

No 42.

1681. June 15.

BAIRD against ROBERTSON.

A father disposed to his daughter the half of his free goods at his death, and she intromitted without confirming. A demand was made upon her by one of the defunct's creditors upon a clause of warrandice. It was found sufficient to exoner her, that she paid the value to other creditors before interpellation by the present pursuer, tho' without sentence.

JAMES BAIRD pursues a reduction of a disposition of a tenement of land, granted by Robert Robertson to William Robertson, as being after this pursuer's inhibition. The defender *alleged* absolvitor, Because the pursuit is to the behoof of Margaret Robertson, daughter and only child of the disponent, who hath intromitted with the father's whole goods and gear, and thereby represents him as vitious intromitter, and is liable in the warrandice of his disposition to the defender. The pursuer *answered*, That supposing the pursuit were to the behoof of Margaret Robertson, yet she is not liable to fulfil her father's warrandice, as vitious intromitter with his goods; because, before this disposition, her father, by her contract of marriage, was obliged to disponent to her the equal half of his free gear at his death; likeas, he did disponent the half to her, and the other half to her brother, to whom she is nearest of kin, so that her intromission is no way vitious. It was *replied*, That, by the very nature of the disposition, it behoved to be *retenta possessione* till the father's death, so that the goods were in *bonis defuncti*, and should have been confirmed. It was *duplicated*, That such dispositions, though not upon an anterior obligation, have been ever sustained to exclude the general passive title of vitious intromitter, much more here, where, by a solemn contract of marriage, the father was obliged to disponent before this inhibition. It was *triplied*, That the disposition by the father to the daughter, relating to her contract of marriage, can only be of the free goods, and so must be with the burden of the father's debts, and amongst the rest, of the warrandice of the defender's disposition. It was *quadruplicated*, That the obligation to disponent the free gear, can import no more but with the burden of so much debt as exceeded not the worth of the gear, which did not, nor could not, affect the goods as a real burden, but did only induce a personal obligation upon the daughter to pay her father's debts, not exceeding his moveables intromitted with by her, which she hath performed in paying her father's funeral charges, and other debts equivalent to the goods of her father intromitted with by her; and, being pursued by James Baird, she had satisfied his debt, over and above debts satisfied before, equivalent to her father's goods; and it is the strongest and most favourable defence in law, payment made *bona fide*, for *bona fides non patitur ut idem bis exigatur*, and it is this defender's fault, that seeing by the registers he might have known this *inhibition*, that he moved no pursuit upon the warrandice, which the daughter having but a disposition of moveables, was not obliged to know or enquire after, nor could she know what her father had disposed, or what warrandice he was liable in; but, finding herself liable to pay her father's debts *quoad valorem* of his goods disposed, she could not delay to perform the same to the creditors who did appear. It was *quintuplicated*, That such dispositions betwixt a father and his only child, being most suspect and fraudulent, if they should import only to be liable *quoad va-*

*lorem*, it will be a great detriment to creditors and hinder confirmations; and, where the disponent becomes bankrupt, having no other means, the daughter cannot prefer the creditors at her pleasure, and therefore a disposition of all the disponent's estate for payment of particular creditors, was not found to prefer these creditors to others left out, in the case of a disposition to Kinfawns by his nephew, No 29. p. 900, and of a disposition to Mr George Blair by his nephew, No 14. p. 889; albeit the debts in these dispositions were equivalent to the worth of the lands disposed; and albeit the act of Parliament 1621, against fraudulent alienations of bankrupts, allows the payment made by interposed confident persons to the bankrupt's creditors before diligence done by other creditors, yet it disables the bankrupt to prefer one creditor to another; and, when the disponent is notour bankrupt, as he must become by disposing his whole means, the LORDS, as in the former cases have found, that the interposed persons could not prefer one creditor to another. It was *sexuplied*, That in both the cases alleged, the price was in the purchaser's hand, and therefore was ordained to be applied to the whole creditors more than the disposition, and left out according to their diligence, but where no diligence was done, the acquirer could not know whether they were creditors left out, or not.

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THE LORDS found the disposition by the father to his daughter conform to her contract of marriage was not fraudulent, although thereby she became obliged for her father's debt *quoad valorem*, and found she was not vitious intrmitter, though she was obliged to confirm, and had confirmed; and found, that having paid her father's lawful creditors *bona fide*, before any diligence done upon the defender's clause of warrandice, although she paid without sentence, that she was not liable to satisfy the clause of warrandice, which would infer double payment.—See PASSIVE TITLE.

*Fol. Dic. v. 1. p. 274. Stair, v. 2. p. 873.*

1683. January 10.

GALLATLY against SCOT.

GALLATLY having pursued Skeen, as executor to the deceased Bishop of Caithness, for payment of a debt due by the Bishop; and Skeen having *alleged*, That the inventory of the testament was exhausted by payment to the Bishop's relict, in implement of her contract of marriage, and, it being *replied*, That since there was no diligence done, nor sentence recovered against the executors, they ought not to have made voluntary payment for exhausting the inventory, to the prejudice of the pursuer;—THE LORDS sustained the payment made to the relict for implement of her contract of marriage, in respect they found, that as to the executor, it was a preferable debt, without necessity of a sentence. *Nota*, It hath been otherwise decided in January 1688.

No 43.

An executor may pay a preferable debt without sentence.

*Pres. Falconer, No 41. p. 22.*