1757.

BLACKWOOD
v.
ALLAN.

[M. 6991.]

ROBERT BLACKWOOD of Petrevie, - *Appellant.*
HENRY ALLAN and OTHERS, - - *Respondent.*

House of Lords, 23*d March* 1757.

INHIBITION.—An inhibition sustained which was objected to as setting forth two separate debts by bond, in the narrative of the letters, while the will only referred to a bond without distinguishing which, the omission of the letter S in the word "bond" being a clerical error.

A RANKING and sale of the estate of Dudhope was brought, over which several heritable securities were granted. Upon one of these heritable bonds, an inhibition at the instance of Allan was led, and the question in the ranking was, whether his inhibition was effectual to secure a preference over a subsequent disposition in security? The objection stated to the inhibition was, that it was null and void, in respect that in the narrative of the letters, it set forth, that Robert Allan was creditor to Sir George Hamilton, by bond, for the sum of L.4000 Scots, and that he was creditor to the said Sir George Hamilton, and Sir Robert Milne, by another bond, in the sum of 3000 merks; yet the *will* of these letters ran thus:—Our will is, "&c.—That ye prohibit and discharge the said Sir "George Hamilton and Sir Robert Milne to wad-"set, dispone," &c., "in prejudice of the said com-"plainer, anent the implement and fulfilling to him "of the aforesaid *bond*." The will, the use of the word "bond" in place of "bonds," made it uncertain to which of the bonds the warrant applied. The executions returned by the messenger against the debtors, and also against the lieges, were in precisely

the same words. It was therefore contended that the inhibition was void and null by reason of uncertainty. It was answered:—That the objection was founded merely on the inaccuracy of the writer of the inhibition. It was a mere clerical omission of the letter S, and ought to be disregarded, because it was apparent from the narrative of the inhibition what bonds were meant; and although the executions bore the same error, yet, as they contained a general clause that all was done conform to the tenor of the principal *letters*, the preamble of which mentions both bonds, they ought to be sustained.

The Lord Ordinary at first sustained the objection to the inhibition; but on representation and reference being made to the case of Maclellan *v.* Allan, 8th July 1725, where, in a competition between Sir George Hamilton's creditors, the same objection was stated then to the inhibition that is now stated; the Court overruled it; and he therefore maintained that the same judgment ought to be applied in this case. Dec. 5, 1749.

The Lord Ordinary repelled the objection to the inhibition, in respect of the former judgment in the case alluded to. And on reclaiming petition, the Court adhered. June 27, 1750. Nov. 6, 1750.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—That an inhibition was a writ which must be correct in all its parts, particularly in so essential a part as the will, which is the warrant for execution. In the present case that warrant is defective. It does not specify clearly the debt in respect of which it is granted. The narrative of the inhibition sets forth two separate and distinct bonds, unconnected the one with the other, but the will only refers to one bond, without speci-

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fying which, and therefore it is impossible the inhibition can be good for anything. The supplying the letter S in the register of inhibitions was unauthorized and improper, and did not remedy the defect.

Pleaded for the Respondent:—It clearly appears, from the various steps of procedure, that the inhibition proceeds upon the *bonds;* and therefore the objection, in the strongest light, is founded on a trifling clerical error, namely, on the omission of the single letter S, which, neither in law nor equity, ought to vitiate the inhibition so as to destroy the preferable right of a creditor under it, against whose debt otherwise no other objection applies, or is pleadable. This error, though appearing in the will of the letters of inhibition, was correctly inserted in the record of inhibitions, which ought to suffice. And the objection is *res judicata*, because it was pleaded before against the same inhibition, and repelled by the Court in 1725.

After hearing counsel, it was

Ordered and adjudged the said appeal be dismissed, and that the said interlocutor complained of be, and the same is hereby affirmed with costs.

For Appellant, *Al. Forrester, Al. Wedderburn.*
For Respondents, *Rob, Duudas, C. Yorke.*

Note.—Lord Elchies has this Note, p. 209, "Inhibition." "In the register (of inhibitions), they had erroneously added the letter S, and I at first sustained the objection; but afterwards on showing me a decreet, 8th July 1725, in a question on this very inhibition, with Callender of Craigforth, where the same objection was repelled, I thought it did not become me to contradict a judgment in point of the whole Court, therefore I gave my interlocutor in respect of that former judgment, repelling the objection. Pittrivie reclaimed, and the President and others were

of my opinion, that when preference is claimed on legal diligence, especially when that diligence is used to reduce onerous transactions as being *spreta auctoritate*, that if there be any defect in the diligence, equity cannot interpose to supply it. And I observed further, that there was more here wanting than the letter S, because Sir Robert Milne could not be inhibited on both bonds. But on the question, it carried, to adhere to my interlocutor, renit. President et me."

JEAN CRAIK and JOHN STEWART her husband, - - - - } *Appellants.*

GRIZEL CRAIK, only surviving daughter of Adam Craik, - - } *Respondent.*

House of Lords, 25*th March* 1757.

ENTAIL—PROVISION—EQUITY.—An entail empowered the next heir to grant provisions to his younger children; but he conceiving that the entail so executed was in fraud of his father's marriage-contract, which provided the fee of the estate to the heir of the marriage, disponed the estate in fee to his own daughter, and did not exercise the powers conferred of granting provisions. Held, on reduction of the son's settlement, as in fraud of the entail, that when she was deprived of the benefit of her father's settlement, equity will support that deed to the extent of a reasonable provision, although the powers of the entail in this respect had not been exercised.

For the circumstances of this case see p. 542.

The House of Lords, in affirming the judgment of the Court of Session, specially reserved power to the respondent to claim a provision out of the estate, her father having, by the entail of 1723, a power to provide such provisions to younger children; and in the present action she now contended that the settlement of the estate on her by her father, although adjudged to have been *ultra vires* of the father, yet