

S E C T. V.

Oath in Exhibition.

1749. July 8. & II. ELLIOTS against AINSLIE and PORTEOUS.

THOMAS PORTEOUS, 19th April 1695, disposed his whole effects, reserving his own and his wife's liferent, to Thomas Ainslie his grandson, burdened with L. 1000 to Andrew, and 1000 merks Scots to Isabel Ainslie his other grandchildren, payable two years after his own and his wife's death, dispensing with delivery, but without reserving power of revocation; and this deed was registered 16th March 1696.

Isabel was married to Adam Elliot; in contemplation whereof, Robert Ainslie her father, 22d July 1702, became bound to pay 5000 merks, as tocher with her.

Thomas Porteous, 15th May 1703, executed a deed, narrating, that he had, by his above mentioned disposition to Thomas Ainslie, burdened him with the payment of 1000 merks to Isabel; and considering that Robert her father had sufficiently provided her in her contract of marriage, at the execution whereof it was agreed he should give her 4000 merks, and that the 1000 merks laid upon the disposition to Thomas should make part of her provision, which Robert Robert Ainslie had desired Thomas Porteous to become bound for, and he had refused; but desired him to give 5000 merks, and thereon agreed to revoke the legacy; therefore he revoked and recalled the same, and discharged Thomas Porteous thereof.

Thomas Ainslie died, leaving issue Christian and Cecilia; which last being minor, chose, 15th August 1728, Adam Elliot and other two, and Christian her sister *sine qua non*, her curators.

Isabel Ainslie and Andrew Elliot her husband, in their own right, and as representing Andrew, who predeceased his grandfather, obtained decret before the Commissary of Peebles 16th November 1744, against Christian Ainslie, and Margaret Forbes daughter of Cecilia, as representing their father and grandfather, for the sums laid upon the disposition to him; which was suspended, and begun to be discussed at their instance, and finished at that of their children.

A defence was pleaded on the charger's contract of marriage, whereby these claims were alleged to have been discharged; and Adam Elliot being examined as in an exhibition, deponed, That he had sent the contract to a lawyer, to be produced in this process, and was informed it had been got from him and delivered to another lawyer's clerk since dead, amongst whose papers two sheets

No 15.
The oath of a pursuer being taken as in an exhibition for the recovery of a writ, and he having deponed on a fact in the cause not referred to in his oath, the Lords found that the defenders were not thereby barred from insisting on their defences.

No 15. thereof were found, and put into the process, but he had no suspicion where the other sheet was.

One of the sheets produced ended with a renunciation by the spouses, of all bonds of provision by their parents to them, and 'of all bairns' — and there broke off; and the next sheet was missing, which it was alleged had contained a renunciation of the provisions by Thomas Porteous, and had therefore been concealed; and also that Adam Elliot had possessed himself of the other copy of the contract when he was curator to Cecilia Ainslie.

Adam Elliot, on his examination, had further deponed, 'he never heard it communed that any part of the 5000 merks contracted with the deponent's wife with the deponent, was in consideration of the legacy of 1000 merks bequeathed to the deponent's wife by Thomas Porteous her grandfather.' And Isabel Ainslie deponed on a commission, 'That the tocher given her was not given in consideration of the legacy left to her by Thomas Porteous, nor no part thereof.'

Pleaded for the chargers, That the question having been referred to their oaths, whether the claims now made were included in the 5000 merks, and they having deponed *negative*, that behoved to determine the cause.

Answered, Application was made to the Lord Ordinary, for their examination as in an exhibition, touching the contract of marriage, and also in order to an expiscation concerning this most suspicious claim; whereupon they were ordered to attend to answer such interrogatories as his Lordship should judge pertinent; that to the first question, whether they had the contract, or knew what was become of it, there was added on the margin, 'And was not 1000 merks of the tocher, given in consideration of the legacy, left by Thomas Porteous to your wife?' This addition was made without authority; for the only lawyer in the cause knows not how it came there. It is not authentic, as it might have been added after the Ordinary's subscription, which does not apply to it. The examination was only in an exhibition, wherein it was an improper question, and might have been refused to have been answered, since in that state of the process it could not be thought the defenders were referring that fact to his oath, as they were in hopes to recover the contract; and if it should yet be recovered, it will scarce be pretended they are barred from founding upon it; besides, Adam Elliot only depones he never heard such communing; which may be true, for it was only communed with him that he was to get 5000 merks.

Replied, The occasion of the examination was an exhibition; but the chargers were examined on this further fact, *deferente adversario*, who had ingrossed it in their interrogatories, and also in the act and commission extracted for examining Isabel Ainslie.

Pleaded for the suspenders, It ought to be presumed in this case the portion of 5000 merks was in full of all claims upon the bride's grandfather and father; it is ordinary for portions to be given in this manner; and

the part of the contract which appears, discharges all claims against her father, and the clause is not finished. Adam Elliot produces a writ not entire, and had access to the other copy when he was curator to Cecilia Ainslie; and this account of the matter is given in the revocation by Thomas Porteous.

Pleaded for the charger, He has given upon oath a true account of his copy of the contract, and knows nothing of the other; the want of a sheet is not sufficient to presume a discharge of this sum; and the narrative of Thomas Porteous's revocation is patched up, to be a pretence for cutting down a right, which the contrivers were sensible was not in his power to revoke.

Pleaded for the suspenders, Andrew Ainslie having predeceased his grandfather, after whose death his provision was payable, it never became due; as in legacies and donations *mortis causa*, which are not due, if the person honoured predecease the granter.

Pleaded for the chargers, *Dies cessit sed non venit*; this disposition was to Thomas Ainslie, reserving a liferent, but without power of revocation, and was registered; and as it could have been affected by his creditors, so doubtless his brother Andrew could have adjudged for security of his provision.

THE LORDS, 28th June, " Found that the defenders were not barred from insisting on their defence of payment of the sums wherewith the disposition by Thomas Porteous to Thomas Ainslie was burdened, by the oaths emitted by Adam Elliot and Isabel Ainslie in the exhibition against them; and found it presumed that the sum wherewith the said disposition was burdened, in so far as the same did then belong to Isabel Ainslie, and was in her person, was included in and satisfied by the 5000 merks of tocher, given to her in her contract of marriage with the said Adam Elliot; but found that the L. 1000 payable by Thomas Ainslie to Andrew his brother, after the decease of Thomas Porteous, might descend to his executors, notwithstanding the said Andrew died before the said Thomas Porteous, if Andrew was alive at the time of the said contract of marriage."

8th July, On a bill from the suspenders, reclaiming against the interlocutor, finding Andrew's provision might descend, " they adhered."

11th, " They refused a bill from the chargers, reserving to them to be heard, how far Andrew's provision was presumed to be included in the 5000 merks, if he was dead before the contract of marriage, and his sister had then made up no titles thereto."

Reporter, *Justice-Clerk.*

Act. *H. Home.*

Alt. *A. Macdowall.*

Clerk, *Justice.*

D. Falconer, v. 2. No 79. p. 84.