

1727. February 17.

SOUTHDUN, and the other personal Creditors of SIR WILLIAM KEITH of Ludquhairn, and LADY KEITH of Ludquhairn, *against* SINCLAIR, &c.

No 29.

A wife consenting to infestments of annualrent upon her jointure-lands, the annualrenters, after drawing their payment, must assign her to any other subject in which they are infest, in order to relieve her of what she suffered, by yielding them the preference.

By a charter from the Earl of Marshall, several lands are disposed to Sir William Keith, particularly the lands of Boddom, in conjunct fee and liferent, with Dame Jean Smith his wife, for her liferent use of the said lands of Boddom, whereupon Sir William and his Lady are infest 1692. Some time thereafter Sir William contracted great debts, and granted heritable bonds upon the lands of Boddom, with consent of his Lady, 'For all right, title, and interest of conjunct-fee and liferent, she had out of the said lands.' After Sir William's decease, the creditors came into a ranking, where the annualrenters were preferred to the Lady by virtue of her consent; but the Lady insisted, that in so far as she or the factor (the estate being sequestered) should make payment to these annualrenters, out of that fund in which she was truly preferable, she ought to be assigned by them to so much of the annualrents, in order to operate her preference in the price of the estate, preferable to the personal creditors, who had done diligence by adjudication, so as to recover the full value of her liferent.

This was opposed by the creditors adjudgers, who *contended*, *imo*, That the Lady's consent to the annualrenters preference was *simple* and *absolute*; that she could have no recourse against her husband's heirs, for what she suffered by consenting to these annualrents, far less against his creditors. Indeed where a relict is infest in an *annuity* out of lands, *quæ afficit unamquamque glebam*, and has consented to heritable debts, which may restrict her annuity, it is a question if she may not, in so far as the annuity is restricted, bring the deficiency or inlakes to be a real burden upon the ground, in the same manner, as if the subject out of which her annuity was constituted, had not been originally of the extent of the annuity; but, in the case of a liferent *locality*, which of its own kind is a right of property, the wife's concurrence and consent with the husband, in alienating the subject, must as much restrict and diminish her right in the subject, as the husband's estate is diminished and restricted by an alienation apart. And in so far as the creditors can discover, it never was made a question, but if the wife had consented with the husband in an absolute disposition of a part of these lands, over which her liferent-locality was constituted, her liferent would thereby be restricted *pro tanto* of the alienation, without a possibility for her to recover any sum of money equivalent to the right renounced. If this holds in absolute alienations, there is no reason why it should not likewise hold in infestments of annualrent; and therefore, in the present case, the Lady's consent can afford her no recourse against her husband or his creditors, whether directly upon pretence of eviction, or indirectly, by obliging the annualrenters to assign.

*Answered* for the Lady; *Donatio nunquam præsimitur*; when a wife consents to the alienating or burdening her life-tenements, to assist her husband in his necessities; there is no presumption that she designs *absolutely* to give away, more than if she had granted life-tenement in her own heritage for her husband's debts. These, all of them are of the nature of *cautionary* engagements, implying a *recourse* for *recompense*, from the very nature of the thing.

The Creditors *pleaded*, in the *second* place, There is no obligation upon the life-tenementers, upon drawing their payment, to assign to the Lady; and supposing their voluntary concurrence, the law stands in their way, which hinders preferable creditors, by arbitrarily granting assignments, to prefer one subaltern life-tenement to another. These life-tenementers have a preference, both upon the fee and the Lady's life-tenement of the lands of Boddom; they cannot arbitrarily burden either of these subjects, but if they draw their whole share out of one, must assign proportionally against the other; so that, upon the event, each may be burdened in proportion to his subject. If, therefore, the life-tenementers grant assignment of their life-tenement rights to the Lady, it can only be proportionally, not for the whole.

To which it was *answered*; The present case is not that of two life-tenements, in two different subjects, and a preferable catholic life-tenement over all; the Lady notwithstanding her consent, by the priority of diligence is still preferable; if there is a private paction betwixt her and the life-tenementers, that has no effect but betwixt themselves, and can never produce a *jus quæsitum* to the adjudgers, as if the life-tenementers had a catholic preferable life-tenement. *2do*, Allowing the consent gave an *ipso jure* preference to the life-tenementers, which the adjudgers could plead upon, it would avail them nothing in this case; for here the life-tenementers stand bound in an implied obligation, to assign to the life-tenementrix upon payment; which obligation is also inferred, from the nature of the cautionary engagement. The Lady impledged her life-tenement lands for her husband's debts; or, which comes to the same, she consented to the creditors preference in these lands, for their security and payment; it is not conceivable, but in this transaction she designed herself a relief, as far as was consistent with the preference of these creditors, whose security was in view; and to this relief the creditors, who reap the benefit of her funds, are bound *ex bono et æquo* to contribute, as far as is consistent with their own interest. 'Hence arises the obligation upon creditors, in all transactions, where one person intervenes for another, cautionary or the like, to assign upon payment, to the person intervening, for his relief.' If now the life-tenementers became implicitly bound, upon the life-tenementrix her consenting to their preference, to give her assignments for her relief; when they fulfil their engagements, and the assignments are granted, there is nothing like an arbitrary preference of one subaltern life-tenement to another; if the adjudgers plead upon the consent, they must take it with its implied condition, *sciz.* the obligation upon the life-tenementers to assign; and they have no sort of reason to repine, since they are not in a worse case than if the consent had not intervened.

No 29. It was *pleaded* in the *last* place, There are no *termini habiles* here for an assignation; for, in so far as the factor shall make payment to the annualrenters, the annualrent-rights are in so far extinguished, without a possibility of being assigned.

*Answered*; The sums paid by the factor to the annualrenters, do properly belong to the liferentrix, which indeed by paction she is bound to communicate to them; but if they go about to uplift as in their own rights, her liferent right stands in the way; and if they again offer to subsume upon her consent, the answer will be, that the consent establishes not the annualrenters in an *ipso jure* preference, it means no more, than if the liferentrix had obliged herself to communicate to the annualrenters what she should uplift by virtue of her preferable right, till they were satisfied and paid; or more compendiously, allowed them in her name to intromit; which intromission can never operate an *ipso jure* extinction of the annualrent-rights, since these rights are not the title of the intromission, but a power derived from another; much less will the factor's payments operate an extinction, for the factor pays in name of the Lady; and payments in this shape are of the nature of cautionary payments, upon which assignation is always competent; therefore, as from the nature of the transaction, the creditors are involved in a reciprocal obligation of assigning to the liferentrix upon payment, she is well entitled, both in strict law and equity, to stand in the way of their intromissions or payment, unless they will perform their part, by granting assignations.

THE LORDS, in regard both the heritable creditors and the Lady (supposing she had given no consent to their preference) would have been preferable to the other creditors, found, that in so far as the creditors, to whose rights the Lady is consenter, prejudice and hinder her to draw her full provision out of the subject and price thereof, that she is preferable to the said other creditors, to whose rights she is not consenting, because of the priority of her infestment, for the deficiency of the said liferent provision.'

Here the preference was directly granted, without the circuit of an assignation, according to the rule, 'That in competitions every right is held as made up, which actually made up would found a preference.'

*Fol. Dic. v. 1. p. 226. Rem. Dec. v. 1. No 94. p. 185.*

1729. *January.*

CREDITORS of RUSCO *against* RELICT and CHILDREN of BLAIR of Borgue.

No 30.  
A preferable creditor, in particular circumstances, found not bound to assign.

IN the year 1685, M'Guffock of Rusco, heritor of the lands of Borgue, granted an heritable bond for the sum of L. 2000 out of the said lands, in favour of Irvine of Logan, whereupon the creditor was infest the same year. Thereafter, the said Rusco granted a disposition of the lands of Borgue in