

1665. November 16.

WATT against RUSSELL.

No 60.

A relict, by her contract of marriage, became bound to restrict her liferent, in case of children, the surplus being for the childrens' aliment. This surplus being moderate, was found not affectable by the husband's creditors.

JEAN WATT being provided by her contract of marriage to certain lands, and infest therein, the contract contains the clause, that she shall aliment the bairns of the marriage, after the father's death; and, in case she marry again, she shall restrict herself to 600 merks, and the superplus shall remain to the bairns, for their aliment; hereupon she pursues Robert Russell, and the other tenants, for the mails and duties of the hail liferent lands, who *alleged*, *imo*, That she was restricted to 600 merks, and could crave no more, especially now being married to a second husband. Compearance was also made for the only child of the marriage, who claimed the benefit of the superplus, by virtue of the clause in the contract. It was *alleged* further for the defenders, That they were creditors to the husband, before the contract of marriage; and in their tacks had a clause, bearing, that they should retain their tack-duties, while they were paid; and upon their bonds they had also apprised from the child, as lawfully charged to enter heir, all right he had to the lands; so that, if the superplus belong to the child *proprio jure*, it now belonged to the defenders, as apprisers. They had also raised reduction of the clause of the contract, in favour of the children, as being granted by a father in favour of his own children, after contracting of their debt, and so was fraudulent and reducible, by the act of Parliament 1621, against bankrupts. It was *answered* for the Child, That, as for the apprising and decreet against him, as charged to enter heir, he had suspended and raised reduction, and craved to be reponed, and produced a renunciation, offering to renounce all right he could succeed to, as heir to his father, but prejudice of this aliment, which belonged to him *proprio jure*, as a restriction granted to him by his mother; and as to the reason of reduction, upon the act of Parliament, there was here neither fault nor fraud, there being no law to hinder a husband to give his wife what jointure he pleased, which was never counted in defraud of prior creditors; nor is their any restriction or proportion thereof, but as the parties agree, which is always sustained *in favorem dotium et matrimonii*, and seeing the wife might take what liferent the husband was pleased to give her, there was nothing to make her to restrict herself in favour of her children, for an aliment with restriction is no deed of the father, but of the mother. It was *answered* for the defenders, That the reason of reduction stood relevant, seeing in this case there was manifest fraud, in so far as this liferent was exorbitant, and unproportionable to the father's estate, whose hail lands being only worth 1000 merks, and having nothing but the tocher, which was 6000 merks, he infests his wife in the hail, and yet restricted her to 600 merks, and provided the rest to his children; and albeit it appears to flow from the mother, yet that is but *dolose*, and, in effect, it flows from the father; *2do*, Seeing the superplus was appointed to be an aliment to the hail children, seeing there is but one, it ought to be modified, and

what remained above the 600 merks, and a competent aliment, to belong to the creditors.

No 60.

THE LORDS found that the child's renunciation should repose him; and found, that if the provision had been exorbitant, it might have been counted as fraudulent; but they found it not exorbitant, seeing the land was offered to the defenders for 900 merks, and there were 200 merks thereof liferented by another woman, so that there remained but 100 merks for the child; and, therefore, repelled the defences, and decerned.

Fol. Dic. v. 2. p. 77. Stair, v. 1. p. 308.

* * * Gilmour reports this case :

THE deceased James Hamilton of Boighead, being necessitated to borrow sums of money from Robert Russell and others, his tenants, he gave them bonds, by which he was obliged to repay, and till payment, that they should retain their duties *pro tanto*, in payment of their annualrents. The said Thomas being thereafter married to Jean Watt, she, by her contract of marriage, was provided to his hail lands, with provision, that, if she should survive him, having bairns of the marriage, in that case; she should be restricted to part of the mails and duties, and the rest to belong to the children, for their entertainment. The relict having pursued, for the duties, Robert Russell, as creditor, and having comprised, compares; and he *alleges*, That the relict must be restricted to the said sum of *Answered*, It was *jus tertii* to the said Robert Russell, seeing the restriction was in favour of the bairns of the marriage, for their aliment, which being alimentary, could not belong to the creditor.

THE LORDS found, that the relict should be restricted, but prejudice to the bairns, one or more, of the marriage, to compare and debate for their preferences.

AN only son of the marriage comparing; *alleged*, That he ought to be preferred; because the mother being provided to the whole, by her contract of marriage, she, in the case of existence of children, one or more, of the marriage, was obliged to restrict herself for their aliment; which being an alimentary right flowing from him, the children cannot be disappointed thereof, in favour of any creditor, which creditors are in no worse case than if she had had no children at all; now, if she had no children, she would liferent the whole. *It was answered*, The provision in favour of the children was a deed of the father's, who caused draw the contract in these terms, and which provision, in favour of children, could not prejudice lawful creditors; *2do*, The lands being comprised from the son, as lawfully charged to enter heir to his father, *omne jus* he has is comprised from him; and, consequently, the right of the foresaid provision; *3tio*, It being a provision in favour of children in general, there being

No 60.

none but only one, whereas there might have been many; the LORDS ought to modify that aliment in favour of the one. *Duplied*, The provision properly flowed from the mother, who, in favour of her children, put herself in worse case than if she had none; and though the lands be comprised, that cannot prejudice the child's aliment; nor ought the creditor to be in better condition, than if the child were dead; and, for the same reason, the aliment ought not to be modified.

THE LORDS preferred the child to the superplus duties for his aliment.

Gilmour, No 167. p. 118.

No 61.

1667. February 1. EARL of TULLIBARDINE against MURRAY.

THE reversion of a wadset being conceived to the heirs and assignees of the reverser's own body, an order of redemption was not sustained, being at the instance of an assignee, who was not of the reverser's own body.

Fol. Dic. v. 2. p. 75. Stair.

* * * This case is No 43. p. 7206. *voce* IRRITANCY.

No 62.

If a bankrupt has obtained decree of *cessio bonorum*, a fee given him for service, equivalent to an aliment, is not arrestable.

1668. July 8. BOGG against DAVIDSON.

ROBERT DAVIDSON being debtor to Hugh Bogg by bond, and becoming bankrupt, did obtain a decret, freeing him from personal execution, a *cessione bonorum*; and thereafter being employed by the Magistrates of Edinburgh in Heriot's Hospital, for which he had a fee allowed him during his service, the said Hugh did arrest the fee, and pursued to make furthcoming; which action was not sustained, unless it were condescended and proved, that he had more than a reasonable aliment; for the LORDS found, that, so far as it was an aliment, it could not be arrested, it being in the power of Magistrates to deprive both him and the creditors thereof.

Gosford, MS. No 24. p. 49.

* * * Stair reports this case:

1668. July 9.—HUGH BOGG having arrested Robert Davidson's fee, as keeper of Heriot's Hospital, pursues the Town of Edinburgh to make it forthcoming; it was *alleged* for Robert Davidson, Absolvitor; because Robert Davidson had made *cessionem bonorum*, in favour of this pursuer and his other creditors, and thereupon was assoilzied. The pursuer *answered*, That a *bonorum* did noways secure *contra acquirenda*, unless the assignation or disposition had been equiva-