to was quite within the spirit, meaning, and powers of the charters, and is at once decisive of this question. It is not pretended that Mr. Keir was ignorant of this regulation; and that ever since 1728 it had been acted on without question or dispute. He must have bought his stock in the full knowledge that its transference was subject to this regulation; and the bank advanced him money on the faith that the stock was pledged for its repayment. The creditors of Mr. Keir, therefore, can have no better right than Mr. Keir himself, and must take it *tantum et tale* as in him. The bank's power to make such bye-law is not the least shaken by a right of retention being given in special cases, because such special cases are often inserted *ob majorem cautelam*, so as to apply to cases where the right might not otherwise be pleadable. But as the charters confer general powers to make bye-laws for the good of the Company; and as they expressly declare the stock not affectable by the diligence of arrestment or attachment, it is obvious that the right of creditors in regard to this stock was limited: and that the bye-law, when enacted, fell within the intent and meaning of the charters so limiting the rights of creditors.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors be affirmed.

For the Appellant, *W. Grant, Wm. Adam, John Clerk.*

For the Respondents, *Sir J. Scott, W. Alexander.*

MRS. SARAH AGLIONBY, otherwise LOWTHIAN, Widow of Richard Lowthian, } *Appellant;*

GEORGE Ross, Nephew and Heir-at-law of Richard Lowthian, and his Trustees, } *Respondents.*

House of Lords, 15th Dec. 1797.

WIDOW'S TERCE—JUS RELICTÆ—HERITABLE OR MOVEABLE.—(1.) A husband, before his death, having estates both in England and Scotland, executed a series of deeds, by which he left his wife the English estate, and also the liferent of one of the Scotch estates, &c. In a claim made by her for her widow's terce: Held, that the act 1681 did not refer to unilateral deeds, but to contracts of marriage, or other such deeds of a conventional nature, to which both husband and wife are consenting parties; and therefore she was not barred from claiming her terce and *jus relictæ* as well as the provisions so left her. (2.) The deceased having purchased an estate,

1797.

LOWTHIAN
v.
ROSS, &c.

and become bound to pay all the seller's debts, many of which were heritable constituted, (he having been previously bound by bond along with the seller for those debts) the question was, Whether this obligation was personal, and fell to be deducted in estimating the widow's *jus relictæ*: Held that the obligation was moveable in its nature, and fell to be deducted in estimating the moveable estate.

Mr. Lowthian, who was a Scotsman, and domiciled in Scotland, died there possessed of considerable estates both in Scotland and England. Previous to his death he executed a series of deeds intended to settle his Scotch estates, and disponed them in favour of his wife, the appellant. He at same time, by separate deeds, settled on her certain of his estates in England. The deeds in regard to the Scotch estates, were made the subject of a reduction by the respondent, the heir-at-law, on the ground of incapacity, and nullities in their execution; and after considerable litigation, which ended in an appeal to the House of Lords, the deeds were set aside and reduced.

This reduction did not affect her right to the liferent of the estate of Nineholm in Scotland, left her by a deed granted by her husband, which was left entire to her. She was also left, by separate deed, his whole plate and household furniture, and by this settlement the devise also of the English estate.

The respondents then brought an action of count and reckoning against her, to make her account for her intromissions with the rents, and her management of the estates. In answer to this claim she insisted: 1. That she was entitled to the rents of the English estates devised to her by her husband's will, this not being reduced, and being irreducible. 2. That she was also entitled to a third part of the rents of the real estate in Scotland in which her husband died infeft, as the widow's terce. 3. Also to the half, or relict's part (there being no children) of her husband's free moveables, after deducting debts considered moveable. The respondents contended that the appellant was not entitled both to the English estates, and also to claim her terce over the Scotch estates. That she was only entitled to the one or the other, and not to both; and was bound to make her election; and founded on the Scotch act of parliament 1681, c. 10, enacting that a widow *shall be excluded from her terce*, where the husband has granted to her a particular provision " by a contract of marriage or other writ before " or after marriage, unless it be expressly provided in the

" contract of marriage or other writ containing the said pro-
" vision, that the wife shall have right to a terce over and
" above the particular provision conceived in her favour."
He admitted that she has a right to the half of the move-
ables, but there fell to be deducted from these a debt which
was moveable in its nature, namely, arising from an obliga-
tion on the part of the late Mr. Lowthian to purchase the
late Mr. George Mackenzie's estate, and with the price
thereof pay all George Mackenzie's debts, as well as those
for which he was otherwise bound for him to his creditors.
In answer to this last claim of deduction, the appellant con-
tended that the debts alluded to were not moveable, and so
could not diminish the relict's part.

Of this date, the Lord Ordinary, (LORD JUSTICE CLERK) May 21, 1796.
pronounced this interlocutor, " Finds, that in order to bar
" a claim to the terce, it is not necessary that the conven-
" tional provision should be constituted over lands in Scot-
" land: Finds it acknowledged, that the defender is pos-
" sessed of a settlement made by her husband, in her fa-
" vour, of an estate belonging to him in England: And in
" respect it is not alleged by the defender that any other
" person is in possession of that estate, or competing with
" her for it, or that she herself is not in possession of it, in
" terms of her said settlement; and further, in respect that
" she does not offer to convey her right to that estate in
" favour of the pursuers, or even to repudiate her hus-
" band's settlement thereof: Finds, that she is not entitled
" to claim a terce out of the lands in Scotland: Finds, that
" the obligation granted by Mr. Lowthian to the trustees
" of George Mackenzie, for the price of the estate of Nether-
" wood, and debts owing by George Mackenzie, being of a
" moveable nature, must affect the *jus relictæ*; and, there-
" fore, upon the whole, refuses the desire of the represen-
" tation, adheres to the former interlocutor, and discharges Jan. 20, 1797.
" any more representations." On two separate reclaiming
petitions the Court adhered. * Feb. 9, ——

---

* Opinions of Judges :—

LORD PRESIDENT CAMPBELL said—

" This is a question upon the construction of the act 1681. The terms of the act are general, including conventional provisions of whatever kind; 2d. point, The interlocutor is also right, the obligation by Mr. Lothian being merely personal. He purchased the lands at a certain price, and also obliged himself to pay all Mr. Mackenzie's debts, he being put in possession of all his funds.

1797.

LOWTHIAN v. ROSS, &c.

Against these interlocutors the present appeal was brought.

Pleaded by the Appellant.—Neither by the common law, nor by the statute, nor by the intention of the deceased, is the appellant debarred from taking both the lands devised to her in England, and her terce over the lands in Scotland, because the rule, that one who takes under a will cannot set up a claim in contradiction to what is either expressed or implied in that will, does not apply here. That rule is always founded on a presumed intention of the donor to give only one or the other, unless a clear contrary intention to give both expressly appear. Now, this contrary intention is precisely what appears in this case. The intention of Mr. Lowthian to give his wife at least much more than a terce of his Scotch estates, *besides the land in England*, is demonstrable in all his deeds. And the question comes to be, how far the act 1681, c. 10, nullifies that intention, and debars her from claiming her legal terce out of the lands in Scotland, by the devise to her of certain lands in England, made by her husband's last will. On a sound construction of the statute, the "provision" therein referred to, does not refer to deeds of a testamentary and unilateral nature. It refers only to provisions conferred by "*contract of marriage*, "*or other writ before or after marriage*," thereby comprehending only those deeds, *inter vivos*, to which *both husband and wife* are consenting parties. It is to mutual deeds to which both parties consent, and which are only of a conventional nature, that the act seems to point at. The preamble sets forth, "That sometimes, through the ignorance "and inadvertence of writers and notaries, clauses are in-"serted in *contracts of marriage*, containing provisions by "husbands in favour of their wives, without mentioning the "terce that is due to her by law, or expressing the provi-"sion to be granted in satisfaction of the terce, whereby "occasion is given to relicts to claim a terce out of their "husband's estates, over and above the provision," &c. This whole preamble, then, refers to *conventional provisions*. In other words, those made by writings or contracts, to which both husband and wife are parties. It is true, that the enacting clause of the statute is broader in its terms, in using words such as these,—"That in time coming, *where* "there shall be a particular provision granted by a husband

---

"On the first point, Court unanimously for adhering. 2nd point, Lord Justice Clerk said, The obligation for price clearly personal."

President Campbell's Session Papers, vol. lxxxiii.

" in favour of his wife, either in a contract of marriage or " some other writ before or after marriage, the wife shall be " thereby excluded from a terce out of any lands or annual " rents belonging to her husband, unless it be expressly " provided in the contract of marriage, or other writ con- " taining the said provision, that the wife shall have right " to a terce over and above the particular provision con- " ceived in her favour." But still it is obvious, that the " other writs" alluded to are such deeds to which the wife is a party; for otherwise, unless this were held to be the construction of the act, the husband might cut off her claim of terce by providing her with the most illusory provision imaginable—a jewel, a ring, or a trinket, might suffice, and be called a provision in the sense of the act. The act, therefore, relates to grants of the nature of an annuity or jointure, to which both parties consent. This construction is farther supported by the rule in law, that when general words are subjoined to an enumeration of particulars, it cannot be extended to things of a different description. The words are, " a contract of marriage, or some other writ, " BEFORE or *after* marriage;" and the particular specified being a contract of marriage, the general words, " some other writ," must be understood to signify other writs of the same nature, importing a contract or agreement between the parties. Besides, the preamble states, that sometimes, through the ignorance or inadvertency of the writer, certain things were done " contrary to the meaning and intention " of the *parties contractors;*" from all which it was clear that the act only refers to a provision settled between the parties during their lives, by contract or mutual agreement, binding on both. 2d. But even supposing it to apply to unilateral deeds, such as wills, even then the statute could not debar her from her terce, because, in conveying to her the English estate, it is conveyed to her in exact words of the statute, over and above the lands left to her by the Scotch deed. 3d. Besides, the exclusion of the terce, implied in the grant, or at least in the acceptance of a conventional provision, being founded upon a statutory regulation of the municipal law of Scotland, is ineffectual beyond the territory of the legislature which enacted it, and cannot be applied to a landed estate in England or any foreign country. The framers of the act 1681, had in view nothing but *Scots* deeds and Scots property, as is evidenced by the words of the preamble, as well as the enacting clause of the act.

1797.

LOWTHIAN v. ROSS, &c.

It refers expressly to terce, which is a legal provision only applicable to Scotland, and to lands in Scotland, and consequently the statute cannot be extended to provisions out of lands in England, or any other country, because the enactment, from its whole scope and tenor, was not so intended to be so extended. The rules in the law of England are the very reverse of those in Scotland, in regard to such provisions. In order that a jointure, settled on a wife, may exclude from her dower, it must be particularly expressed to be in satisfaction of her whole dower; but according to the Scots statute, the provision excludes her from her terce, unless the deed bears that she is to have the terce also. A voluntary provision to a wife out of English lands, by an English deed, can never be held to be the provision to which the Scots act applies

Jus relictæ.

Mr. Lowthian took upon himself the payment of George Mackenzie's debts, some of which were clearly heritable by constitution; but he undertook this obligation as connected with the purchase of his estate.—"I hereby agree to be-"come purchaser thereof, at twenty-five years' purchase "of the present free rental of those subjects. And as I "have already agreed to make payment of all Mr. Macken-"zie's debts, *I expect to be put in possession of all his funds,* "and shall oblige myself to hold you indemnified from all "challenge at the instance of any of my heirs," &c. If he had substituted his own obligation to the creditors for those debts, then the obligation would have been moveable; but as this obligation is undertaken to third parties, M'Kenzie's trustees, he was put under the same obligation as M'Kenzie was, which was confessedly heritable, and therefore this obligation ought not to affect the *jus relictæ.*

Pleaded by the Respondents.—Terce. The preamble and enacting clause of the statute, quoted by the appellant, are so clear, that there is neither occasion for commentary or room for construction on them. The great object of this statute was to provide against the evil of omitting to mention about the terce, in conferring special provisions, by which, contrary to the intention of the deceased, the widow has got often both the one and the other. But the statute now declares, that a provision to a wife shall be held to exclude the terce, unless it be expressly provided to her over and above her terce. And there is no ground whatever for contending that this enactment has reference only to

deeds of provision in the nature of contracts, and to which the wife is a party. The terms of the act are general, "where there shall be a *particular* provision granted by "a husband in favour of his wife, either in a contract "of marriage, or some other writ, *before* or *after* marriage." The leading feature, and chief object in the act is therefore to correct the omission in men of business neglecting to insert an express exclusion of the terce; and it equally applies to provisions when given by way of mutual contract, or in the way of an unilateral donation. This is the fair construction of the statute. The widow has her election which to take, and thus law does full justice to her. 2. There is no clause in any of the deeds giving the appellant a right to terce over and above the conventional provisions. And it is no evidence of this, that after settling his whole Scots estates on her, he settled the English estates in addition thereto, because the whole deeds as to the Scotch estate being now reduced, must be looked at, and considered as not the deeds of Mr. Lowthian. Of the contents of these he knew nothing. The import was carefully concealed from him; and he did not know in whose name and for whose behoof they were executed. 3. The respondents do not maintain that the act of Parliament can regulate estates in England. The judgment of the Court of Session does not trench on that principle. The interlocutor only finds that the widow, having accepted a conventional provision, could not claim her terce in Scotland. The act does not make any distinction as to how, where, and from what source the provision is payable. It does not confine it to estates or funds in Scotland. The act says nothing about estates in England. And the Court, not looking to the source from which the conventional provision was payable, but to the fact that it was a provision, they determined solely upon the heritable right claimed by the widow to her terce in Scotland.

Jus Relictæ.

The obligation to pay George M'Kenzie's debts was no doubt connected with an obligation to pay the price of his lands, but an obligation to pay the price of his lands, undertaken to his trustees, and out of the proceeds to pay all his debts, so far as it would go, and all others, in so far as he was otherwise bound, was a personal obligation. In so far, therefore, as those debts were not all paid at the time of Mr. Lowthian's death, it follows, as a consequence of this personal obligation, that they attach to the personal estate.

1797.

LOWTHIAN v. ROSS, &c.

The obligation to pay the price of the estate to George M'Kenzie's creditors was undoubtedly personal as to Mr. Lowthian, and fell therefore against his personal estate, without respect to whether there were some of the debts due to creditors heritable or not; because all obligations for sums of money are *sua natura* moveable, unless constituted by heritable bond, which Mr. Lowthian's obligation was not.

LORD CHANCELLOR LOUGHBOROUGH said,—

"MY LORDS,

"This cause is of some importance in the law of Scotland, and deserving of your Lordships' attention. It contains two principal questions, 1st, Whether an estate in Cumberland, devised by the will of Mr. Lowthian to his wife in fee, is a bar to her claiming terce or dower out of his real estate in Scotland? And if it be not a bar, whether it shall not put the widow to her election, either to renounce the terce or the estate? I state it in this double point of view; because there was some confusion in the Court below, in distinguishing whether the taking the estate did bar the terce, or put the widow to her election.

"The second question is, Whether a debt, or certain debts, owing by Mr. Lowthian, are to be deducted from the widow's half of his personal estate, in a due proportion; or whether the same shall fall solely on his next of kin. Of these there were two classes, one for the price of an estate bought from the trustees of George Mackenzie; and the other, the debts due by Mackenzie, which Mr. Lowthian became bound jointly with him to discharge; but I make no distinction between these two classes.

"On the first point, Whether the devise of a real estate in England be a bar to terce in Scotland? I shall submit to your Lordships a few short observations, on what I have observed in the law of Scotland with regard to terce. By the decisions, previous to the act of Parliament 1681, it was held that a provision, to a wife of the liferent of a great part of her husband's estate, did not bar her terce as to the remainder; nor is this rule remarkable, for the same prevails in this country. In 1681, a case occurred, reported by Fountainhall, which brought this rule into question; a gentleman, in his contract of marriage, provided his wife to a jointure of a moiety of his real estate, and she afterwards claimed her dower out of the remainder. Sir George Mackenzie mentions that this case was *referred* from the Session to the Parliament; *that* was an inaccuracy of expression; the cause was not referred to the Parliament to be tried, but only to the effect of producing an act of Parliament, which was passed, not having a retrospective effect, but providing in future that the question could only arise from the ignorance or inadvertence of

agents. It was therefore enacted (1681) that the provisions made by contract on a wife, before or after marriage, should be a bar to the terce, where the settlement had said nothing to the contrary.

"All the text authorities in the law of Scotland agree, and the language of the law, calling this a *conventional* provision, and the words used in the pleadings in the cause, evince the sense of the statute, and describe the bar of dower as by *conventional,* not by *revocable* provisions. Wherever the act applies, it is compulsory, and imperative, and no election is given. *That* is the bar uniformly described to which the act applies a compulsory effect; The widow cannot set aside *conventional* provisions; but, in the case of a provision after marriage, *which can be set aside,* the wife is not barred from her terce; but if she claim it, she cannot take both, and may be put upon her election.

"This was the effect, and the whole effect, of the act 1681; it removed former prejudices, and restored a liberty to the courts to consider whether provisions revocable, or revocable *sub modo,* should not put the widow to accept the legal provisions, or renounce them. No doubt is held that provisions out of land by deed, voluntary or properly revocable, *might* put the widow to her election; provisions out of personal estate by will might do the same. Beyond all controversy, express words in a deed would do this, or if there were a presumption that the will of the grantor was such, the widow might be put to her election.

"With respect to Mr. Lowthian's will, no ground of presumption appears, that, by a devise in fee of an estate in England, he meant to bar the appellant's dower out of his Scots estates. I lay no stress on the circumstance of its being an English estate. A life-interest in an estate in England, or out of money in the funds, might put her to her election; but, in the case of the grant of an estate in Scotland, *if in fee,* I should hold it no bar to terce or reason to go to election; if *in liferent* it would be different. It is a strong feature in the present case, that this plea is only set up against the terce, and that the widow has a great interest in the personal estate as relict; if Mr. Lowthian had meant to exhaust his bounty by the devise of the estate, he would have provided that the *jus relictæ* should be cut off as well as the terce. There occurs one observation more upon this point. I find, in reading the will, a strong circumstance against presuming that Mr. Lowthian meant to restrict his widow to the will; he there refers to certain deeds which he mentions to have executed. In the pleadings, there was a see-saw sort of argument upon this point; that these deeds were set aside on account of fraud or circumvention, and that they were not the deeds of Mr. Lowthian; but whenever an heir-at-law does not set aside a will, he is bound to admit it altogether, and he cannot cut and carve upon it; it must be held a sound will, and the testator as of competent understanding. At the beginning of this will, there is no appearance of restriction

1797.

LOWTHIAN
v.
ROSS, &c.

on the widow. I am therefore for reversing the interlocutors of the Court upon this point.

"On the 2nd point, though I agree with the judgment of the Court; yet, as a very able and ingenious argument was maintained by the appellant, I am called upon to say something on the subject. 1st. Undoubtedly I must feel touched also, as stated by Mr. Grant, with the unanimous decision of the Court on a point of Scots law; but, 2nd. I do not go upon that only, but upon the principle of the decision, which appears to me to be right.

"Mr. Lowthian was bound in several debts of George Mackenzie's, which fell to be paid by his next of kin; but they would have been entitled to be reimbursed out of the estate of Mackenzie; as the widow did not lose by the *active* debts; so she ought not to gain by the *passive* debts.

"Mr. Lowthian was the arbiter of his own succession, as to what should be heritable or moveable, and his heirs who succeed *ex lege* must take it as they find it. What is it that he has therefore done? He was bound to pay Mackenzie's debts, but he had a right of relief against his estate; he anticipates that, by taking the estate with the charge of all Mackenzie's debts, which he personally undertakes to pay in an aggregate sum, not distinguishing principal from interest. But he was relieved from this obligation by Mackenzie's estate; and he has *de facto* received from it wherewith to pay the debts.

"The form given to this was a sale of Mackenzie's estate, at twenty-five years purchase, *ultra* all debts affecting it, which Mr. Lowthian undertook to pay. To Mackenzie's representatives, therefore, he was only liable for the price of the estate (£28,000) at twenty-five years' purchase, and an unliquidated amount of debts; and he was not to be discharged of his obligation till *all* the debts were paid. It was therefore merely a purchase of lands, for an undefined sum, which Mr. Lowthian made; and as the widow will be entitled to her terce out of the lands, it seems just that those debts which formed the price of the lands should be deducted out of the *jus relictæ*."

I therefore move, that it be

Ordered and adjudged, that the interlocutor of the Lord Ordinary, of 5th February 1796, in so far as it finds, That in respect Mrs. Lowthian has accepted of a provision of an estate in England, that she is not entitled to claim a terce out of the lands in Scotland; and the interlocutor of the Lord Ordinary, of the 21st May 1796, in as far as it finds, That in respect it is not alleged by the defender that any other person is in possession of that estate, or competing with her for it, or that she herself is not in possession of it in terms of

her husband's settlement; and in respect that she does not offer to convey her right to that estate in favour of the pursuers, or even to repudiate her husband's settlement thereof, therefore that she is not entitled to claim a terce out of the lands in Scotland; and the interlocutors of the Lords of Session, of the 20th January and 9th of February 1797, in so far as they adhere to the parts of the Lord Ordinary's interlocutor above mentioned, be, and the same is hereby *reversed;* and it is hereby declared, that the appellant, Mrs. Lowthian, is not bound to give up the benefit of the devise to her by the will of the 12th October 1782, and codicil thereto of her husband, before she can be admitted to the possession of her terce out of the lands in Scotland: And it is further ordered and adjudged, that the rest of the said several interlocutors be affirmed.

For Appellant, *Sir John Scott, M. Ross, Wm. Tait.*
For Respondents, *W. Grant, Geo. Ferguson.*

[Bargany Cause.]

SIR HEW HAMILTON DALRYMPLE of Bargany and North Berwick, . . . } *Appellant;*
MRS. FULLERTON and HUSBAND, . . *Respondents.*

House of Lords, 18th Dec. 1797.

ENTAIL— CONTRAVENTION — PRESCRIPTIVE RIGHT—MINORITY.— A party was said to have contravened the prohibitions of an entail, and to have made up titles not under the entail, but otherwise, upon which he possessed unchallenged by the next substitute heir of entail for more than forty years. In a question with an heir-substitute, who was a minor at the time this contravention took place, Held in the Court of Session, *that in this case,* in computing the period of prescription, the period of the substitute-heir of entail's minority was to be deducted, and therefore that there was no sufficient title to exclude. On appeal to the House of Lords, the case was remitted, with an instruction to the Court of Session to review their interlocutor. And opinion indicated, that if the pursuer could establish that she was in the situation of next heir-substitute of entail, that she might plead her minority.

Mr. John Hamilton, otherwise Dalrymple, *second* son procreated between Sir Robert Dalrymple of Castletown, and Joanna Hamilton, only daughter of John, Master of