

1705. November 22.

MR. WILLIAM AYTON of that Ilk, *against* DAME MARGARET COLVIL,  
LADY AYTON.

## No 132.

Certification in an improbation, at the instance of an heir served *cum beneficio inventarii*, against some bonds of provision granted by the defunct to a wife and children of a second marriage, not stopped on this ground, that the writs called for were in the hands of the defunct's writer.

MR WILLIAM AYTON having raised reduction and improbation against the Lady Ayton and her Children, of several rights and exorbitant provisions made in their favour by the deceased Sir John Ayton his father; and diligence being allowed to the defenders for recovering such of the writs called for as were not in their hands; and executed against Patrick Hume writer, he compeared and acknowledged the having of some of the writs called for, but refused to give them up till he was paid of his account of writing.

*Alleged* for the defenders, That no certification could be granted at the instance of the pursuers, against papers in the hands of Patrick Hume, the father's writer, more than if they were in the pursuer's own hands; seeing they are retained for security of a writer's account, which Sir John by his letter obliged himself to pay, and the pursuer, as heir to him, is liable for. *2do*, Patrick Hume having taken an obligation for his account from Sir John Ayton, he ought to deliver up the writs to the defender without seeking payment of any part of the account from her; because in law a hypothec is competent to writers only for accounts before they are constituted, and not when they take bonds, tickets, or other obligations for the same.

*Answered* for the pursuer, It is not to be imagined that a writer should be in a worse case by having a missive letter for instructing his account than if he had none. *2do*, The writs in Sir John's writer's hands could not be said to be in his own hands, he having only a right to recover them; far less can they be said to be in the son's hands, upon any representation as heir, which extends not to acts of natural possession, and detaining of things, which requires tradition. *3tio*, The pursuer is only served heir *cum beneficio inventarii*, and the debts and provisions to the defender and her children of the second marriage exceed the value of the estate. *4to*, It is none of the pursuer's concern to debate matters betwixt the Lady and the writer, whether his hypothec be ceased or not; but seeing both terms for producing the writs are run out, the pursuer ought to have certification against such as are not produced.

THE LORDS allowed confirmation to go out, in respect the pursuer was served heir *cum beneficio*, reserving action against the representatives of her husband.

*Fol. Dic. v. i. p. 450. Forbes, p. 44.*

\*\*\* Fountainhall reports this case :

THE deceased Sir John Ayton having made large provisions in favour of his second Lady and her bairns, Mr William, his eldest son of the first marriage,

raises a reduction and improbation of these deeds, wherein the Lady makes production of what papers she had, but, as to others, contends she was not bound to produce them, nor could any certification pass against them, because her husband having employed Patrick Home writer, to frame and expedite them through the seals, he refused to deliver them up till he were paid the sum of L. 300 Scots for writing and debursements, and for which he had the said deceased Sir John Ayton's obligatory missive letter, acknowledging the account, and promising payment; and therefore Mr William, as heir to his father, ought to pay the said account, and relieve the papers himself, and not turn it over upon the relict.—*Answered*, No law could force him to loose and take out papers that were to his own prejudice, and which he repudiated, having no benefit by them, they being extravagant provisions conceived in favour of herself and her children; by which, and the debts owing to strangers, the estate is so exhausted, that, on the 25th of July last, the Lords gave him an aliment; and though he be served heir to his father, yet it is *cum beneficio inventarii*, and the estate is burdened to the value; whereas the Lady, as executrix, has carried off a considerable quantity of moveables.—THE LORDS first desired to know, whether the writs in Mr Home's hands were more in favour of the Lady and her bairns, or of the heir; and having read the inventory, they found them conceived more in favour of the relict and her children; and therefore ordained her to relieve the same, reserving her action of recourse against the heir as accords; but thought it unreasonable to let the certification go out without allowing her a competent time to get them up out of the writer's hands; therefore superseded extract for two weeks, and what should be produced in that time to be received.

There was another point occurred here, viz. That the hypothec upon writs takes only place where the writer's account is not constituted; but where they have either bond, ticket, or other obligation for it, then it ceases; and here Mr Hume has an obligatory letter.—*Answered*, This additional security was none of his procuring, and therefore he may still recur to the hypothecation law gives him in the papers till he be paid.—THE LORDS thought in this case he might retain the writs till he were paid. Some proposed the dividing the expense betwixt the heir and the relict; but it was decided *ut supra*, reserving her action of relief as accords.

*Fountainball, v. 2. p. 294.*

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1706. June 20. STRCHAN *against* CREDITORS of EDZELL.

A CREDITOR upon an incumbered estate, for a sum far exceeding half its value, pursuing reduction and improbation against all the other creditors, and the question being, how far they were obliged to produce warrants and principal writs, and how far extracts could satisfy a production; the LORDS, considering