

1798. June 13.

JOHN MAKGILL and his CURATOR AD LITEM, *against* MRS. AGNES LAW and Others.

George Makgill possessed the lands of Kemback, &c. under a strict entail, executed by his brother, which allowed the heirs "to charge the said lands and estate with reasonable annuities in favour of their husbands and wives, after their own decease, such annuities not exceeding a fourth part of the free rent of the estate at the time; it being hereby declared, That, in computing the free rent, the annual-rents of any debts outstanding at the time chargeable on said estate are to be deducted from the gross rents, as also the public burdens payable out of said estate; which annuities are hereby declared to be in lieu and in place of the rights of courtesy and terce, competent by law to husbands and wives out of their wives' and husbands' estates; which right is hereby expressly excluded and debarred, any law or custom to the contrary notwithstanding."

The heirs of entail were likewise allowed to grant to younger children "such provisions, bearing interest from the granter's death, as shall not exceed three years free rent out of the said lands and estate, no deduction in the computation of the rental to be made on account of jointures or annuities, but only of public burdens, and interest of debts, chargeable on the estate at the time."

George Makgill married Mrs. Agnes Law. No marriage-contract was ever entered into between them; but he, several years after the marriage, granted her an heritable bond of annuity for £.200, payable after his death, said, in the bond, to be within a fourth part of the free rent of the estate, after the deductions specified in the entail.

She took infestment on this bond; and her husband was, of the same date, infest upon the entail; which, however, was not recorded in the register of tailzies.

There were a son and four daughters of the marriage. As provisions to the daughters, George Makgill granted a personal bond for £.2400, payable at his death upon the narrative of that sum not exceeding three years rent of the estate, in terms of the entail to which it referred.

The rent, at Makgill's death, after deduction of interest of debts and public burdens, was about £.670. His widow having claimed alternatively a terce from the lands, or her full annuity, and doubts having been entertained with regard to the validity of the provisions to the younger children, an action was raised in name of John Makgill, the heir, (to whom a curator *ad litem* was afterwards appointed), concluding, that these different claims should be restricted, in terms of the entail.

The arguments of the parties with regard to the nature of the right of terce, and the power of excluding it, as also with regard to the effect of the special claim of the widow, (than which those of the children were admitted to be less

No. 61.

Where an entail excluded the terce, and prohibited the heir in possession from giving a higher annuity from the estate to his widow than one fourth of the free rent of it, or to give larger provisions to younger children than three years free rent of it, it was found, that a widow could not claim the terce; and an heritable bond granted to her by her husband, and provisions to younger children, above what were allowed by the entail, were restricted in terms of it, though not recorded.

No. 61. favourable), were not materially different from what will be found in the case, 24th November, 1795, and 1st March, 1796, Gibson against Kerr Reid, No. 108. p. 5891. and *voce* TERCE.

The Court, on advising memorials, considered that case to be decisive of the present. In the former case, it was observed, the entail, though recorded, was ineffectual against creditors, from wanting an irritant clause: But irritant and resolutive clauses, and consequently registration, are unnecessary to make entails effectual *intra familiam* of the substitutes.

“ The Lords found, That Mrs. Agnes Law, otherwise Makgill, has no right to a terce out of the entailed estate, or any part thereof; also found, That the life-rent annuity of £.200 Sterling, contained in the heritable bond in her favour, must be restricted to a yearly sum or annuity equal to one fourth of the free rent of the said entailed estate for the year current at her husband’s death; but valuing the victual-rent upon an average of the prices thereof for the three preceding years, and deducting public burdens and interest of the entailer’s debts chargeable thereon; and further found, That the provision of £.2400 Sterling, contained in the bond of provision to the younger children, must be restricted to a sum equal to three years free rent of the said entailed lands and estate, converting the victual, and deducting public burdens, as aforesaid.”

A reclaiming petition was (5th February, 1798,) refused, without answers.

Lord Reporter, *Glenlee.* Act. *Rolland.* Alt. *Monypenny.* Clerk, *Menzies,*
D. D. *Fac. Coll. No. 6. p. 10.*

1799. February 1.

SIR BENJAMIN DUNBAR *against* GEORGE, LOUISA, HENRIETTA, and ELIZABETH DUNBARS, and their TUTOR AD LITEM.

No. 62.

A Knight-Baronet executed an entail, settling his title and estate on a series of heirs different from those to whom his patent of Baronet was limited; and the clause prohibiting the heirs of entail from selling or contracting debt having been directed against

Prior to 1707, Sir William Dunbar of Hempriggs obtained the dignity of baronet, to himself and his heirs-male.

In 1707, Sir William had an only daughter, Elizabeth, then married to Sir James Dunbar, advocate. She had children by a former marriage.

In that year, Sir William executed an entail, by which, on the narrative that he had resolved “ to tailzie his *dignity* and estate,” he obliged himself “ to make due and lawful resignation of his title and *dignity* of baronet, and also of all and sundry his lands, &c. in favour of the said Sir James Dunbar, in life-rent, during all the days of his life-time, and to Dame Elizabeth Dunbar, his only lawful daughter and child now in life, now spouse to the said Sir James Dunbar, in fee; and, after their decease, to the heirs whatsoever, male or female, procreate or to be procreated betwixt the said Sir James and Dame Elizabeth Dunbars, likewise in fee, and the heirs whatsoever, male or female, descending of their bodies;” whom failing, to Elizabeth’s children by her former marriage, and a series of other substitutes.