No 45.

to his tutors, it appears from a process of exhibition, which was intented 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.

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.

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 1730, 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 Gair-'lock '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 resolutive 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 46. of the estate. Upon this tailzie, Sir Alexander expede charters, and passed infeftments, in which the whole conditions and provisions of the tailzie were ingrossed. And the tailzie was, in 1753, recorded in the register of tailzies.

In 1755, the pursuer Alexander, the son of the tailzier, married Margaret M'Kenzie, daughter to Redcastle; and, in December 1755, a postnuptial contract of marriage was entered into, whereby the pursuer, and his father, Sir Alexander M'Kenzie of Gairlock, on the one part, and Mrs M'Kenzie, with consent of her father, on the other part, 'in contemplation of the marriage, 'and in implement of the minutes of agreement made on that occasion, 'the 'said Sir Alexander M'Kenzie, who has already settled his succession of his 'whole lands and estate of Gairlock upon his eldest son Alexander aforesaid, 'and his heirs of tailzie and provision, mentioned in the said settlement, here-'by, in the mean time, provides his said son and heir presumptive, till the 'right of succession shall open to him, by the demise of his said father, to an 'establishment out of any part of said lands and estate that shall be thought 'most convenient, equivalent to L. 70 Sterling per annum, free of all burdens 'and deductions whatever.'

The contract contains a clause, empowering Alexander the son, to provide his younger children on the estate, to the extent of L. 1000 Sterling, to be divided among them, if three or more in number. 'Provided always, that the 'said portions and provisions stand excluded, and take no place, till all other 'provisions or establishments made by the said Sir Alexander M'Kenzie, in fa-'vours of his own younger children, be satisfied and extinguished, in whole or in 'part; and, if in part only, that these provisions in favours of said younger 'or other children of the present marriage, shall be restricted and reduced to 'the amount of such partial payment only, in such manner as not to exceed 'what is satisfied and paid of said other provisions, and so as the whole of these 'provisions together, both the present and what is outstanding of the other, 'may never exceed L. 1000 Sterling in all. Provided also, that no adjudica-'tion or other legal execution be competent against the fee or property of the 'said lands and estate of Gairloch, or any parts thereof, for payment or secu-'rity of the said younger or other children of this present marriage, their pro-'visions aforesaid, but that the persons only of the heirs of tailzie for the 'time, and any other estate, real or personal, belonging to them, as also the 'yearly rents and profits of the said estate of Gairloch, be subject to all dili-'gence for that effect.'

Of this marriage there was issue one son, Hector; and the marriage being dissolved by the predecease of the wife, Alexander the pursuer entered into a second marriage, by which he had several children.

Sir Alexander, the father, died in 1766, and Alexander the son, considering himself as improperly fettered by the foresaid deed of entail, particularly, that he was disabled from providing properly for his younger children, brought an action for reducing said tailzie, in which he called as defenders, his sons of the

No 46.

first and second marriages, and others called, by said deed of entail, to the succession; and the action concluded for reduction of the tailzie, charters, and infeftments following thereon; in respect that, by Sir Alexander senior his contract of marriage, the estate being provided to the heirs male of the marriage, Sir Alexander could not limit his son the pursuer's right and interest in that estate, by a gratuitous deed of entail.

*Pleaded* for the pursuer; By the marriage-contract 1730, Sir Alexander provides the estate only to himself 'in liferent,' and the heirs-male of the marriage 'in fee.' And from the contract, it appears, that the fee which necessarily remained with Sir Alexander, before the existence of an heir male of the marriage, can be considered only as a fiduciary fee, which he held in trust for behoof of the heir-male of the marriage, and of which the heir-male could have denuded him, even in his lifetime; and if so, he could not lay the heir-male under the fetters of a strict entail.

But even, considering the settlement in the ordinary form, and that the father was entitled to remain proprietor during his life, still the entail was *ultra vires* of Sir Alexander, as he thereby counteracted the obligations he lay under to the heir-male of the marriage, by his marriage-contract. Where an estate is settled in a marriage-contract, the heir of the marriage is creditor to the father, to the full amount of the estate. If a father contract debts, he is under an obligation to purge them; an action is competent to the heir of the marriage against his father's other representatives, and separate subjects, to relieve the estate of these debts; Fotheringhame *contra* Fotheringhame, 5th Dec. 1734, *voce* PROVISION to HEIRS and CHILDREN; M'Intosh *contra* Laird of Aberarder, 23d Jan. 1717, IBIDEM. And if Sir Alexander was under an obligation to give the estate to his son, *tanquam optimum maximum*, and to purge it of debts, it cannot be maintained that it was in his power to fetter the heir with a strict entail, whereby he was reduced to the state of a naked liferenter. The onerous debts of the father must affect the heir of the marriage, because the fee remaining in the father, the son, as heir of provision, must necessarily represent him; and, in like manner, he must be liable for suitable provisions to the younger children, the father being under a natural obligation to provide his children; but, if the father has a separate estate, the heir is entitled to be relieved of all such debts and burdens; and if so, an heir cannot be burdened with a strict tailzie, which is a mere voluntary gratuitous deed of the father, which he was under no obligation, either civil or natural, to grant. And this tailzie ought the more especially to be set aside, as it contained sundry unreasonable restrictions and limitations, particularly as to providing younger children, &c.

It has been said, that the pursuer is now barred from challenging this entail, having homologated the same in his own marriage-contract, where, under the character and description of heir of tailzie and provision to his father, he accepts of an yearly aliment; and that the children's provisions in that contract are conceived in terms of the tailzie. But, supposing that the pursuer had, in his marriage-contract, homologated this entail in the most express manner, it

No 46. would not have barred him from insisting in this reduction, if otherwise competent. In order to give effect to any deed, there must be a free consent upon the part of the granter; but, when the pursuer entered into his contract of marriage, he was not only under the awe and authority of a father, but entirely dependent upon him for subsistence, being then married, without either fortune or employment to depend upon, and obliged to trust altogether to his father's generosity; and, in these circumstances, would naturally accept of an aliment or provision for children, under any terms the father thought proper to prescribe. It is a general rule in law, that homologation of a deed to a man's prejudice, is not to be inferred from any act of the party which can admit of another construction. The only purpose of the marriage-contract was to secure to the pursuer an aliment during his father's life, and provision for his wife and children; but *non agebatur* by the marriage-contract, to renounce any right or interest, otherwise competent to the pursuer, or to approve of any deed to his prejudice.

*Answered* for the defenders; Although Sir Alexander M'Kenzie, the father of the pursuer, by his contract of marriage in 1730, provided the estate to the heirs of the marriage, he still remained fiar, and had full power to make rational deeds. It has been found by the Court, that a father had power to alter the provisions, and even the order of succession made in his marriage-contract, upon good reasons occurring; Douglas *contra* Douglas, 10th July 1724, *voce* Provision to Heirs and Children; Trail *contra* Trail, 7th January 1737, Ibidem; and, if he can alter the order of succession, he may certainly execute rational deeds regulating the same; and the entail in question is a rational deed; it is devised to the same series of heirs with the contract of marriage; nor are the limitations of the provisions to the younger children any ground of complaint. This estate is of very considerable yearly rent, in a country where every necessary of life is purchased on the most moderate terms; and, with œconomy, the younger children may be provided without burdening the estate one shilling; so that, upon the general point, the question it in favours of the defenders.

But, if there was any doubt on the general point, it would not aid the pursuer, as he is barred from challenging this entail, having homologated it in the strongest manner in his own contract of marriage. The pursuer was, at the time of executing that contract, 25 years of age; he knew of his father's contract of marriage, and entail executed by him, which had been registrated several years before; and, upon the security of which it was, that the pursuer's wife and her relations rested for the estate coming to the heir of that marriage; and, therefore, the pursuer, on that ground alone, must be barred from reducing this entail.

'The Lords found the pursuer barred, by his contract of marriage, from reducing the entail in question; and, therefore, assoilzie from the reduction and decern.'

And adhered, upon advising a reclaiming petition for the pursuer, with answers for the defenders. No 46.

For Sir Alexander M'Kenzie, *Ro. Macqueen.* For Hector M'Kenzie, *James Boswell.*

*A. E.* *Fac. Col. No 61. p. 298.*

---

1774. *January* 13. WILLIAM STEEL *against* THOMAS and DAVID STEELS.

No 47.
Where there is one deed for one sum, in favour of more persons, *ex eadem causa*, payment made in part, though not to every one of them, infers homologation of the whole.

THOMAS STEEL of Netherhouse, the father of these parties, by a deed, executed the 29th June 1764, for the love and favour he bore to James, Thomas, and David Steels, his children, did, with the special advice and consent of William Steel, his eldest lawful son; and the said William Steel for himself, and they both, bound them, their heirs, &c. jointly and severally, to make payment to the said James, Thomas, and David Steels, equally between them, of the sum of 6000 merks, Scots money, at the first term of Whitsunday or Martinmas after the decease of the said Thomas Steel, with penalty and annualrent, &c.; which sum of 6000 merks is thereby declared to be over and above the executry that will fall to them through the death of the said Thomas Steel; as also, they bound themselves to make payment of an annuity of L. 30, Scots money, to Anne Weir, spouse to the said Thomas Steel, while she should remain a widow, after his decease, besides the provisions in her favour by the contract of marriage.

William Steel, the eldest son, within the *quadriennium utile*, instituted a reduction against his two surviving brothers, Thomas and David, James being by this time dead, to have the said bond set aside, as having been elicited from his father while on death-bed, and *quoad* him, only signed by one notary, before two witnesses, and from the pursuer himself, while he was under age, to his enorm hurt and lesion; especially considering the smallness of the land estate he derived from his father, attended with so many burdens, and that his younger brothers were *aliunde* provided to the whole of the father's executry, which was considerable.

*Objected* for the defenders; That the bond under challenge had been homologated by the pursuer after his majority, by payment of the additional annuity to his mother, and of the annualrents of the sums provided to the younger children, and that, on that account, he was barred from setting aside the bond. And the Lord Ordinary, 'upon considering the debate, and the receipts of payment produced, whereby it appears that William Steel, pursuer, made sundry payments to and for the defenders, after his majority, repelled the reasons of reduction, and assoilzied the defenders.'

*Pleaded* in a reclaiming bill, upon the point of homologation; As the bond is intrinsically null and void, acts of homologation are not sufficient to support