

1675. February 16. BINNING against BROTHERSTANES.

ALEXANDER BINNING, by contract of marriage with Margaret Trotter, was obliged to resign a tenement of land in favours of himself and his wife in life-rent, and the heirs of the marriage in fee ; and accordingly resignation being made, infestment was taken to him and his wife, and their heirs foresaid.

Thereafter the said Margaret having deceased, there being only one daughter of the said marriage (Margaret Binning), the said Alexander married a second wife, and did oblige himself to provide the heirs of that marriage to 10,000 merks ; and thereafter did induce the said Margaret his daughter of the first marriage, after her minority, to give a bond, obliging her to resign the above mentioned tenement, to which she was to succeed as heir of provision, to her father, in favours of herself and the heirs of her own body, which failing, in favours of Alexander Binning, her brother of the second marriage, and his heirs whatsoever, and to do no deed to prejudge him anent the succession.

The said Margaret Binning being thereafter infest as heir of provision to her said father in the said tenement, did by contract of marriage with William Brotherstanes, oblige herself to resign the said tenement in favours of herself and the said William, and the heirs of the marriage, which failing, his heirs whatsoever ; and upon the said resignation she and her husband were infest.

Thereafter the said Alexander Binning her brother did obtain a decret against the said Margaret and her husband for implement of the said bond, and for granting a procuratory of resignation for resigning of the said tenement, conform to the said bond, in favours of the said Margaret herself and the heirs of her body, which failing, in favours of the said Alexander ; and in obedience to the said decret, the said Margaret and her husband did resign the said tenement ; and infestment was taken to the said Margaret and the heirs of her body, which failing, to the said Alexander. After the said Margaret's decease, the said Alexander did obtain decret against the tenants of the said tenement for mails and duties, which being suspended by the said William Brotherstanes, and turned into a libel, it was *alleged* for him, that he ought to be preferred, being infest long before the pursuer, and seven years in possession : Whereunto it was *replied*, That the defender was denuded of any right that he had by the infestment foresaid, in favours of the said Margaret and her heirs of provision foresaid ; and that the pursuer had thereby right as heir of provision to her.

To which it was *duplicated*, That being incarcerated upon the said decret against him and his wife for implement, he had resigned for obedience as husband, and authorising his wife, but did not intend, nor could not be decerned to denude himself of his own right, which he had for so onerous a cause by his contract of marriage.

No 140.

A husband granted procuratory of resignation in obedience to a decree. The act found also to affect the interest of his wife.

No 140.

THE LORDS having considered the procuratory of resignation granted by the defender's wife and himself, did find that he had granted the same not only for obedience, and for his interest as husband, but for his own interest, and as taking burden for his wife; and so did denude himself of any right that he had, in favours of his wife and the pursuer as heir of provision; and therefore preferred the said Alexander.

Upon the debate it was agitated amongst the Lords, whether such clauses in tailzies, viz. that no deeds should be done in prejudice of the heirs of tailzie and provision, and their succession, do import that the granter of such obligations should not have power to dispose of the land that is tailzied, and have that liberty which is inherent to *dominium*? or if it should import only, that they cannot break the tailzie, or provide the lands in tailzie to other heirs.

The President was of opinion, that the fiar could not dispone nor do any other deed; and that the said clause was not restricted to the altering or breaking of the tailzie. But this point was not decided.

*Dirleton, No 257. p. 124.*

\* \* \* Gosford reports the same case :

In a double poinding raised at the instance of the tenants of a tenement of land and laigh booth against the foresaid persons, It was *alleged* for Alexander Binning, That he ought to be preferred, because he stood infest in the saids lands and laigh booth, upon a procuratory of resignation granted by Margaret Binning his sister, in obedience of a decret of the Lords, whereby she was decerned to infest herself as heir of provision, conform to her bond made for that effect. It was *alleged* for William Brotherstanes, That notwithstanding thereof he ought to be preferred, because he having married the said Margaret, and provided her to a liferent, in contemplation thereof, she had resigned her right of the foresaid tenement and booth in his favours, whereupon he was infest, and by virtue thereof in possession by the space of nine years, and so ought to have the benefit of a possessory judgment; especially that bond granted by his wife being fraudulently obtained from her by her father when she was *in familia*, and thereby any provision she had was taken away, and her father's whole estate settled upon a brother, who is a son of a second marriage. It was *replied*, That the said Alexander's right being founded upon a decret of the Lords, could not be taken away but by a reduction; and the said William could never quarrel the same, because he had subscribed the procuratory of resignation in question in obedience not only as consenter, but as taking burden for his wife. It was *replied* by the said William, that he did subscribe the same in prison, and that the words making him take burden were only *verba narrativa* foisted in by the writer, which he never considered; whereas the procuratory itself did only make him a consenter, and his consent being only to a deed of his wife who was decerned, and for obedience, could

not prejudice him. THE LORDS notwithstanding did prefer the said Alexander Binning, seeing the decret against the wife could never be reduced, being a decret *in foro*; and that the procuratory being conceived as said is, the said William could not have the benefit of a possessory judgment, albeit it were found that he was only a consenter, seeing there was no reservation of his right, it being in his power to consent or not as he thought fit.

No 140.

*Gosford MS. No 748. p. 461.*

1675. December 8. THOMSONS *against* CREDITORS OF ALICE THIN.

THE husband has power to dispose of the moveables in communion, to take effect in his life or after his death, provided it be exercised *sine dolo*. But a bond being granted to a neice, payable after the death of the granter and his wife, 'in case he left no heirs of his own body,' the LORDS found the circumstances of fraud here alleged, viz. That at the date of the bond the granter had not an estate sufficient to satisfy the bond, leaving any thing considerable to his wife, not otherwise provided, and that the bond bore a condition of not having heirs of his own body, relevant to this effect, that the bond should not affect the wife's half.

No 141.

*Fol. Dic. v. 1. p. 396. Stair.*

\*.\* Gosford reports the same case :

In a multiplepounding raised at the instance of Mr James Eleis, who was heretor of the dwelling house, wherein both James Masterton and his wife (Alice Thin) had died, and was preferred to both creditors, for the house-mail, as having *jus tacita hypothecæ*, and had order for satisfying thereof, to dispose of the moveables remaining in the house at the best rate; there being a competition betwixt the creditors of the husband, and the creditors of the wife, who should be preferred to the superplus, it was *alleged* for Margaret Thomson, that she ought to be preferred to Baillie Hall and other creditors of Alice Thin, because the deceased James Masterton, had granted bond to her and her sister, for payment of the sum of five thousand pounds at the first term after his own and his wife's decease, and the longest liver of them two, failing heirs of his own body: Likeas, thereafter he did make a disposition of his whole goods in favours of his wife Alice Thin, with the burden of his whole debts, who not only had accepted the same, but by confirmation of herself as executrix, and uplifting the sum of two thousand merks due to her husband by Sir William Thomson, she had homologated the said disposition, affected with her husband's debts; and therefore the saids Thomsons ought to be preferred to her creditors, who could pretend no right to any of the moveables, which were possessed in common betwixt him and