

they had any such paper, it would be yet receivable, the taking advantage of those irritancies being odious in law.

No 87.

*Fol. Dic. v. 1. p. 491. Fountainhall, v. 2. p. 544.*

1709. December 24.

Mrs ELIZABETH SCOT, Relict of JOHN LOCKHART of Lee, against JAMES LOCKHART of Lee.

No 88.

THE deceased Cromwell Lockhart of Lee disposed his estate, in the form of entail, to Richard Lockhart, his immediate younger brother, and his other heirs substitute, with several clauses irritant, and provisions; particularly, that it should not be in the power of any of the said heirs to provide their Ladies in jointures exceeding a third of the free rent of the estate for the time, and that in full satisfaction of all right of terce. Upon the foot of this tailzie, John Lockhart, who succeeded to Richard, provided his Lady in an yearly annuity of 2000 merks; who, after his decease, pursued James Lockhart of Lee, her husband's heir of tailzie, for payment of the said provision, and an interim aliment.

A lady having restricted her liferent annuity, the ease thereof was found affectable for a provision to the relict of a former heir, as long as the lady who restricted did not claim the benefit of her full annuity; although the irritancies in the restriction had been incurred.

*Alleged* for the defender; The rent of his estate was exhausted by annual-rents of debts, and Ladies' liferents, prior to the pursuer's; particularly with 5500 merks of annuity in favours of Martha Lockhart, relict of the said Cromwell Lockhart, now Lady Stevenson.

*Replied* for the pursuer; The Lady Stevenson had restricted her annuity to 4000 merks for the weal and standing of the family of Lee, which must be profitable to the pursuer, who is a lady and mother in the family.

*Duplied* for the defender; The restriction was made with several strict clauses irritant, which have been incurred; so that the estate is liable to the burden of the Lady Stevenson's full liferent, when she pleases to take herself to it.

*Triplied* for the pursuer; Although the Lady Stevenson might recur to her full liferent, yet she has not done it; and so long as she does not exercise that faculty competent to her, the ease of her jointure continues a subject affectable for the pursuer's provision and aliment.

*Quadruplied* for the defender; It is all a matter in this case, whether the Lady Stevenson be actually insisting for the whole 5500 merks or not; seeing she may do it, and *illud est debitum, quod exceptione perpetua summoveri non potest.*

THE LORDS found, that the Lady Stevenson's jointure is only to be reckoned at 4000 merks yearly, ay and while she recur to the irritancies in that restriction.

*Forbes, p. 377.*