

1703. December 8.

ROBERT ALLAN *against* The LAIRD and LADY AIRTH.

HARY ELPHINGSTON of Calderhall, in the contract of marriage of Sir Thomas Elphingston his son, dispones his lands of Calderhall and Kerrie in favours of Sir Thomas, and the heirs-male of the marriage; which failing, to his heirs-male of any other marriage; which failing, to the heirs-male of Hary's body, &c. And the contract contains a clause, in favours of the daughters of the marriage, to this effect: 'And because the lands are provided to Sir Thomas's heirs-male, in this or any other marriage; which failing, to return to Hary and the heirs-male of his body;' in which cases, or any of them, the daughters of the marriage will be debarred; therefore Sir Thomas obliges him, and his heirs-male, and of tailzie; succeeding to him in the said lands, to pay to the daughters 25,000 merks, at the terms of payment therein expressed.

Robert Allan, who married one of the daughters of that marriage, and as assignee by her and the other daughters, pursues the Lady Airth and her Husband, for his interest, as heir to Charles Elphingston her brother, who was heir served to Richard Elphingston her father, who was the heir-male of the said marriage, and to whom Sir Thomas disponed the lands mentioned in the contract, *per praeceptionem*.

It was *alleged*, That the disposition by Sir Thomas to Richard was granted upon his undertaking the payment of his father's debts, contained in a list, extending to lb. 20,000, and further, with the burden of 11,000 merks, for the provision of the children, and with the burden of two liferents; which together did amount towards the whole value of the lands disponed. And the said disposition was granted by Sir Thomas, and accepted by Richard, with the burdens foresaid alternarily, &c. no otherwise. And accordingly Richard paid the debt; and the pursuer, as having right from the younger children, did pursue Charles Elphingston, his son and heir, for the 11,000 merks of provision, wherewith the disposition was burdened, and obtained a decret, or payment and security, conform; and cannot now insist for any further provision against the defender, as representing her father, who accepted that disposition; because it bears an express quality and provision, that the same was granted and accepted with the foresaid burdens alternarily and no otherwise.

It was *answered*, That the accepting of the disposition was *praeceptio hereditatis*, which is an universal passive title; and if a father, by inserting such qualities and provisions, could disappoint creditors, it would be no difficult matter to defraud them; therefore all such contrivances are reprobate: and whatever the pursuer obtained by virtue of the former decret, should be allowed in part of the 25,000 merks.

It was *replied*, The defender does acknowledge that such conditions and provisions, betwixt a father and his apparent heir, cannot prejudice lawful creditors pursuing upon their bonds, or other instructions of debt; nevertheless, in this case,

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An eldest son is taken bound in a disposition to pay his father's debts, *per list*. In the list is mentioned a certain sum as provision to younger children. The children, in an action, found on this disposition as their active title, containing a burden and provision in their favour. They are barred from attempting to make the defender liable to a greater extent.

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the pursuer cannot insist to make the defender liable, as representing Sir Thomas, by her father's accepting with the said quality in the disposition, otherwise than in the terms, and with the conditions and quality thereof; because he, as assignee by the daughters, did formerly make use of that disposition, and obtained the benefit and advantage of the quality therein contained, libelling, that thereby Richard had undertaken the payment of the 11,000 merks to the younger children, with annualrent, and by his acceptance was bound to pay the sum. And the specialty and difference of the case lies in this, that a creditor pursuing upon his bond as his active title, and recovering a disposition *per preceptionem* to instruct the passive title, cannot be tied by any affected quality in the disposition; and therefore, if the daughters had pursued on their father's contract, and overtaken the defender as representing, by accepting that disposition *per preceptionem*; though the first pursuit had been but for a part, they might have pursued for the rest, without regard to that quality or restriction; but, seeing they did libel upon and produce the disposition to Richard as their active title, because it did contain a provision to the younger children, and have obtained the benefit of it, they cannot now object against the other conditions and qualities of it, that it was accepted, as well as given, with the foresaid burdens allennarly.

It was *replied*, The pursuer did not, at that time, know of the contract of marriage, and provisions therein contained, and so could not be understood to pass from the benefit thereof; for no man is presumed *suum jactare*.

THE LORDS found, That the pursuer having founded upon the said disposition as his active title, and as containing a burden and provision in favours of the younger children, his cedents, he cannot now insist to make the defender liable for any greater sum for her father's accepting of that disposition, containing the quality foresaid, without prejudice to the pursuer to insist against the defender upon any other passive title, or to affect any other means and estate of Sir Thomas, for payment of the superplus of the daughters' provisions, as accords.

Fol. Dic. v. 1. p. 49. Dalrymple, No 39. p. 49.

No 6.

Found that a party might found on the concession and acknowledgment, in a paper granted by the contrary party, and at the same time might deny the other facts which made against him, alleged in the same paper.

1715. July 22.

SIR PATRICK HOME *against* The EARL of HOME.

IN an action of exhibition at Sir Patrick Home's instance, against the Earl of Home, of an old apprising, grounds thereof, &c. it being, among other things, *alleged* for his Lordship, That the disposition granted, by Sir Patrick's remote author, of the apprising, was lying by the granter the time of his decease; and, therefore, that it not being a delivered evident, another person who got a posterior disposition, and whom the Earl represents, ought to be preferred: And, for proving the allegiance, the Earl having produced a petition to the Lords, given in by Sir Patrick's immediate author, wherein he acknowledges, That the said papers were lying by his cedent the time of his decease; the said petition, containing also a narrative of another matter of fact; which, if proven, or acknow-