

No 56.

'THE LORDS preferred Andrew Macreadie as assignee by his sister Margaret to the whole sum in the bond in question.'

Act. *Alex. Boswell.*Alt. *And. Macdowall.*Clerk, *Kirkpatrick.**Fol. Dic. v. 3. p. 216. Fac. Col. No 34. p. 54.*1752. *December 22.*LIEUTENANT WAUCHOPE *against* JOHN GIBSON of Durie.

No 57.

In bonds of provision to children, a simple substitution of one child to another does not bar gratuitous alienation.

By contract of marriage, dated 1713, betwixt the deceased Alexander Gibson of Durie and Elizabeth Stewart his second wife; the former became bound to provide and secure to the children of the marriage, if three or more, 20,000 merks, to be divided by the father, and payable at the first term after his decease; which sums are declared to be in full contentation and satisfaction of their legitim, &c.

Of this marriage, there was issue four children, viz. Alexander, Anne, Cecil, and Mary; all of whom survived their father.

In 1727, Durie made a total settlement of his estate in favour of John Gibson the defender, his eldest son by the first marriage; and, of the same date, he executed a bond of provision, in favour of the four children of the second marriage; by which, upon the narrative of their being yet unprovided, he became bound to pay to each of Alexander and Anne, 6000 merks, and to each of Cecil and Mary, 5000 merks at the first term after his decease; and, failing any of the said children by decease, without lawful issue of their own bodies, the one half of such child's portion is declared to pertain and belong to the said John Gibson, and the other half to be equally divided among the surviving children; declaring the same to be in full satisfaction to the said children, of all executry, portion natural, and bairns part of gear, they can ask or claim by his decease; but reserving to himself power to revoke or alter, &c. Durie also granted an additional bond of provision, dated in 1728; wherein he recites the bond 1727, and that the annualrent of the portions granted to his younger children would not be sufficient for their education and maintenance, therefore settled an annuity of L. 100 Scots, over and above the annualrents of their portions. Soon thereafter Durie died. Alexander and Cecil died soon after him. Mary, by her testament and assignation, made over to her only surviving sister Anne, wife of the pursuer, her whole effects; and particularly the 5000 merks contained in the bond 1727.

After Mary's death, the pursuer, under the right of Anne his wife, brought his action against John Gibson the defender, and claimed, *1mo*, The 20,000 merks provided in the contract of marriage; *2do*, The 5000 merks provided to Mary by the bond 1727, and by her conveyed to his wife.

*Objected* to the claim of the 20,000 merks ; That the provisions in the bond 1727 came in lieu of it. By our law, *debitor non præsumitur donare* ; and indeed the narrative of the latter provision bearing to have been for love and favour to these children, and that they were yet unprovided, plainly shows that Durie intended it to come in place of the former : and this appears still more clear from the additional bond 1728. Further, both provisions are declared to be in satisfaction of the claim of legitim. Now Durie could never intend double satisfaction for the same claim.

*Answered* for the pursuer ; New bonds of provision are not understood to be in satisfaction of former ones, unless this be expressly declared. Now the second provision is not only not expressly declared to be in satisfaction of the first, but there seems to be a tacit declaration of the contrary ; for when Durie declares the second bond to be in satisfaction of the legal provisions ; he seems purposely to have omitted the conventional one, so that *inclusio unius est exclusio alterius*.

In the second place, The provisions in the contract of marriage are onerous, and no way in the power of the granter. Those in the bond 1727 are revocable at his pleasure ; therefore the latter cannot come in place of the former ; for this would in effect make the former as much revocable as the latter.

*Objected* to the pursuer's claim of the 5000 merks provided to Mary by the bond 1727, and by Mary conveyed to his wife, That from the conception of that bond, the defender had right to retain one half of it. The provision was under this condition, to wit, that failing issue of Mary, one half should pertain to the heir. This condition, which is no less than a right of return to the granter's heir, could not be defeated by Mary, at least not by her gratuitous deed. It is very different where a subject is conveyed to a child, with simple substitution ; there the fee is vested in the child, and implies the power of disposing. See the cases of Duke of Douglas against Lockhart of Lee, No 31. p. 4343 ; Scot against Scot, No 29. p. 4341 ; Irvine against Irvine of Drum, No 45. p. 4385 ; Napier against Lady Logan, No 34. p. 4344 ; Lumsdain against Beatson, No 35. p. 4345.

*Answered* for the pursuer ; There is not here a clause of return to the granter of the bond ; there is only a simple substitution of the granter's heir, which the institute, a simple fiar, could defeat, even by a gratuitous alienation, *2do*, This is the better founded, if the objection to the first claim be sustained ; for the provisions in the contract of marriage were simple, and liable to no return ; and therefore provisions alleged to come in place of these must be so too. *Lastly*, The Court have in many cases been very strict in their interpretation even of clauses of return. See the cases of Semple against Geddes, No 14. p. 4322 ; Frazer against Frazer, No 42. p. 4378 ; Lady Ardkinlees against the Heirs of Tailzie, 1733, (*See TAILZIE.*) ; Stewart against Stewart, No 25. p. 4337 ; Murray against Murray, No 27. p. 4339 ; Macaulay against Tennent, No 23. p. 4335 ; Laurie against Borthwick, No 28. p. 4339.

No 57.

'Found that the bonds of provision were in lieu of the provisions in the contract of marriage ; but found that the substitution in the bond of provision to Mary Gibson did not restrain her after her father's death from disposing of her provision ; and as she did dispose thereof to her sister Anne, that therefore the present Durie has no right to retain the half in virtue of the substitution.'

Act. *A. Lockhart.*Alt. *R. Craigie.*Clerk, *Kirkpatrick.*

S.

*Eol. Dic. v. 3. p. 216. Fac. Col. No 51. p. 75.*

## S E C T. X.

The first Member of an Entail being Disponee, is not bound by the Restrictions laid on the Heirs of Entail.

1758. *February 14.*KATHARINE and RACHEL ERSKINES *against* Mrs MARY BALFOUR-HAY.

No 58.

A party disposed his estate in favour of his son and the heirs whatsoever of his body ; whom failing, to a series of heirs, with strict prohibitions, and irritant and resolute clauses. The son was found unlimited fiar.

IN 1677, Michael Balfour of Randastoun executed a settlement of his estate by way of entail, in favour of James Balfour, second lawful son to Sir David Balfour of Forret, one of the Senators of the College of Justice, and the heirs whatsoever of his body, without division ; whom failing, to the other heirs therein named.

This entail contains the strictest prohibitions *de non contrabendo et non alienando*, which are fenced with the usual irritant and resolute clauses, and by virtue of this settlement, the said James Balfour succeeded to, and enjoyed the said estate, and after him his sons, Michael and Robert, and his daughter, the defender.

In 1756, the pursuers brought an action against the defender for payment of a bond for 1000 merks granted to their father in November 1717, by the said James Balfour.

The defence was, That she was only an heir of entail, under strict prohibitive, irritant, and resolute clauses ; and therefore not liable for any of her predecessors debts, who had no power to charge the entailed estate therewith.

The dispositive clause in the tailzie runs thus : ' Me, Michael Balfour of Randastoun, for certain onerous causes, &c. to have given, granted, and disposed, &c. from me, my heirs, and all others my successors, &c. to and in favour of the said James Balfour, and the heirs whatsoever of his body, &c. ; which failing,' and so forth, substituting several other persons, and their heirs-male alienably, ' under the provisions, conditions, reservations, and restrictions under