1678. *January* 22. HAY *against* The EARL of TWEDDALE.

BY contract of marriage betwixt the deceased Earl of Tweddale and the Earl of Eglintoun's daughter, the heir-male of the marriage was provided to the lands of Drummelzier; and the Earl was obliged to ware and employ 60,000 pounds upon land or annualrent, for the heir-male of the marriage; and it was declared, That the Earl might provide the conquest to what heir he pleased to nominate. Thereafter the Earl purchased the lands of Hercus, from Lawson of Cairnmoor, to himself, his heirs and assignees; but, before infeftment, there is a letter produced, written by the Earl to Cairnmoor, to grant a new procuratory in favours of the Earl and his heirs-male of the marriage, in implement of the contract of marriage; which words are margined in the procuratory, and are not repeated in the infeftment, but are contained in the instrument of resignation; and there are witnesses subscribing to the letter. But, after this infeftment, the Earl grants a disposition of Hercus to his son William and the heirs of his body; which failyieing, to a sister of that marriage; which failyieing, to their mother and her heirs: whereupon no infeftment followed. In which disposition it is declared, That Hercus shall be no part of the 60,000 pounds. But shortly thereafter, the Earl having disponed his estate to the Lord Yester, his eldest son, whom he took obliged to fulfil the contract of marriage with the second lady: in implement whereof, the deceased Earl, as tutor and lawful administrator to his son William, takes a disposition of the lands of Rodono, from his son, for 50,000 pounds; and which bears, that Hercus being acquired for 10,000 pounds, for implement of the contract of marriage, therefore the deceased Earl accepts this in full satisfaction of the 60,000 pounds, and discharges this Earl of his obligement to fulfil the contract, and obliges himself to procure a discharge from William to this Earl. And, after all, the deceased Earl, in his testament, declares Hercus to be disponed for no part of the 60,000 pounds. Drummelzier, as heir of the marriage, pursues for the 60,000 pounds, and annualrents thereof since his father's death, and insists against the Earl of Tweddale, as successor, *titulo lucrativo*, to his father, by a disposition of the estate of Tweddale, after the contract of marriage; and that it might be declared,—That this Earl, both as cautioner and successor, should fulfil the contract, and relieve the heir of the marriage of all debts of his father, to which he would be liable as representing him as heir of the marriage; and thereby the provisions of the contract of marriage would be evacuated;—so that an implement thereof would be an effectual implement.

It was ANSWERED for Tweddale to that member of the declarator, That a lucrative successor could never be liable for debts contracted by his father, after the disposition of the estate to him.

And it being REPLIED, that the contract of marriage was prior, the implement whereof behoved to be *cum effectu;* and if the deceased Earl had been pursued to fulfil, no disposition would have been accepted from him, without purging his debt, anterior to that implement, which would evacuate the same; and therefore the son, as lucrative successor, can be in no better case: This point was not determined, but was settled by a reference, in which Drummelzier got 1000 pounds sterling, and the Earl became obliged to relieve him of all his father's debt. But as to that member, of paying the 60,000 pounds with annualrents,

the defender alleged Absolvitor, because it was already fulfilled by the disposition of Hercus and Rodono, upon which the pursuer's father, as lawful administrator, had employed that sum.

The pursuer ANSWERED, That Hercus could be no part of the implement, because of the disposition thereof to the pursuer, declaring it to be no part of the implement. *2do.* That Rodono ought not to be accepted for 50,000 pounds; because the pursuer's father, who was debtor in the contract of marriage, and lawful administrator, could do no deed prejudicial to the pupil, to evacuate his son's and his own obligement; so that albeit Rodono had been accepted, it could only be for the true worth.

The defender REPLIED, That the disposition of Hercus was false in the date, and so *in totum;* and that it was never delivered, but kept by the father; and therefore while it was in his hand, without resignation or infeftment, it was at his disposal, and he might have cancelled or qualified it as he pleased; which he had done by the posterior disposition of Rodono, declaring Hercus to be a part of the implement: and as to his contrary declaration in his testament, it could operate nothing in relation to heritage.

The Lords having, before answer, ordained either party to adduce probation of the date and delivery of the disposition of Hercus to the pursuer, and of the rental of Rodono, when it was disponed to William, and the rate of such lands, being kirk-lands, now holden of the King, by ancient infeftments, confirmed according to the ordinary rate of such lands in that place of the country; and the probation being now closed, the Lords advised the same, and found that it was not proven, that the disposition of Hercus to the pursuer was delivered to any person to his behoof, but detained by the father; and that though the want of delivery would not have prejudged it,—the father's custody being the son's custody,—yet, while it remained in the father's custody, without any further progress, he might annul or alter it at his pleasure; and that he had altered it by the posterior disposition of Rodono, and therefore found it to be an implement of the 60,000 pounds; and so found no necessity to advise the testimonies as to the date, or consider what effect the first disposition on Cairnemoor's resignation would have. But, by the probation adduced for the worth of Rodono, the Lords found that it was not worth the 50,000 pounds: but that by the probation, and in consideration that the Earl had no right to the teinds, but that there had been an old use of payment of 100 pounds of vicarage to the minister, without any valuation,—the pursuer's witnesses having proven that the ordinary rate of such lands was 15 years' purchase, and the Earl's witnesses having proven that 18 years' purchase had been gotten for such like lands,—the Lords determined the price to be 15 years' purchase, both for stock and teind; the Earl warranting the teind against any other right or burden already imposed, except 100 pounds payable to the minister.

In this process there was a declinator given in by Drummelzier against Newbyth, as being a witness adduced by Tweddale, anent the date of the disposition of Hercus, and so could not be both judge and witness in the cause. The Lords found, that Newbyth could not judge as to that point for which he was adduced witness, but might judge in any other point in the cause. But thereafter, upon a bill, the Lords made the price 17 years' purchase, Tweddale giving real warrandice for the teind by infeftment.

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