Simon Lord Lovat, - - - *Appellant*, Caſe 80.
Emilia Lady Dowager of Lovat, Alexander Mackenzie of Garloch, an Infant, by his Guardians, and others (ſtiling themſelves) real Creditors upon the Eſtate of Lovat, and Hugh Mackenzie and Patrick Robertſon, Factors appointed upon the ſaid Eſtate, - - - - - *Reſpondents.*

1ſt *April* 1721.

Real and Perſonal.—A diſpoſition is made of an eſtate to one perſon in life-rent, and to others in fee, with the burden of payment of the grantor's debts: in a competition between the grantee of the life-rent eſcheat of the life-renter, and the debtors of the grantor of the diſpoſition, the Court found that theſe debts were *real*, and did affect the eſtate; but their judgment is reverſed.

A grantor of a deed declares, that if children's portions are not paid in his lifetime, perſons whom he names may appoint a factor, after his death, to receive certain rents, and pay theſe portions: theſe portions were real debts affecting the eſtate.

Sequeſtration.—Obtained irregularly is ſet aſide.

Preſumption.—Marriage proviſions preſumed to be compenſated by the grant of and accepting a poſterior proviſion.

Children's proviſions not claimed till after a forfeiture, and the lapſe of ſeveral years after a locality might have been made effectual to pay them, were not preſumed to be paid; an affirmance.

BY the deciſion in the former appeal, (No. 53. of this Collection) the appellant was confirmed in his right as grantee of the life-rent eſcheat of Alexander Mackenzie of Fraſerdale, the attainted perſon; and it was ordered and adjudged, "that the "rents of the eſtate in queſtion ſhould be paid to the appellant "according to his grant; but that ſuch debts of the ſaid Alexan-"der Mackenzie as were real, and did by the law of Scotland "affect the ſaid eſtate, at the time of the forfeiture of the life-"rent eſcheat ſhould be charged on the ſaid eſtate in due courſe "of law." It now became a queſtion between the appellant and reſpondents whether certain debts claimed by them were real or not, or whether they did affect the ſaid eſtate. Theſe queſtions took their riſe from the following circumſtances.

By contract of marriage in 1690, between Hugh Lord Lovat deceaſed, and the reſpondent Lady Emilia, daughter of the late Marquis of Athol, the ſaid Hugh Lord Lovat, in conſideration of the then intended marriage, obliged himſelf to ſettle upon Lady Emilia as a jointure, ſeveral lands therein particularly mentioned, of the value of 4000 merks Scots *per annum*, and likewiſe an annuity of 2000 merks *per annum*, charged upon the lordſhip of Lovat, and lands of Stratherrick and Abertarf; and accordingly, purſuant thereto, a charter was obtained from the crown, and Lady Emilia was infeft in the premiſes in May 1694.

In September 1696, Hugh Lord Lovat executed a bond of proviſion to his daughters the Honourable Ann, Catherine, and Margaret Fraſer, three of the preſent reſpondents, for 10,000 merks Scots, payable to each of them at their age of 16 or marriage: and this bond was regiſtered in October 1700.

The eſtate of Lovat being very much incumbered and adjudications led thereon prior to ſaid marriage-ſettlement, the greateſt part of theſe adjudications were purchaſed in by Roderick Mackenzie of Preſtonhall, one of the Senators of the College of Juſtice, whoſe ſon Alexander Mackenzie, the attainted perſon, married Emilia, ſome time ſtiled Baroneſs of Lovat, eldeſt daughter of the ſaid Hugh Lord Lovat. In 1706, Lord Preſtonhall, obtained a charter of adjudication from the crown of the eſtate of Lovat, upon which he was duly infeft; and he afterwards executed a deed granting to the ſaid Alexander Mackenzie and his wife 4000 merks per annum charged upon the ſaid eſtate; and he alſo executed an entail thereof, to Alexander Mackenzie in life rent, whom failing to Hugh ſtiled maſter of Lovat his ſon, and the heirs male of his body, whom failing to certain other heirs therein mentioned. This deed of entail when reciting the particular lands out of which the reſpondent, the Dowager Lady Emilia's jointure of 4000 merks was ſecured, expreſsly mentioned that the ſame ſhould continue a burden upon theſe lands; but it took no notice of the annuity of 2000 merks before mentioned, which had been alſo provided to her by her marriage contract, and charter and ſaſine thereon. The deed likewiſe provided "that the ſaid Alexander Mackenzie, "his life-rent, over and above the ſaid 4000 merks provided to "him and his lady in life-rent, and the other heirs their fee "ſhould be affected and ſtand burdened with the payment of all "the lawful debts, and to the performance of all the deeds that "the ſaid Roderick Mackenzie ſhould happen to be bound in, or "obliged to perform at the time of his deceaſe by bond, or any "other manner of way whatſoever: and that in caſe the daughters of the ſaid Hugh Lord Lovat deceaſed, were not ſatisfied "and paid their portions in the life-time of the ſaid Roderick "Mackenzie, that it ſhould be in the power of the perſons therein "named to appoint a factor or receiver of the rents of the lands "of Stratherrick and Abertarf within one year after the grantor's "death, and to apply the rents of the ſaid lands to the payment "of their fortunes." In terms of this entail a charter was obtained from the crown, upon which infeftment was duly taken. Lord Preſtonhall died in 1708.

In February 1717 the father of the reſpondent Alexander Mackenzie the infant, to whom Lord Preſtonhall was indebted by bond, obtained a decree of declarator and adjudication (after the dates of the forfeiture and gift of life-rent eſcheat,) declaring the life-rent of Alexander Mackenzie the forfeiting perſon, and the fee of Hugh (ſtiled) Maſter of Lovat, and the lands themſelves ſubject to the payment of what was due on ſaid bond, amounting to 6132*l.* Scots.

The

The reſpondent Lady Emilia, and other creditors likewiſe brought their ſeveral actions before the Court of Seſſion, to have their demands aſcertained, and to have the rents of the ſaid eſtate applied in ſatisfaction of their debts, as real charges on the eſtate. The perſons, too, authorized by the deed of entail 1706, to appoint a factor upon the lands of Stratherrick and Abertarf for payment of the ſaid young ladies' fortunes, named a factor accordingly; and the ſaid ladies and their factor likewiſe brought their action to be preferred to the rents of theſe lands. And the reſpondent the infant, brought an action of mails and duties in virtue of the ſaid adjudication. To theſe actions the appellant made defences, and inſiſted, that the clauſe in the entail did not make the debts of Lord Preſtonhall, real charges upon the eſtate; that, as to the reſpondent, the dowager's, claim of 2000 merks, it was included in her jointure of 4000 merks ſpecified in the entail, at leaſt ſo it was to be preſumed, ſince in that deed notice is only taken of the 4000 merks; that it was to be preſumed that the fortunes of the reſpondents, the daughters, were paid, but if they were not, they could not be looked upon as a real charge, there being nothing in the deed declaring them to affect the lands themſelves, but only a locality granted for payment of the portions, and that the reſpondent, Alexander Mackenzie's debt, being very old, was preſumed to be paid.

The Lord Ordinary on the 25th of January 1718, "found "that the ſaid Lord Preſtonhall, having conveyed his eſtate "to Mr. Mackenzie, the forfeiting perſon, with the bur-"den of his debts, and the ſaid burden being tepeated both "in the procuratory of reſignation, and precept of ſaſine, and alſo "repeated in the infeftment following thereupon, the ſaid Lord "Preſtonhall's debts are real, and preferable to the debts and "deeds of Mr. Mackenzie; and that the reſpondent, Alexander "Mackenzie, was creditor to Lord Preſtonhall, by virtue of the "inſtructions in proceſs before the date of the entail, and there-"fore preferred him to the appellant the grantee, his tutor de-"poning upon the verity of the debt: and likewiſe preferred "the factor appointed for the lands of Stratherrick and Aber-"tarf, according to the ſaid deed of ſettlement, until the reſpon-"dents, the daughters, ſhould be paid and ſatisfied their ſaid for-"tunes and intereſt thereof according to the ſaid entail; and "likewiſe found the reſpondent, the lady dowager, was provided "with an annuity of 2000 merks per annum, out of the lordſhip "of Lovat and other lands, and therefore preferred her likewiſe "for her ſaid annuity."

And after a repreſentation and anſwers, the Lord Ordinary, on the 15th of February 1718, "adhered to his former interlocutor, "finding theſe debts real burdens, preferable to Mr. Mackenzie, "the forfeiting perſon, and ſo that they muſt exclude the grantee "of his eſcheat; and found it relevant, if it be inſiſted upon, "that the portions of the late Lord Lovat's children are ſatisfied in "haill or in part; as alſo that the lady dowager's laſt proviſion is "in ſatisfaction of her former by her contract of marriage; but

" repelled the allegation, that either the portions are to be pre-
" ſumed to be paid, or that the lady muſt be preſumed to have
" accepted the ſecond proviſion in full ſatisfaction of the former,
" as no ways relevant preſumptions, without ſome further pro-
" bation."

The appellant reclaimed againſt theſe interlocutors to the whole Court, and their Lordſhips by ſeveral interlocutors, on the 28th of February 1718, the 23d of June, the 3d and 14th of July, and 24th of December 1719, confirmed the foreſaid interlocutors of the Lord Ordinary.

Previous to the former appeal, the creditors of the forfeiting perſon, who were then litigating with the appellant, arreſted the rents of the eſtate in the hands of the tenants; and in the multiple poinding ſubſequent thereto, the rents were found ſubject to the debts and diligences of theſe creditors, preferable to the appellant, and a factor was appointed to receive the ſame. After the order on the ſaid appeal had been ſerved, the appellant preſented a bill of ſuſpenſion in the name of the tenants, upon the ground of his appeal, and all execution was accordingly ſtayed thereon. Pending the action with the preſent reſpondents, they, in June 1719, preſented a petition to the Court praying leave to diſcuſs the reaſons of ſuſpenſion of the ſaid bill, (which had been given in againſt the then factor in another cauſe); and that in the mean time the ſaid eſtate might be ſequeſtrated, and a new factor appointed to receive the rents.

On the 27th of June 1719, the Court " remitted to the Lord
" Ordinary, before whom the aforeſaid bill of ſuſpenſion was pre-
" ſented, to diſcuſs the reaſons ſummarily on the bill, but ordered
" the appellant to anſwer the ſaid petition as to the ſequeſtration
" againſt Tueſday then next." But no anſwer having been given in, the Court, on the 30th of June 1719, " remitted to
" the Lord Ordinary to ſequeſtrate the eſtate, and to name a fac-
" tor to receive the rents." On the 18th of July thereafter, the Lord Ordinary ſequeſtrated the eſtate, and named Mr. William Fraſer, factor thereon.

The appellant reclaimed againſt theſe interlocutors, praying that they might be ſet aſide, and the ſequeſtration recalled, and amongſt other things inſiſted, that the ſaid Alexander Mackenzie, the forfeiting perſon, had a right to 4000 merks per annum, out of the rents of the eſtate preferable to all debts, and therefore that theſe rents ſhould not be ſequeſtrated. The reſpondents made anſwers, and the Court, on the 31ſt of July 1719, pronounced this interlocutor " in regard there was no inſtruction that the
" 4000 merks of life-rent reſerved free of the burden of debts
" was allocated on any part of the ſaid eſtate, and as there are no
" inſtructions of the objections againſt the factor named, adhere
" to the ſaid Lord Ordinary's interlocutor, both as to the ſequeſ-
" tration and nomination of the factor, reſerving to the appellant
" to be heard on his right to the ſaid 4000 merks, when he ſhall
" inſiſt therefore."

William

William Fraſer, however, not finding ſecurity, upon application of the reſpondents, Mr. Hugh Fraſer and Patrick Robertſon were on the 10th of November 1719, named factors of all the eſtate of Lovat, except the lands of Stratherrick and Abertarf, (upon which a factor was appointed by the perſons named in the deed of 1706, for ſecurity and payment of the young ladies' fortunes,) who gave ſecurity to be anſwerable as the Court ſhould direct.

The appeal was brought from "ſeveral interlocutory ſentences "or decrees of the Lords of Seſſion of the 25th January, the "15th and 28th February 1718, the 23d of June, the 3d and "14th July, and 24th December 1719; and from the interlo- "cutors and other proceedings in relation to the ſequeſtration of "the eſtate of Alexander Mackenzie, late of Fraſerdale, and ap- "pointing a factor to receive the rents thereof." Entered, 13 Jan. 1719-20.

On the Sequeſtration and appointing a Factor on the Eſtate.—Heads of the Appellant's Argument.

The proceedings therein are wholly irregular, as not being had in any action brought by any of the reſpondents againſt the appellant, but only grafted upon his bill of ſuſpenſion in another cauſe, at the inſtance of other creditors, whoſe debts were merely perſonal, to which the reſpondents, or any of them, were in no ways parties, or ſo much as named therein, and which action was determined by the judgment in the former appeal.

By that judgment, the rents and profits of the eſtate are ordered to be paid to the appellant; but it would be abſolutely ineffectual to him, if at the ſuit of any pretended creditor, the Lords of Seſſion may, on a ſummary application, ſequeſtrate the eſtate and appoint a factor to receive the rents. And though by the ſaid judgment ſuch debts as are real, and did by the law of Scotland affect the eſtate at the time of the forfeiture, are allowed to be charged thereon in due courſe of law, yet the appellant apprehended that ſuch debts were to be paid by him out of ſuch rents and profits as ſhould be received by him, and until he ſhould make default therein, it would be unreaſonable to bring the charge of a factor on the eſtate, which muſt conſequently fall upon the appellant. And further the reſpondents' debts cannot be ſaid to be real in the ſenſe of the former judgment; for it will not be pretended, that they could have produced any real action to exclude the appellant's gift of eſcheat; and however they may be conſidered in ſome ſenſe to be real, ſo as to make them preferable to the debts and deeds of the grantor's heir, yet it will not thence follow that they are real with reſpect to the forfeiture; ſince at that time they could no more have produced a real action, than the mereſt perſonal debt whatever.

Heads of the Reſpondents' Argument thereon.

There was no actual ſuſpenſion of the action at the inſtance of the creditors, but only the reaſons of ſuſpenſion ordered to be heard. As creditors upon an eſtate which is much encumbered, have a right to apply to have it ſequeſtrated, and a receiver or

factor appointed; ſo, no doubt, the reſpondents were in the ſame caſe with other creditors; and it is certainly more juſt and equitable, that the rents of an eſtate, which are applicable to the ſatisfaction of creditors, ſhould be under the management of a receiver who is appointed by the Court, and obliged to give ſecurity to pay as the Court ſhould direct, than of any other perſon. There no injuſtice can poſſibly happen; every perſon will be paid according to his rights, and there will be no fear, that one only receiving the rents may render the payment of the others precarious; and it were contrary to equity that the appellant, whoſe advantage it is not to pay the creditors, ſhould be allowed to levy the rents of an eſtate to which they are preferable.

It was the appellant's own fault that he did not inſiſt in the reaſons of ſuſpenſion; he had notice, and might have done it, and no doubt had there been any thing of moment to be objected, he would have appeared by his counſel. Since he did not, it ſeems improper for him to complain at this time.

As the judgment on the former appeal directs the payment of the rents to the appellant according to his grant, ſo it directs, *that the real debts of the ſaid eſtate be charged thereupon in due courſe, according to the law of Scotland.* This judgment gives no new right to the appellant, but leaves him as grantee, and the real creditors upon the foot of the law of Scotland in the like caſes; and it cannot be pretended but that creditors upon an eſtate are by that law entitled to a ſequeſtration of the eſtate for the juſt payment of their debts, and conſequently the judges have only purſued their uſual rules and methods in ſuch like caſes. And ſince there may be interfering intereſts among the creditors themſelves, as it is plain there are interfering intereſts between the grantee and the creditors, nothing can be more juſt, nor more agreeable, both to the intention and words of the decree of the Houſe of Lords, than that the rents ſhould be ſecured in due courſe of law for the benefit of all concerned, that is, by a ſequeſtration.

On the interlocutors finding the claims of the reſpondents to be real charges on the eſtate.—Heads of the Appellant's Argument.

As to the lady dowager's claim of 2000 merks annuity more than the 4000 merks provided to her by the ſaid Roderick Mackenzie's ſettlement, which ſhe has all along enjoyed, and never had or claimed more till ſince the forfeiture; it is to be ſuppoſed that the ſaid 4000 merks ſo ſecured to her were agreed by her to be taken in full of all ſhe could demand by her contract of marriage. From this it is apparent that ſhe was excluded by the prior incumbrances which had been purchaſed by the ſaid Roderick Mackenzie, whereby he got an abſolute right to the ſaid eſtate: and more eſpecially ſince in the charter which he thereby obtained from the crown, there is no exception of her right by the marriage contract, nor is there any proof that ſhe ever claimed or received more than ſhe now enjoys.

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As to the ladies' portions it is to be believed that they were paid by the ſaid Roderick Mackenzie before his death, when they had become due, being payable at their reſpective ages of ſixteen, or marriages; and more eſpecially ſince two of them have been married about ſixteen years. If they had not been ſo paid, the lands of Stratherrick and Abertarf muſt, according to his ſettlement, have been ſequeſtrated, and a factor appointed to receive the rents thereof the next year after his death, which happened in 1708, whereby they would ſoon have been paid; and yet no factor was appointed till after the grant of the life-rent eſcheat to the appellant.

As to the reſpondent Mackenzie's pretended debt, it may reaſonably be believed, that the ſame was paid by the ſaid Roderick Mackenzie in his lifetime, ſince no action had been brought, or the bonds ſo much as regiſtered, in ſo many years till after the forfeiture. But, further, this general clauſe in the ſettlement, wherein this pretended debt is not mentioned, could not make it a real charge on the eſtate at the time of the forfeiture, the reſpondent not being thereby entitled to bring any real action againſt the ſaid eſtate. And if clauſes of this nature ſhould have ſuch a conſtruction, no purchaſer of land in Scotland could be ſafe; and the appellant's caſe is much ſtronger than that of a purchaſer. Beſides, the reſpondent's decree of adjudication is null and void, as to the appellant, who was in poſſeſſion of the ſaid eſtate by virtue of his grant, before the ſame was obtained, and yet he was never made a party to the action.

The Court of Seſſion put it on the appellant to prove, that the claims of the reſpondents were ſatisfied, which it was impoſſible for him to do, the diſcharges or agreements relating thereto being all in the cuſtody or power of the forfeiting perſon, for whoſe intereſt theſe and other claims are colluſively ſet up to cover the eſtate againſt the appellant. On the other hand, if theſe claims be juſt, the lady dowager might have proved, that the 2000 merks annuity, more than the 4000 merks which ſhe has all along enjoyed, had been paid to her, at any time ſince the proviſion made for her by the ſaid ſettlement; and her daughters might have proved the payment of intereſt for their reſpective portions, within ſome reaſonable time before the forfeiture; and the reſpondent Mackenzie might have proved payment of intereſt, or given ſome other ſatisfactory proof of the juſtice of his debt; none of which have been done.

But if any debts ſhall, after a due examination, be found juſt and real, ſo as to affect the eſtate, the appellant is willing to pay the ſame in their due courſe, on their being aſſigned to him; and it would be very unreaſonable if ſuch creditors ſhould not be obliged to aſſign their reſpective debts, on payment thereof, but that they ſhall be ſtill kept up on the eſtate to exhauſt the whole rents during the attainted perſon's life: and more eſpecially ſince his lady has 300*l.* ſterling *per annum* allowed to her by the government out of all the reſt of the forfeited eſtates in Scotland: ſo

that if by theſe artifices they can cover the eſtate, *the family, inſtead of being loſers, will be gainers by the treaſon.*

Heads of the Reſpondents' Argument thereon.

The lady dowager does not poſſeſs either her jointure or annuity by virtue of Lord Preſtonhall's deed of ſettlement, but by virtue of her marriage articles, and a charter from the crown, and ſaſine thereon; and by theſe ſhe is entitled to 4000 merks out of certain lands, and an annuity of 2000 merks out of the whole eſtate, and no expreſſion in Lord Preſtonhall's deed can be any bar to her right, ſince ſhe does not claim under it. Beſides, the appellant miſtakes the deed of ſettlement, for it contains no reſtriction of the reſpondent's right. All that is ſaid there is, that when enumerating the particular lands out of which the ſaid 4000 merks were iſſuing. and making a ſettlement of them, Lord Preſtonhall does it with a reſervation of the reſpondents' right out of theſe lands, but does by no means reſtrain her claim to that ſum only.

The portions to the daughters were not paid; and if the appellant thinks he has any reaſon to inſiſt upon that, he is at liberty to do ſo: but he cannot expect, as he pleaded below, that the reſpondents ſhould prove that they are not paid: that were to take the burden of proving a negative; and indeed, the appellant never pretended that they were paid, but only inſiſted that it was to be preſumed they were. Though the perſons entitled to name a factor upon the lands might for ſome time neglect to do it, becauſe the daughters might depend upon Mr. Mackenzie's paying them, that was no argument why they, when the eſtate went into other hands, might not apply to have a factor named for their better ſecurity; and as the deed of ſettlement under which Mr. Mackenzie, and conſequently the appellant, as grantee of his eſcheat, claims, is expreſsly burdened with that power, and the perſons entitled to execute it have done ſo, it is difficult to know why the appellant ſhould complain. The aſſignment to the rents of the lands in queſtion, and the power to name the factor being an expreſs burden, affecting both the diſpoſitive clauſe and procuratory of reſignation contained in the deed of ſettlement, it gives the children a real right and immediate acceſs to the rents, preferable to any perſon claiming under that ſettlement, as the appellant does.

It is denied that the reſpondent Mackenzie's debt was paid; the reſpondent's tutor was, at the appellant's deſire, directed to make oath of the truth of the debt, which he offered to do, but the appellant did not inſiſt upon it; and he is, by the very interlocutors complained of, allowed to inſiſt upon any defence of payment.

The debts of the grantor were certainly real by the expreſs words of the clauſe in the deed of ſettlement, for *the liferent of Alexander Mackenzie, and the fee of the maſter of Lovat,* are declared ſubject to the payment of all the grantor's debts; and this is the method by the law and conſtant practice of Scotland,

land, of burdening conveyances of lands with debts owing to third parties, ſo as to make ſuch debts real; and this will certainly give a preference to the creditors of the grantor before the creditors, either of the perſons in life-rent or in fee. It is true the creditors have no acceſs to the rents without an adjudication, that being the legal method of obtaining poſſeſſion; yet the debts are burdens upon the infeftments of property, and as ſoon as an adjudication is led thereupon, the adjudger has immediate acceſs, and will be preferred, not according to the date of the adjudication, but of the infeftment burdened, to all infeftments or real rights granted after that infeftment of property, though before the date of the adjudication; which is a demonſtrative proof that the debts are real from the date of the infeftment burdened.

After hearing counſel, *It is ordered and adjudged, that the ſeveral interlocutors of the Lords of Seſſion complained of, by which the eſtate in queſtion is ſequeſtered, be reverſed, without prejudice to any future ſequeſtration that may, upon juſt cauſe, be granted in a proper and regular method againſt the ſaid eſtate, for any ſuch debt as is chargeable thereupon, agreeably to the decree mada in this Houſe in the former appeal; and that ſo much of the interlocutors complained of, as decree the annuity of* 2000 *merks to the Lady Dowager Lovat, and the debts claimed by and on the behalf of Alexander Mackenzie of Garlock, the infant, and other real creditors upon the ſaid eſtate, be reverſed; and that ſuch of the interlocutors as prefer the factor appointed for the lands of Stratherrick and Abertarf, in purſuance of the Lord Preſtonhall's deed, for the portions of the reſpondents, Anne, Catharine, and Margaret Fraſer, until the ſaid reſpondents ſhould be paid their reſpective portions of* 10,000 *merks each, with intereſt, be affirmed, without prejudice to the appellant, to object upon payment, or any other ground of law againſt the ſaid debts as accords.* Judgment, 1 April 1721.

For Appellant, *Rob. Raymond.* *Sam. Mead.*
For Reſpondents, *Ro. Dundas.* *Wil. Hamilton.*

The ſequeſtration in this caſe was ſet aſide upon an informality; it may be of importance to ſee from the record what was done therein in the ſubſequent proceedings between theſe parties.

The judgment is of great importance, in regard to the effect of a clauſe in a diſpoſition burdening the ſubjects conveyed with payment of the grantor's debts; and appears to form a leading caſe thereon.