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which, by the civil law, there was *locus pœnitentiæ post dationem ex uno latere interpositam*; and even though granting an assignation were a *factum*, yet it was such a one as *infectum fieri*, and a decret of reduction would make the dominion revert to the wife.

As to the defences from the tenor of the contract, &c. it was *answered*, That the wife was no partner in trade with the husband; and since part of her money remained unuplifted, she ought to be preferred to his creditors: That the whole sums disposed by her father bore annualrent, and were ordered to continue so till they were uplifted for the ends and purposes specified in the disposition; so that nothing fell under the husband's *jus mariti*, but the annualrents due before his decease. And, *lastly*, That an arrestment being only an inchoate diligence against a personal subject, it could not put the arrester, when he came to insist in his furthcoming, in any better condition than the person for whose debt he arrested.

THE LORD DUN Ordinary, in regard the prestations on the part of the husband were the mutual cause of the pursuer's assigning to him her portion, and what should accresce to her by the death of her brothers and sisters, and that the husband, by reason of his insolvency, was incapable to fulfil these prestations, found and declared, that the pursuer had a preference to all her husband's creditors, in so far as concerned such part of her portion, and of what did accresce to her by the death of her brothers and sisters, as remained yet unuplifted, for her security, and making effectual to her her liferent-provision conceived in her favours by the contract.

To this interlocutor the LORDS adhered, with regard to such subjects as fell not under the *jus mariti*; but found that she had no preference to such subjects as fell under it.

Act. Ch. Areskine.

Alt. Ja. Boswell.

Clerk, Mackenzie.

Edgar, p. 113.

1772. July 23.

MARGARET, COUNTESS DOWAGER of Moray *against* JOHN BAIN STEWART and Others, Tacksmen and Tenants in Glenfinglas.

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Tacks may be let by a fiar, notwithstanding of a prior liferent by way of locality granted by him in a contract of marriage.

By contract of marriage between James late Earl of Moray, and the Countess, dated April 19th 1740, she was provided, in the event of her survivance, to the liferent of certain lands in the way of locality, and particularly of the lands of Glenfinglas; and, upon the precept of sasine therein contained, the Countess was infeft upon the 23d of April 1741, and her sasine was duly registered.

In July 1767, the Earl died, when the Countess's liferent-right took place; and, some time thereafter, she brought a process of removing against the tenants of the said lands, in which decree was allowed to pass; but the tenants

afterwards obtained a suspension, alleging, that they were entitled to continue their possession of these lands, by virtue of a lease from the late Earl of Moray, for the term of 19 years, from Whitsunday 1765, till the issue of that lease.

Objected by the Countess; *imo*, That the Earl had no power to let a tack of the lands provided to her in locality, so as to exclude her from entering on the natural possession of the lands, if she thought fit; or to let them to others for a higher rent, if it could be got. That, with regard to the locality-lands, he became in the state of a liferenter, whose powers are limited by their own life; and she, particularly founded on the authority of Sir George M'Kenzie, in his observations upon the statute 1491, cap. 26. in these words: ' Though buyers of land be obliged to keep the tacks set by their predecessors, yet the superior is not obliged to keep them when the land falls to him in ward, during which time he is proprietor; nor are liferenters, nor conjunct fiars, obliged to keep them during their temporary rights; but, when these rights expire, the tacks revive.'

Answered to this plea; It has hitherto been understood, that the husband's powers were fully sufficient to enable him to let tacks, and to do every thing, in the ordinary way of administration, with respect to his wife's jointure-lands, notwithstanding her infertment, provided he does not counteract his warrandice, by selling or giving away the lands, or doing any fraudulent deed to her prejudice. The wife's prior infertment will secure her sufficiently against every such deed; but the present question regards an act, not of alienation to her prejudice, but of mere ordinary management, perfectly consistent with her security, and which generally must be for her benefit; as, without the power of letting leases for a definite number of years, no improvement can possibly go on, nor increase of rent be expected.

Though tacks are every day let by husbands, of lands eventually secured to their wives in liferent by contracts of marriage, it has never yet occurred, so far as the suspenders can learn, to any husband, in these circumstances, or to any man of business advised in such affairs, either to take the wife as a consentor to the tacks, or to limit the duration of them to the husband's life. Neither has it till now occurred to any widow, to attempt a reduction of the tacks let by her husband, of the lands provided to her in locality, the tacks being fairly let, and not under the rental at the time of letting.

The husband's management of his own estate, though burdened with an eventual provision to his wife, is not only natural in itself, but generally as much for his wife's benefit as for his own. If her provision is by way of locality, and if the marriage subsists for any considerable time, the consequence, which seldom fails to happen, is, that, by the husband's administration, the lands are improved, the rents heightened, and the wife finds herself, at the dissolution of the marriage, possessed of a much better rental than was engaged to her in the contract. But, were the Court to give so violent a check to the husband's power of management, as to find that he cannot let tacks for any certain num-

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In the *next* place, when principles are attended to, there is nothing in this new invented objection.

When a man infefts his wife in a locality, he does not denude himself of the property of his estate, but only creates an eventual burden upon it for a certain purpose, which he cannot frustrate by any after alienation or deed, inconsistent with the burden thus constituted. It is a clear case, that he remains, to all intents and purposes, in the absolute fee and property of his estate, except that he cannot hurt the eventual provision, if it happens to take place. He does not reduce himself to the state of a naked liferenter; he has both fee and liferent remaining in him; and he only constitutes a liferent-burden against his heir, in case the event takes place, which is provided for in the contract.—A posterior tack, if fairly let, is no alienation, is no burden, and is not, in any one shape whatever, inconsistent with the feudal right constituted by said infeftment.—It is an act, not of alienation, but of common administration, which every proprietor must have in his power; and which, therefore, every husband, who has not denuded himself of the property, but only constituted an eventual liferent-incumbrance, must, in law and common reason, be entitled to exercise.

Lord Stair says, 'that the setter must have right to the thing set, and power to administrate.' The Earl had clearly a right to the thing let, and power to administrate, although he had secured his Lady in an eventual liferent upon it; which liferent she now accordingly enjoys, in as full and beneficial a manner, as the most favourable construction of the marriage-contract could possibly give her a title to expect. She enjoys the subject in as beneficial a manner as the Earl himself would have done, had he survived, or as his heir would do, were the Countess not in life. The right of administration must necessarily be somewhere before the locality opens. It cannot be in the wife, who has only a chance of succeeding to the right; it must, therefore, be in the husband, who is the actual proprietor at the time, subject only to a conditional burden, which may never take effect.

The passage of Sir George M'Kenzie referred to, is very obscurely expressed; and, upon looking into the act itself, it rather appears that he has mistaken what is there said. The act bears, 'That, when onie lands fallis in waird, or quhen onie Ladie havand terce or conjunct-seftment happenis to deceis, or quhat land be redeemed or lowsed be reversion, gift, selling, or wadsetting, or onie other waies landes happenis to be altered, the tennentes, labourers, and inhabitantes onie of the said landes, shall remain unput foorth or remooved, quihill the nixt term of Whitsunday followand.' All the cases here stated in

the act itself are clear, nor have the suspenders any occasion to dispute them. The maxim, *resoluto jure dantis, resolvitur jus accipientis*, must take place. But, in the case of a husband creating a life-rent-burden upon his estate in favour of his wife, the husband's right *non resolvitur*. It remains entire, with the wife's incumbrance upon it; which is no obstacle whatever to his letting tacks, or performing any other act of ordinary and reasonable administration; and it does not occur; that there would be any propriety in suspending the effect of the tack during the widow's life-rent, and making it revive after the life-rent was at an end. This is a method which would not answer in practice, as it could not be well extricated. But, whatever the doubts or opinions of lawyers may have been formerly upon the abstract point, it is sufficient to say, that this part of our law is explained by the uniform practice of the country, and by the understanding of men of business for a long time past. And this practice is agreeable to the clearest principles of reason and justice, besides being unquestionably for the benefit and advantage of all concerned.

Objected ; That, as the tack in question was not signed by the Earl, it was altogether an incomplete deed, binding upon no person.

Answered ; It was owing merely to inattention or forgetfulness in the Earl that he had not signed it.

A lease of lands may be binding upon the parties, though the written instrument is defective. The parties, on one side, are generally ignorant and illiterate; and, if advantage could be taken of any supposed want of solemnities, after they had been admitted to possession, paid their rents, bestowed money, and acted for years together upon the faith of an honest and fair transaction, entered into with the landlord, which they had reason to consider as equally binding on both parties, their situation would be extremely hard. Accordingly, it is an established rule, founded upon manifest justice, that parties are not at liberty to rescind from a contract of lease, however defective in form, if it has actually taken place by possession, if parties have rested on the faith of it, and have signified their acquiescence *rebus ipsis et factis*; where expense has been bestowed, and matters are not entire, so that damage would ensue, if a breach of bargain were to happen.

In the present case, the lessees were bound to the Earl, by subscribing the lease, and transmitting it to him, in order to be completed by his subscription. They were likewise bound, by possessing, in terms of the lease, and going on for years together to fulfil the clauses and conditions of it. It was not thereafter in their power to recede from, or throw up the bargain; and as little could it be in the Earl's power, by delaying his subscription, the lease being in his own custody, to keep himself loose, while, at the same time, he was homologating the transaction, by allowing the lessees to possess, encouraging them to lay out money on improvements, taking their increased rents, and, in every shape, approving of the transaction. Had the noble Lord himself been the party in the this cause, it is impossible he could have prevailed in removing the suspenders;

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even the attempt so to do would have been unjustifiable, and as little would his heir be heard in such a plea.

' THE LORDS find no necessity that the Earl of Moray, before determination of this cause, should be made a party thereto. Find, that the late Earl of Moray, notwithstanding of the prior liferent by way of locality, granted to the Countess, and her infeftment thereon, had right to grant tacks of the lands contained in said locality effectual against the Countess; but find, that the tack in question not having been regularly executed by the said Earl, is not effectual against the Countess; and, therefore, ordain the suspenders to remove from their houses, biggings, yards, and grass, at Whitsunday 1773, and from the arable lands at the separation from the ground of the crop 1773.' *See TACK.*

Act. A. Lockhart, et M^o Queen.

Alt. Hay Campbell et Crosbie.

Clerk, Tait.

Upon an appeal taken by the Tenants, and a cross appeal brought by the Countess, the House of Lords, March 24th 1773, affirmed the first part of the judgment and reversed the latter. They ' ORDERED and ADJUDGED, ' That that part of the interlocutor of 23d of July 1772, complained of by the ' cross appeal, be affirmed; and it is further ordered and adjudged, that the in- ' terlocutor of the 29th January 1772, and also so much of the interlocutor ' 23d of July 1772 as are complained of by the original appeal, be reversed; ' and it is hereby declared, that, under all the circumstances of this case, the ' lease in question is as effectual and binding, as if it had been signed by James ' late Earl of Moray, deceased. And it is farther ordered, that the reasons of ' suspension be sustained.'

Fol. Dic. v. 3. p. 215. Fac. Col. No 22. p. 61.

SECT. VIII.

Provisions by Parents in contemplation of Marriage of their Children.

1743. November 2. & 30. M^cCLELLAN and WATSON *against* MEIK.

No 53.
Prohibition to
alienate, in-
ferred from
implication.

PATRICK ERSKINE, butcher in Dalkeith, by deed in 1729, settled his little estate of three acres and a tenement of houses, upon Jean Erskine his only child, and Robert Meik her husband, in conjunct fee and liferent, and the children of the marriage in fee, which failing, to the said Jean Erskine her nearest