was held under a strict entail against contracting debt, or doing any deed whereby it might be evicted, but with power to the heirs to burden it with the entailer's debts. In security of some of these debts, proper wadsets were granted over a part of it, and the heir afterwards executed a bond of eik in favour of the creditor upon his becoming bound to relieve him of certain other of the debts. It was found that the bond was not *ultra vires* of the heir, and that a decree of apprising proceeding upon it, by which the lands had been carried off, was not struck at by the entail.

No. 32. ROBERT, Earl of Roxburgh, after the death of his only son, Henry Lord Ker, settled his whole estate upon Sir William Drummond, youngest son of the Earl of Perth, (on condition that he should marry Lord Ker's eldest daughter,) and upon the issue male of that marriage, and several substitutes; under strict prohibitions and irritancies against alienating the estate, or burdening it with any other debts than those of the entailer, which were excepted by the following clause: "Necnon reser-
" vando potestatem ante dictis heredibus dictum
" statum et patrimonium cum quibuscunque sum-
" mis monetæ vel debitis debendis per prefatum

" Robertum, comitem de Roxburgh, tempore sui " decessus, quæ per ejus bona mobilia non solven- " tur modo prescripto per illum in novissima ejus " voluntate, *onerandi.*"

Earl Robert's debts being very considerable, Andrew Kerr, (ancestor of the respondent, Christian,) and other friends became bound for him to a great extent during his lifetime. After his death, the creditors pressing for payment, Earl William granted two proper wadsets over certain parts of the estate; the one in 1655, in favour of John Scott of Langshaw, by whom it was shortly after assigned to William Kerr, then an infant, (father of the respondent, Christian Kerr;) and the other, dated in 1658, in favour of the above Andrew Kerr, father of the said William.

Of the same date, a bond of eik was executed, whereby, on a recital of the above two wadsets, and that Andrew Kerr was bound as cautioner for Earl Robert in a farther sum of 22,500 merks, and had undertaken to pay off and relieve Earl William of that sum, and also of the sum of 5000 merks which he had borrowed for the purpose of paying other debts of Earl Robert, the Earl became bound to pay to Andrew Kerr, or William his son, the whole amount of 27,500 merks, at Whitsunday 1659; and for their further security, charged the lands included in both the wadsets, and the reversion, with payment thereof. By the same deed, Andrew released all manner of execution, personal or real, competent to him for the above sum, except by apprising the lands, which he reserved a power to do, ' provided nevertheless, that if the

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'said wadsets or bond should be quarrelled by the 'said earl or his heirs, or by the heirs of line, male, 'or tailzie, of Robert Earl Roxburgh, and Henry 'Lord Kerr, his son, that then the said release 'should be null and void, and that the said An-'drew and William Kerr should be at liberty to 'sue all manner of execution, real or personal, to 'recover payment of the whole sums contained in 'the said bond and deeds of wadset.'

Andrew Kerr paid off all those debts, and died; and in 1666, no part of the 27,500 merks having been paid, the curators of his son William obtained upon the above bond a decree of apprising of the lands contained in the wadsets. Upon this title the lands were afterwards possessed by William Kerr. He sold part of them to Elliot (father of the respondent;) and the remainder, upon his death, vested in his daughter, Christian, (respondent.)

In 1729, an action was brought by the Duke of Roxburgh, then in possession of the estate under the entail, to set aside the above deeds, on the ground that the transaction was an indirect contrivance to alienate the lands in defraud of the entail, and that notwithstanding it, an equity of redemption was still competent to him upon payment of the debts.

It was likewise alleged that several of the debts in consideration of which the deeds were granted, had been previously paid; but it is unnecessary to detail the discussion which arose upon this last point.

July 23, 1731. The case was reported by Lord Coupar, Ordinary, when the Court found, "that the two con-"tracts of wadset, and bond of eik were lawful

" transactions and not inconsistent with the tailzie,
" and repelled the objection made by the pursuer
" against the 15,000 merks bond due to Murray
" of Longharmiston, and assigned by him to Scott
" of Langshaw, and also repelled the objection
" against the 5000 merks bond of Earl William
" and Kerr of Chatto to Sir William Scott of
" Clerkington, and found the same was applied
" for purchasing of two debts of Harry, Lord Kerr,
" of the same extent, with which the tailzied estate
" was burdened; and found the bond of corrobo-
" ration and eik granted by Earl William of debts
" due by Robert, Earl of Roxburgh, maker of the
" entail, was a sufficient ground of an apprising,
" whereof the legal might run."

The appeal was brought from this interlocutor.

Entered Jan. 26, 1733.

*Pleaded for the Appellant*:—Earl William was, by the entail under which he possessed, prohibited to make any alienation, disposition, or other conveyance of any part of the estate, even in satisfaction of the debts due by the maker of the entail. He had only a power to charge it with such of those debts as should not be paid from the personal estate of the entailer in manner directed by him. But the wadsets and bond above mentioned, being the foundation of the decree of apprising, are a mere contrivance to render the redemption impossible, and an indirect alienation to the prejudice of the heirs of entail, equal in effect to an absolute conveyance; and they ought therefore to be set aside, to the effect at least that the appellant may still have the power of redeeming by payment of what may be due.

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Although it may be true that the lands might have been carried off by an apprising obtained for the debts of Earl Robert; yet as Earl William could not himself alienate the lands, or do any deed whereby they might be evicted, no apprising upon his deed could expire or have any effect except according to the limitations of the entail. The apprising in this case was not obtained for the debts of Earl Robert, but upon the bond, which was Earl William's deed alone; and although he might grant a bond of corroboration to the effect of making himself personally liable; yet an apprising upon his bond of corroboration or for his debts, if it is not likewise for the debts corroborated, cannot expire. Were it otherwise, an heir of entail, wishing to get the better of the entail, might do so in any case by merely suffering a decree of apprising upon his own deed to expire.

*Pleaded for the Respondents*:—Earl William had, by the express terms of the entail, a power to *burden* the estate with the debts of the entailer, and as he was not restricted to any particular form, he was at liberty to affect it with any sort of burden which the law allowed, and which the creditors would accept of. Proper wadsets were the most usual securities granted at that time; and however beneficial they might be to the creditor, the Earl, or those claiming under him, had the power of redeeming when they were inclined to do so. The heirs of entail had power by the entail to feu, and therefore much more were they enabled, by the power reserved to them of burdening the estate

with the entailer's debts, to grant redeemable securities, such as proper wadsets.

With regard to the bond, although the entail prohibits any deed whereby the estate may be adjudged or evicted, yet there is expressly given, by way of exception from this disabling clause, the power of burdening with the entailer's debts. Securities given in virtue of this power, must necessarily contain an obligation to pay; and that obligation, by the force of the law, must necessarily produce process of apprising, adjudication, and other methods for making it effectual. Earl William, therefore, did nothing with respect to charging the estate with the entailer's debt which he might not lawfully do; and it is evident that what he did was most prudent and beneficial to his successors. It must be admitted that decrees of apprising might have gone on every one of the debts severally, which composed the gross sums contained in the wadsets or bond of eik; that each of these apprisings might have affected the whole estate; and that, in point of fact, both Earl William and Andrew Kerr were actually sued for some of the entailer's debts. Under these circumstances, the Earl drew as many of the debts as he could into the hands of one creditor, to whom he granted the wadset, and thus confined his diligence to the limited portion of the estate over which the wadset extended.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "the said interlocutor therein complained of, be "affirmed."

Judgment March 18, 1735.

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MONCRIEFF
*v.*
MONCRIEFF.

For Appellant, *Ro. Dundas* and *W. Murray.*
For Respondents, *Dun. Forbes* and *Will. Hamilton.*

SIR THOMAS MONCRIEFF, Bart. *Appellant;*
THOMAS MONCRIEFF, Esq. *Respondent.*

*21st March*, 1735.

**ALIMENT.—The Court of Session having modified aliment to a son, the same was restricted to the allowance which had originally been voluntarily given by the father.**

**Judgment for the appellant *ex parte.***

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No. 33. THE respondent having by his marriage and conduct in other respects offended his father, (the appellant,) a quarrel unhappily arose, notwithstanding which, the latter made him an allowance of 2000 merks Scots, equal to L.111, 2s. $2\frac{1}{3}$d. sterling.

The respondent raised an action before the Court of Session for a larger aliment, on the ground that *jure naturæ*, his father was obliged to provide for him according to the extent and circumstances of
Jan. 17, 1734. his estate. The Lord Ordinary "ordained either "party to give in a condescendence of the defend-"er's estate."

A condescendence was given in by the son, and the case being reported to the Court, they "or-"dained the defender to give in a condescendence