

confusion; and it were incongruous a consent should rear up again a claim which was satisfied: That it was plain he was not considered as having any concern, more than the Lady Home and the Lady Holyroodhouse, since they all signed their consent only to the last page; whereas Lord Holyroodhouse, who concurred in the settlements, signed the whole; but supposing that his signing as consenter, which he meant to be only to the marriage, would have the effect to bind him if validly adhibited, he could not in that case be blamed for taking advantage of the defect in the execution, that he neither signed the whole pages, nor was his subscription attested by the witnesses, since it was only said that both parties, to wit, the bridegroom and bride, signed before them, whereas there were several other parties who adhibited, out of respect to them, a ceremonial but useless consent.

No 44.

The assignation was part of the same transaction, and the Earl's subscription to it of the same kind; and there also the attestation was only of the Lady's subscription, the terms of the clause being, 'I have subscribed.'

THE LORDS, 18th November 1747, 'having considered the nature and circumstances of the debt assigned, with the form of the attestation of the parties' subscription, and that my Lord Home signed only as consenter on the last page, found that his subscription, in the manner that it stood to the contract of assignation, did not bar him from quarrelling the title of the pursuers to the half of Lady Marjory Home's provision.'

On bill and answers,

THE LORDS adhered.

Act. R. Craigie & Ferguson.

Alt. Lockhart.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 271. D. Falconer, v. 1. No 239. p. 323.

*** This case is reported by Kilkerran, *voce* WRIT.

1755. December 5. Sir THOMAS HAY of Alderston against JAMES KILGOUR.

SIR JOHN HAY died in the 1706, leaving his eldest son and heir Sir Thomas, then an infant, under the tuition of his mother and two uncles.

A few months after the death of Sir John, these tutors entered into a feued contract with James Kilgour; wherein, upon the narrative that Sir John intended to have executed this contract had not death prevented, 'they sold to Kilgour, his heirs and assignees, certain lands for the sum of 2500 merks. *Pro viso*, That Sir Thomas may redeem at any time before his age of 25, upon payment of that sum. And the tutors bind and oblige them, their heirs and successors, to move and cause their said pupil, and his foresaids, at his attaining the age of 25 years complete, either to ratify this present contract in favour of Kilgour, or to repay to him the said sum of 2500 merks.'

No 45.

Acts of homologation after majority, of a deed done by tutors, sustained to bar the minor from reducing that deed.

No 45.

Of this feu contract Sir Thomas, in the year 1750, brought a reduction upon this ground, That the same was void and null, as being granted by his tutors without the authority of a Judge; and though he, Sir Thomas, did not redeem before his attaining the age of 25 years, yet, as the tutors had no power to grant this right, they could not limit him in his power of redeeming the lands *quocunque tempore*, and insisted still to be allowed to redeem.

Answered for Kilgour; Sir Thomas is not only foreclosed by not redeeming within the *quadriennium utile*, but he has, by repeated acts of homologation, ratified the deed in question, so as to bar his power of redemption; *imo*, By his having stated and cleared accounts with his tutors after his majority, wherein this transaction with Kilgour is stated as an article and allowed. See Crawford against Crawford, No 73. p. 5694. And though it is named in the accounts *a redeemable security made by the tutors to Kilgour*, yet it is most properly so described on account of the power of redemption reserved in it to Sir Thomas.

2do, In the discharge granted to his tutors, in consequence of this clearance, reciting their having delivered up to him all his writs and evidents, he, by a particular clause, 'ratifies and approves all discharges and conveyances made and granted by them during the time of their administration, to whatever persons, as fully as if the same had been therein particularly expressed.' And as he, Kilgour, unquestionably has recourse against the tutors upon the feu-contract, and their obligation therein, so the tutors have recourse against Sir Thomas upon this discharge and ratification.

3tio, Sir Thomas, so far from taking advantage of the clause leaving him at liberty to resile at any time before his age of 25, has continued for upwards of 30 years to receive the feu-duty payable by Kilgour, and to discharge it expressly under that name.

Replied for Sir Thomas; The acts of homologation alleged by Kilgour are not sufficient to bar this redemption. Homologation is never to be presumed where the act is capable of a different construction, nor unless it do clearly appear, that the party was in the full knowledge of the nature and quality of the right which he is supposed to have homologated. The tutorial accounts mention this right granted to Kilgour, as a redeemable security for repayment of 2500 merks. Sir Thomas understood it, as the words plainly import, to be a wadset, and as such approved of it; but from thence it cannot be inferred that he had any knowledge of this being an absolute sale of part of his estate, under a limited power of redemption, and as such ever purposed to homologate it. The same answer is made to the other act of homologation, viz. the receipts of the feu-duty. A small feu-duty was altogether consistent with the right, whether containing a limited or unlimited power of redemption; and acceptance of this feu-duty can never import a knowledge that the faculty of redemption was limited to the age of 25, or presume a consent that Kilgour should hold the lands as an absolute right of property. With respect to the discharge granted

to his tutors, it appears from a process of exhibition, which was intended in the year 1749, against Thomas Hay one of the tutors, that the whole of Sir Thomas's writings still remained in the hands of the tutors till they were produced in that process, and then, and no sooner, Sir Thomas came to the knowledge of the nature of the right granted to Kilgour; and as the approbation of the tutorial accounts must be explained *quoad* this article agreeably to the nature of the deed, as stated in these accounts, so also must the general discharge and ratification granted upon the accounts so stated.

THE LORDS found the lands not redeemable.

Act. Lockhart.

Alt. George Cockburn.

Clerk, Justice.

W. S.

Fol. Dic. v. 3. p. 271. Fac. Col. No 169. p. 250.

1767 December 4.

SIR ALEXANDER M'KENZIE of Gairlock, Baronet, Pursuer; *against* HECTOR M'KENZIE, younger, of Gairlock, and RODERICK M'KENZIE of Redcastle, his Tutor *ad litem*, Defenders.

SIR ALEXANDER M'KENZIE of Gairloch, father to Sir Alexander the pursuer in this action, succeeded his father Kenneth in the estate of Gairlock, as nearest heir, without any fetters or limitations whatever.

In 1735, Sir Alexander, by his marriage-contract with Mrs Janet M'Kenzie, bound and obliged himself to make due and lawful resignation of the lands and barony of Gairlock, and 'that in favours, and for new infeftments of the same 'to be made, given, and granted to him the said Alexander M'Kenzie of Gairlock 'in liferent,' and the heirs-male to be procreated betwixt him and the 'said Mrs Janet M'Kenzie 'in fee;' which failing, to him the said Alexander M'Kenzie of Gairlock, his heirs-male and assignees whatever.' Of this marriage, Sir Alexander had issue; Alexander the pursuer, two other sons, and a daughter.

In 1752, Sir Alexander executed a tailzie of his whole estate in favours of the pursuer, his eldest son, and the heirs-male of his body; whom failing, his other sons, &c.; and this tailzie contained strict, prohibitive, irritant, and resolute clauses, *de non alienando et contrahendo debita*. The terce and courtesy are debarred and excluded. The heirs of entail are allowed to provide their wives in a provision not exceeding a third of the free rent; after discounting former liferents subsisting, interest of debts, and annual burdens. They are empowered to provide younger children, but under restriction, that the whole burden affecting the estate for the provisions of the younger children of the heirs of tailzie, shall not exceed L. 1000 Sterling, affecting the estate at one-time. And it is further declared by the tailzie, that no adjudication, or other legal execution, for security or payment of these provisions, shall affect the fee or property.

No 45.

No 46.

A party entered into a contract of marriage, which contained provisions relative to a prior entail. Found that he was thereby barred from afterwards attempting a reduction of the entail.