1698. *June* 24. HOME *against* HOME.

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An apparent heir was found to have right to continue his predecessor's possession, notwithstanding of a disposition and infeftment from the defunct, which is a good foundation for a process of removing, but cannot entitle the disponee to turn the granter, or his apparent heir, out of possession *brevi manu*.

SIR ALEXANDER HOME of Renton having died in possession of his house and lands, a debate arose between Sir Patrick Home, Advocate, his brother, and Sir Alexander's relict and son, who should have the possession of the house; both of them seized on it, and attempted to debar the other; whereupon the Lady and her son pursued a riot against Sir Patrick before the Privy Council, who referred the point of right, and who should have the present possession to be summarily discussed by the Session; where it was *contended* for the Lady and her son, That she ought to be preferred, 1*mo*, Because, by her contract of marriage, she was provided to the liferent of the house and parks, ay till the heir should be 21 years old. 2*do*, Her son, as apparent heir, has right to continue his father's possession ay and until he be removed by one having a better right, and that by order of law, but cannot be thurst out summarily; yea, he may uplift the mails and duties *medio tempore*, his predecessor's possession being his possession. *Answered*, Sir Patrick must have the possession, both in respect of his rights of adjudication and apprising upon the estate, and by virtue of the late transaction past betwixt his brother and him, by which he disponed the fee of the lands irredeemably to Sir Patrick, reserving his own liferent; and, it is a clear principle, that on the death of the liferenter nothing can debar a fiar but he may presently enter, wherein Stair is very clear, *lib* 2. *tit.* 1. of real rights, § 16. that the liferenter's possession is the fiar's. And as to the relict's pretence, it being only a personal obligement whereupon infeftment never followed, it can never compete with Sir Patrick who stands infeft, as appears from Craig, *feud. lib.* 2. *Dieg.* 22. Sect. 25. where *maritus nequit præjudicare conjugi si investita fuerit in usufructu;* but if it be only by contract, *ea provisione non obstante, potest fundum suum alienare, actione evictionis ei reservata.* And as to the apparent heir's right of continuing his predecessors possession, that is quite cut off; because he instantly instructs the predecessor denuded of the fee, in which case he can transmit nothing to his heir; likewise here, the relict and children were not *in familia* with Sir Alexander the time of his death, but had withdrawn many years before, and lived separately; and he had likewise used a warning upon his rights, and intented a warning against them, which he repeated here *incidenter*, and wherein he would certainly prevail; and therefore the momentary possession ought to be adjudged in his favours. *Replied* for the Lady and the apparent heir, In so far as Sir Patrick founded on his legal rights of apprisings, &c. they would prove them extinct by intromission. And as to his disposition from his brother, they had a reduction thereof depending on the head of fraud and circumvention, of his being inhibited, and on sundry other grounds which they now repeated; and though his denudement were good and valid in itself, yet the apparent heir could not be thrown out; because, by our old law, the fiar behoved, on the liferenter's death, to raise letters on six days

No 5. warning, and thereon obtain a summary removing. See Hope, title Liferents, Preston *contra* Cockpen, *voce* REMOVING; and where Stair affirms the liferenter's possession to be the fiar's, he adds, against third parties; but this will not extend to the apparent heir, who is not obliged to know your right till it be legally found and declared. THE LORDS found the relict, not being infeft, could not claim the possession in prejudice of Sir Patrick who stood infeft; but that the apparent heir had interest to retain the possession, though his predecessor was denuded, ay till he were legally removed; which possession he behoved to quit, when Sir Patrick prevailed in his removing, founded on his brother's disposition to him, unless their reduction of that disposition should happen to be sustained; and for determining the whole, both as to property and possession, *simul et semel*, recommended to both parties to discuss the removing and reduction summarly; which they at last condescended to do.

1698. *December* 1.—SIR Robert Home, son to Alexander Home of Renton, and Dame Margaret Scot his mother, against Sir Patrick Home advocate. See the case touched *supra*, 24th June 1798. They now *insisted* in their reasons of reduction of the disposition and discharge given by Sir Alexander to his brother, Sir Patrick. The *first* reason was, That Sir Alexander by his contract of marriage, was obliged to provide the lands to the heir-male of the marriage, and upon which obligement and contract there was inhibition served against Sir Alexander, at the instance of the Lady's friends named in the contract, before he disponed to Sir Patrick; and Sir Robert is now served heir of provision to his father, and so has right to the foresaid obligement as a creditor, and so craves it may be reduced *ex capite inhibitionis*. *Answered* for Sir Patrick, That no such process can be sustained, because though served heir of provision, yet truly he is general heir of line, and so bound to warrant his father's disposition, and can never quarrel the same. It is true, the remoter heirs of tailzie and provision do sometimes plead they are strangers, and in some sense creditors *comparative* with the heir of line, who must be first discussed; yet it is strange doctrine to pretend that the general heir of line *qui succedit in universum jus defuncti*, and is *eadem persona* with him, can claim performance of his obligements, and yet not fulfil his deeds; for then he would be both debtor and creditor, and so *confusione tolleretur obligatio*. 2*do*, Sir Alexander being absolute fiar, no inhibition upon a mere destination of succession (which can never be the foundation of an inhibition) could impede him to use all the deeds of property, by disponing or discharging; else husbands, by such clauses in their contracts matrimonial, should be divested of the power over their estates, which is absurd, and always repelled by the Lords. *Vide* 23d November 1677, Crawfurd, *voce* PROVISION to HEIRS and CHILDREN; Sibbald *contra* Sibbald, IBIDEM; and 7th January 1675, Innes *contra* Innes, IBIDEM; where inhibitions served on such clauses were not sustained, and the children found to represent their father, and might not quarrel his deeds; and which last decision is both recorded by Stair and Dirleton. *Replied*, Whatever effect a naked destination may

have not to incapacitate a father from disponing at his pleasure, yet where it is contained in a mutual contract of marriage, where there is a *synalagma* and prestations on both sides, it is much stronger, and can be no more evacuated and enervated than a mutual onerous tailzie; seeing the wife and her friends, in contemplation of the obligement for the heirs of the marriage their succession, pay a tocher, and enter into a contract. But 2*do*, However these clauses are not impeditive of the husband's power of disposal for onerous causes, yet it is most unjust that he shall have liberty, by gratuitous deeds, to frustrate such rational settlement in defraud of his own children; and so it has been found, as Durie tells us, 16th December 1628, Granton, *voce* PROVISION to HEIRS and CHILDREN; and 7th July 1632, IBIDEM; and Stair has recorded many, 10th July 1677, Carnegy, IBIDEM; 26th July 1677, Stevenson, *voce* WRIT; Mitchel against Littlejohn's Children, No 11. p. 3190; 19th June 1677, Murrays, *voce* PROVISION to HEIRS and CHILDREN; 29th Jan. 1678, Stuart, No 5. p. 3052; and 3d January 1679, Gibson, *voce* PROVISION to HEIRS and CHILDREN; *item* Andrew Bruce's case in 1680,* and Simpson's case, 20th December 1693, *voce* PROVISION to HEIRS and CHILDREN. By all which heirs of provision are found creditors, and parents might not *contra fidem tabularum nuptialium* overturn these destinations of succession, unless for just, rational, and necessary causes and considerations. The next reason of reduction was on fraud and circumvention, that Sir Patrick was by his father's tack in a manner constituted tutor, overseer, trustee, and interdictor to Sir Alexande , his brother, because of his weakness and facility; and it is so much the stronger, where the person imposed on is under the power and management of the imposer, and he is a near relation, and patches up a transaction *remotis arbitris* with a weak melancholy man, himself being an expert cunning lawyer. Neither is it a necessary qualification of fraud, that the party be wholly fatuous, ignorant, or incapable of consent; it is enough that his father knew him to be unfit for business, and therefore trusted Sir Patrick with the management, who should have never closed accompts with him but in the presence of friends for both parties; and he might as well have filled him drunk, and then presented this disposition and discharge to him when he was void of all judgment and comprehension. *Answered*, Sir Alexander was neither idiot, nor furious; and on such frivolous clamours to impugn solemn transactions may endanger the security of many others as well as his; neither must dispositions be taken away by such pretences; and the matters of fact are calumnious, for the tack has nothing of an interdiction in it, neither is it at all of the nature of a trust to Sir Alexander's behoof, but rather to his own, being set to him, his heirs, and assignees; likeas, it was for payment of the debts, which were very great, and such as Sir Alexander could never have been able to stand under; and Sir Patrick could never pay them; because, after his mother's liferent and his brother's aliment, the superplus rents were not able to pay the current annualrents of the debts. THE LORDS being to ad-

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* Examine General List of Names.

No 5. vise this debate stopped, on a motion, that being so near relations, it was fit to try a settlement; and some were named to endeavour an agreement till next week.

1699. *January* 12.—The cause marked *supra*, 10th December 1698, betwixt Sir Patrick Home and his nephew, Renton, was this day advised, the communing having taken no effect. THE LORDS were all clear, that an obligement in a contract of marriage to provide the fee to the heirs to be procreated, is so far onerous, that the father can do no voluntary gratuitous deed fraudulently to cut off and evacuate the succession, so as to give away his whole estate from his son by a donation without the least onerous cause; for that will be presumed to be downright fraud *in concilio*; but if it be supported by any probable, rational, onerous cause, though not adequate and equivalent, sundry of the LORDS thought there was no law to restrain a father in such a case from the administration and disposal of his fee; and therefore the LORDS, waving this point, they fixed on the second reason of reduction, founded not upon constructive fraud, (because they were eventually prejudged, which is the ground of the act of Parliament 1621,) but on real fraud *in concilio*, that the deed was elicited by circumvention; and the vote being stated, whether the qualifications and branches of the breach of trust and circemmvention insisted on, some whereof were already proven, were sufficient to convince the Lords, so as they might reduce Sir Patrick's disposition and discharge, on the evidences lying before them, or if there should be a farther trial and expiscation, by an act before answer, of such deeds enforcing the fraud, as were denied; such as Sir Alexander's melancholy and weakness, and Sir Patrick's stopping the redemption of the adjudications, by offering to poind the consigned money, &c.; six were for reducing upon what they had before them; but the plurality carried, to try the points of fact as to his condition, and the onerosity of Sir Patrick's right, and other matters alleged by both parties.

Many human transactions want that rectitude and integrity required to good and moral actions, and yet are not repudiated by human laws; because we live *in fæce Romuli*, and legislators are forced to connive at some corruptions; and *l.* 144. *D. de reg. juris* tells us, *multa sunt licita, et tamen non sunt honesta in foro conscientiæ*; and in emption, *se invicem circumvenire permittitur*. Yet all tricks should be discouraged, and rooted out, so far as possible.

1699. *July* 5.—IN the action pursued by Sir Robert Home of Renton against Sir Patrick Home, it was *objected* against Robert Speid, a witness adduced by Sir Robert, to prove his father's condition when he disponed, that he was frequently entertained by the Lady Renton, Sir Robert's mother in her house, and had been present at their consultations against Sir Patrick, and so could not be an unbiassed witness. *Answered*, His staying now and then by way of visit in the house could be no argument of partiality, unless he were a domestick;

and his being at consultations was not relevant, unless it had been since the Lords, by their act before answer, allowed the several points of fact alleged to either party's probation, but since that time he had never been present at any. THE LORDS thought this an affected abstinence, and therefore rejected him from being a witness. The Lady and her son did also recriminate against Sir Patrick, that he had tampered with her witnesses, by asking what they would depone, which Sir Patrick *contended* was wholly calumnious. She also adducing some witnesses to prove the rental of the estate, Sir Patrick craved they might be also interrogated on his brother's condition and sensibleness to go about business. Sir Robert and his mother *contended* that they did not adduce the witness for that, but on quite separate points. THE LORDS found the other party might make use of her witnesses for any thing contained in the act, though not cited by them. *See* IMPROBATION.—PROVISION to HEIRS and CHILDREN.—WITNESS.

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Fol. Dic. v. 1. *p.* 357. *Fountainhall, v.* 2. *p.* 6. 21. 34. & 57.

1741. *February* 19. M'KIE *alias* HERON *against* M'KIE.

No 6.

WHERE a man had disponed his estate in prejudice of his heir, whereof reduction was pursued on the head of death-bed, the disponee having applied for the possession, at least for sequestration; it was found, 'That the apparent heir had right to continue the possession.'

Kilkerran, (HEIR APPARENT.) *No* 1. *p.* 237.

1796. *March* 9.

The Honourable Mrs MARIANNE MACKAY and Colonel WILLIAM FULLERTON *against* Sir HEW DALRYMPLE, and Others.

No 7.

Notwithstanding the dependence of an action of reduction and declarator of irritancy brought against a proprietor and his heir-apparent, the latter, upon the death of the former, is entitled to continue possession till decree be obtained.

THE honourable Mrs Marianne Mackay, with consent of her husband, Colonel Fullerton, in 1793, brought a reduction and declarator of irritancy against John Hamilton, (who had been infeft in the estate of Bargany upon a charter of resignation in 1742, and had been in the uninterrupted possession of it ever since,) and against Sir Hew Dalrymple, his nearest heir both of law and provision, in which she narrated an entail of the estate executed by Lord Bargany in 1688; the manner in which the succession under it had devolved on the late Sir Hew Dalrymple, and his renouncing it in favour of his younger brother Mr Hamilton; from which she inferred, that the late Sir Hew by granting, and Mr Hamilton by accepting this renunciation, and thereby altering the course of succession, had incurred an irritancy for themselves and their descendants; that the pursuer, as next substitute to them, was entitled to the estate;