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riage, whom failing, the said money and lands to be equally divided betwixt her and his heirs;" this marriage dissolving without issue, in a competition betwixt an only daughter of the second marriage and the first wife's heirs, the father having provided his whole lands to the heirs of the second marriage, this was found to be a voluntary deed, which could not evacuate the substitution in the first contract in favour of the wife's heirs *quoad* their half.

Fol. Dic. v. 2. p. 282. Fountainhall.

*** This case is No 30. p. 4236. *voce* FIAR.

1708. *July* 16.

SIR ROBERT HOME *against* SIR PATRICK HOME Advocate.

No 55.
A clause in a contract of marriage, obliging a person to resign his estate in favour of himself and the heir-male of the marriage with inhibition used thereon by the friends at whose instance execution was appointed to pass, found to disable that person from disponing gratuitously in prejudice of the heir-male of the marriage.

SIR ALEXANDER HOME of Renton, in his contract of marriage with Dame Margaret Scot, being obliged to provide the lands of Renton, and others therein mentioned in favour of himself and the heirs-male to be procreated of the marriage, and to grant all rights, titles, and securities thereanent, whereupon inhibition was used by the friends *in anno* 1690; Sir Robert Home, heir-male and of provision of the marriage, pursues a reduction and declarator against Sir Patrick Home, for reducing a contract of alienation of the estate made betwixt Sir Alexander and him in October 1694, upon this ground, That the pursuer had good interest to reduce all voluntary deeds made by his father after executing of the inhibition in defraud of the obligement and provision conceived in his favour as a creditor by the contract of marriage.

Alleged for the defender; The disposition to him could never be quarrelled upon the foresaid clause and inhibition; because, 1*mo*, That obligement is but a simple tailzie and destination of succession, alterable at pleasure, even by gratuitous deeds; seeing Sir Alexander was still fiar, and not tied up from the free disposal of the estate by prohibitory and irritant clauses. He being obliged to resign, failing heirs-male of the marriage, in favour of his heirs-male of any other marriage, and failing of these, in favour of his heirs whatsoever; the clause doth equally relate to them as heirs substituted to him; so as he might alter the destination in favour of the first member of the tailzie, as well as the destination in favour of the subsequent members; yea, a mutual tailzie, which is much more binding, doth not hinder either party to dispose of their estates as they please; as Hope in Lesser Practicks observes to have been decided betwixt Spence against Spence, and betwixt the Earl of Home against Coldingknows, (See APPENDIX.) 2*do*, There is a difference betwixt a clause obliging a father to resign his estate in favour of himself in the first place, and to the heirs of the marriage as substituted to him, and a clause providing the estate to the heirs of the marriage simply; for, in the first case, the father as absolutely fiar, may dispose as he thinks fit, even by gratuitous deeds;

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whereas such deeds should not be effectual in prejudice of an obligation conceived immediately in favour of heirs of a marriage. *3tio*, The inhibition could not disable Sir Alexander to dispone gratuitously, yea could not have been raised if adverted to at the passing; because, *1mo*, The inhibition was principally in favour of the Lady for her liferent provision, and the heirs-male of the marriage are only mentioned by the bye; *2do*, Inhibition can only be raised upon a presently effectual obligement, and not upon obligements *in spe*, such as one that is conditional or an obligement to a long day, as my Lord Stair observes, B. 4. T. 22. § 29.; now, the pursuer having no interest in the estate while the father lived, nay it being uncertain if ever he would succeed thereto, since Sir Alexander might have outlived him; such a *spes successionis* could never be the ground of an inhibition, January 18. 1622, L. of Silvertonhill *contra* his Father, No 1. p. 9451.; *3tio*, Suppose there had been ground for an inhibition, it could have no further effect than the obligement it was raised on imported; and as that obligement could not hinder the father's free disposal, neither could the inhibition, Hope, *ibid.* *4to*, The pursuer cannot come to the estate by virtue of the clause in his father's contract of marriage, without serving heir to him, and so is obliged to warrant his deed, July 9. 1630, Veitch *contra* Robertson, No 48. p. 4256.; November 23. 1677, Sibbald *contra* Sibbald, No 44. p. 12889.; January 7. 1675, Innes *contra* Innes, No 22. p. 12858.; January 9. 1684, Boussie *contra* Menzies, Sec. 10. *h. t.*; albeit the pursuer be only served heir of provision, he is also the person who may be general heir of line, and so succeeding *in universum jus*, is liable to perform all his father's deeds; for his service is actus legitimus, qui nec recipit diem, nec conditionem; and though an heir of tailzie or provision, secured by prohibitory and irritant clauses, may succeed to the lands without noticing his predecessor's deeds contrary to the provision; that holds not in other simple tailzies and provisions, whereof the heirs are *suo ordine* no less liable to perform their predecessor's deeds than heirs-male and of line are.

Replied for the pursuer; Sir Patrick's assertion, That a provision in a contract of marriage (which is a most solemn and favourable settlement) may be evacuated by a gratuitaus deed, hath no precedent in former times, and will stand single in all time coming. Though Sir Alexander was fiar, a fiar may be many ways restrained in the disposal of his property. Accidet aliquando, ut qui dominus sit, alienare non possit, Instit. Tit. Quib. alien. lic. pr. A father, though fiar, has not the liberty of alienating at random without an onerous cause, in prejudice of his own solemn obligement, February 12. 1677, Fraser *contra* Fraser, No 23. p. 12859.; July 10. 1677, Carnegie and her Husband *contra* Smith, No 43. p. 12888.; July 26. 1677, Stevenson *contra* Stevenson, *voce* WRIT; June 17. 1676, Mitchel *contra* Littlejohn, No 11. p. 3190. The opinion of our lawyers go upon this side, Stair, Lib. 3. Tit. 5.; Dirleton's Questions, p. 85. and 86.; Fontanella, Gloss. 9. Part 1. And seeing the onerous cause belongs only to the heir of provision of the first marriage, who is

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in obligatione, the heirs substitute of any other marriage, who are but *in destinatione mariti*, are not so effectual creditors by virtue of the clause. Again, there is no parallel betwixt a tailzie that contains a naked destination, and an obligement in a contract of marriage for an onerous cause; and to say that mutual tailzies may be resiled from by either party without an onerous cause, is precarious and contrary to the decisions cited by the defender, and to that betwixt Sharp against Sharp, January 14. 1631, No 1. p. 4299.; *2do*, There is no difference between a clause obliging a father to resign in favour of himself, and the heirs of the marriage as substitute, and a direct provision to the heirs of the marriage in the first place; for in both cases the father is fiar, and the heirs of the marriage can only come in as heirs of provision to him; *3tio*, The inhibition is even as expressly in favour of the heirs of the marriage, as in favour of the relict; and *de praxi* inhibitions are raised upon contracts of marriage in favour of heirs, which are effectual against posterior gratuitous deeds. The inhibition was not sustained in the case betwixt Innes and Innes, because the father was alive; and besides, the contrary hath been found by posterior decisions, January 24. 1677, Graham *contra* Rome, No 42. p. 12887.; February 12. 1677, Fraser *contra* Fraser, No 23. p. 12859. Albeit an inhibition doth not alter the ground of the obligement it is raised on, it adds to the security thereof; and putting the lieges *in mala fide* to receive voluntary dispositions, in prejudice of the same, is a ground to reduce such. The reason of denying inhibition in the case of Silvertonhill, was, because the parties contractors, who might sue execution, were all dead; *4to*, The decisions Veitch *contra* Robertson, and Sibbald *contra* Sibbald, are in the case of onerous creditors; and in the last case, the creditors had inhibited before the deed in favour of the heir; and in the case betwixt Boussie and Menzies, there is only a declaration in a process against the heir of the marriage, who was not called therein. So that it remains uncontroverted, that an heir of provision by contract of marriage, is partly heir partly creditor; heir as to his predecessor's debts and deeds for onerous causes, and creditor as to gratuitous fraudulent deeds. Though a contract of marriage is not to be so strictly interpreted, as to bind up a father from disponing the least parcel of the estate; it certainly hinders all total gratuitous alienations, which would directly frustrate the very end of the contract. A father might, indeed, notwithstanding such a contract, arbitrate among his children of the marriage, by passing by the eldest, if an idiot, or undeserving, and giving his estate to a second son of the same marriage; but he could not dispone it gratuitously to a brother or to a stranger.

Duplied for the defender; There is no difference whether a father dispone his whole estate or a part in prejudice of his heir of the marriage; for several partial rights may exhaust the whole, and *majus et minus non variant speciem;* so that if he cannot dispone the whole, he cannot dispone a part. The consequence of tying up a father in these terms, would be, that the next day after the marriage, inhibition might be served against him, which would ruin his

credit and deprive him of the free disposal of his estate. Yea, it would in effect hinder the buying of lands, because few would purchase from one that cannot dispone gratuitously for fear of being put to the trouble of instructing an onerous cause.

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THE LORDS found the obligement in the contract of marriage, whereby Sir Alexander is bound to resign the estate in favour of himself, and the heir-male of the marriage, with the inhibition raised thereon by the friends, did disable him to dispone that estate gratuitously in prejudice of the pursuer, who is heir-male of the marriage.

Fol. Dic. v. 2. *p.* 282. *Forbes, p.* 265.

*** Fountainhall reports this case:

1708. *February* 10.—THE LORDS advised the long depending action, betwixt Sir Patrick Home advocate, and Sir Robert Home of Renton, his nephew, for reducing the transaction betwixt Sir Patrick and Sir Alexander Home, father to the said Sir Robert, in 1694, whereby after count of charge and discharge, stated betwixt them, of the debts acquired by Sir Patrick and his intromissions with the estate for 23 years before, Sir Alexander found he was not able to redeem it; therefore he discharged his brother Sir Patrick of all his intromissions, and disponed the estate of Renton to him, on Sir Patrick's obligement to relieve him of all the debts, and to pay him a considerable annuity during his lifetime, and a faculty to burden the estate with 30,000 merks. The grounds on which Sir Robert quarrelled it were, that Sir John Home of Renton, Justice Clerk, looking on Sir Alexander, his eldest son, as a weak man, and wholly unfit for business, he entrusted his second son Sir Patrick with the whole management, and so being trustee for his brother, if he has taken the estate to himself, he ought not to give Cain's answer, "am I my brother's keeper." 2*do,* There was a very strict irritant tailzie, though now not extant, whereby the estate neither could be alienated, nor debt taken thereupon; and by his contract of marriage with Dame Margaret Scott, the fee of the barony of Renton is expressly provided to the heir-male of the marriage, which is Sir Robert, who could not be disappointed and defrauded by such a gratuitous deed, else the *fides tabularum nuptialium* are of no moment. 3*tio,* There is a probation led of the said Sir Alexander's melancholy distemper, which rendered him altogether unfit for business, so that he was incapable to judge on so important a count and reckoning, and by a disposition to put his estate by his own son, without any just cause or provocation, on the false and fraudulent misrepresentations made to him by his brother, who followed that advice of Jezebel to Ahab, arise, kill, and take possession. 4*to,* Sir Patrick by collusion suffered Wilson, the first adjudger, to take out his decreet, which opened the door to a flood of diligence, and overwhelmed the estate with penalties, accumulations, and fifth parts, whereas he ought either to have paid

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him, having then four years rents in his hands, or else have taken a day to produce a progress, and prove the rental, which he did not, but suffered it to pass summarily among the acts, my Lord Newbyth being Judge thereto. *5to*, Whatever muster of debts he makes on the estate, he must deduct the eases he got, and all the penalties and accumulations, and charge no more than what he precisely paid, which will bring down the scheme of his debts considerably; and by his long intromission with the estate, all he can justly charge upon the estate, will be found more than overpaid; for he can no more claim the eases and penalties than a tutor or curator, a trustee, mandatar or factor could, he standing in all these relations to his brother. To avoid repetition, see Sir Patrick's answers to these reasons of reduction, marked, No 5. p. 5235. *voce* HEIR APPARENT. THE LORDS, after many debates, fixed on this point, that before answer to the fraud and circumvention, Sir Patrick should astruct and produce the onerous causes of his discharge and disposition from his brother; and though it were not fully adequate, yet if it were such as took off enorm lesion, the LORDS would be sparing to annul the transaction. And accordingly, Sir Patrick having produced all his grounds of debt, and Sir Robert being heard to object against them, the LORDS proceeded this afternoon to advise the production and debate; and it being proposed by some of the LORDS, that they should first take under consideration, whether Sir Patrick, in his circumstance as trustee, could claim any penalties, accumulations and eases; for if this were deducted, it would make a great alteration in the state of the debts he charged; it was moved by others of the Lords, that to keep closs by the act, there could be no other natural state of the vote, but whether by the probation adduced, or objections made by Sir Robert against it, there was as much of an onerous cause proved, as might take off fraud, circumvention, and enorm lesion. And this being, after some reasoning, made to be the state of the vote, it carried by a plurality of seven against six, that there was as much of an onerous cause proved as might support the discharge and disposition, as not fraudulently elicited. The great argument against Sir Patrick was, that his 23 years intromission with the rents did more than extinguish all his claims. To this he *answered*, That besides all the legal defalcations of cess, feu-duties, public burdens, minister and schoolmaster's stipends, dead, waste, and poor, reparations of houses, &c. he had his mother's terce till she died in 1680, the Lady Carrington's annuity, in place of annualrent, she being a Roman Catholic, who refuse annualrent, but take the equivalent under another name, &c. And allowing Sir Alexander to be as weak a man as you please, yet he may have as much power as the law gives to a bairn or minor. Now, it cannot be denied but a minor by testament could have bequeathed and legated all these bygone rents to Sir Patrick; and if so, why might not his brother by a *legatum liberationis* discharge him fully thereof, as he has truly done.

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1708. *July* 17.—IN the case betwixt Sir Patrick Home, and Sir Robert, his nephew, mentioned 10th Feb. 1708, the LORDS fell to advise a point, which had been several years ago debated, and set down at length, 1st December 1698, No 5. p. 5236, *voce* HEIR APPARENT. The point was, that Sir Alexander, by his contract of marriage, was obliged to resign the lands to himself and the heir male of the marriage, upon which clause the friends (at whose instance execution was appointed to pass) served an inhibition against him; and he having after that disponed his lands of Renton to his brother Sir Patrick, Sir Robert, son and heir of that marriage, repeats a reduction of his father's disposition to Sir Patrick, *ex capite inhibitionis*. *Answered*, That the clause could be no ground or foundation for it, seeing it was only a pure and naked destination, a *spes succedendi*, the father being still absolute fiar, and might dispose of his estate at pleasure, unless he had been under a tailzie with irritant clauses; and if an inhibition, on a common clause, were sufficient to bind up, the act of Parliament 1685, anent tailzied estates, had been unnecessary and superfluous. *Replied*, They did not plead the effect of the inhibition to quarrel any onerous deeds, but only to incapacitate him from doing gratuitous deeds without just, true, and necessary causes, to the prejudice of the succession; which they acknowledge will never hinder him to do voluntary, gratuitous deeds, of a small value; as if he, by way of gift and donation, should grant a bond for a thousand merks or the like to a friend; but they only plead it to this effect, that he could not, by a voluntary gratuitous deed, wholly frustrate and evacuate the succession by that marriage; though he might pass by the eldest, and give it to a second, yet he must never bestow it on children of a second marriage passing by the first, unless they were idiots, or declared prodigals. This being put to the vote, it carried by a plurality of eight *contra* seven; that Sir Alexander Home of Renton was by that clause in his contract, and inhibition served thereon, incapacitated from disponing his estate gratuitously to the prejudice of the succession of that marriage. Sir Patrick did *allege*, That his disposition was onerous, but that depending on the instructions of the debts, and his intromissions alleged to pay and extinguish them, was not at this time considered; though, by the foresaid interlocutor, 10th February 1708, it was found, but is now altered. There were other two points *urged* against Sir Patrick, but not decided this day, viz. 1*mo*, If his accepting the tack was such a trust as put him *in mala fide* to take a disposition from his brother; 2*do*, If his knowledge that the estate was tailzied under irritancies, though cancelled, did not likewise incapacitate him to receive a voluntary disposition of the tailzied lands. Some thought this interlocutor did weaken the paternal power, and gave too much ascendant to children, if they might inhibit their fathers on such clauses.

1708. *December* 17.—IN Sir John Home's action *contra* Sir Patrick his uncle, mentioned *supra*, 17th July 1708, another point came to be decided. Sir Pa-

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trick *alleged*, You can never quarrel my discharge and disposition from your father, because you are served and retoured heir-male to him, and so must warrant his facts and deeds. *Answered*, 1mo, My service is as heir of provision by virtue of the clause in my father's and mother's contract of marriage, providing the barony of Renton, as the heir-male procreate of the marriage; and my serving heir-male is only *designative*, that I am the eldest son of that marriage; 2do, *Esto* I were both heir-male and of provision, that can never hinder me to quarrel gratuitous deeds depending on no antecedent onerous cause; for by the destination of the contract, and the inhibition served thereon, he is so far a creditor as to quarrel all gratuitous rights granted in downright subversion thereof; which is the fixed opinion of all our lawyers, backed and fortified by decisions, as appears by Dirleton, *voce* Heirs, and Obligements in Contracts; and Stair, Lib. 3. Tit. 5. N. 19. *Replied*, His being heir-male is not adjected as a mere designation, but as principally intended, the retour running in these terms, tanquam legitimus et proximior hæres masculus et provisionis virtute contractus matrimonialis. Likeas, he behaved as heir, in so far as before his service he pursued Sir Patrick to remove from the house of Renton, and as apparent heir having right to continue his father's possession, he obtained a decreet of removing against him, and did likewise intromit with the charter-chest and moveable heirship, as the best horse, sword, &c.; and Durie observes, the LORDS would not allow a general heir of line to renounce as heir-male, and reserve his right as heir of provision, 23d January 1627, Lord Ogilvie *voce* RENUNCIATION TO BE HEIR; for though heirs of provision may be reckoned as half creditors against children of a subsequent marriage, yet this can never be stretched to other persons, *quoad* whom they are bound to warrant deeds though gratuitous, seeing donations import warrandice against all future deeds; but here Sir Patrick is not straitened, for his disposition and discharge was granted for just and onerous causes, though he is bound to say adequate and equivalent to the value. THE LORDS, by a plurality of seven against six, did find his retour did not singly make him heir of provision, but likewise general heir-male. Then Sir Robert *contended*, This could never oblige him to warrant his father's deeds in favour of Sir Patrick, who was incapable to receive them by reason of the trust stated in his person by Sir John Home, his father, making him accountable at the sight of my Lord Halton and Kaims, to the effect the rents might be applied for paying the debts. *Answered*, These gentlemen dying before any account was stated, he had no other to count with but his brother; and to make this a trust were strange, when the tack is set to his heirs and assignees, as well as to himself; whereas in all trusts industria et fidelitas personæ principaliter attenditur, which could not be in heirs and assignees, whose fitness was impossible to be then known; and in the count depending betwixt them before the Lords, might not Sir Alexander have said, I allow this article, for I know it to be just and true, and could the Lords have rejected it? *nullo modo*, and if he could allow one or more articles, what hindered him after perusing the state

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of the accounts, and finding he could not quarrel them, but he might give a discharge, especially on so advantageous terms as Sir Patrick gave him.

THE LORDS having advised this point of the trust by the tack, in the beginning of January 1709, found Sir Robert, though heir general, not bound to warrant his father's disposition and discharge, because he had accepted the trust by the tack. It carried only by the President's vote.

Fountainhall, v. 2. *p.* 428. 454. & 472.

1709. *December* 23.

The CREDITORS of the deceast GEORGE MARSHALL, Merchant in Edinburgh, *against* His CHILDREN of the First and Second Marriage.

No 56.
Creditors preferred to children who had adjudged on their bonds of provision, dated before the debts were contracted.

IN a competition betwixt the Creditors of George Marshall and his Children, those of the first marriage having adjudged upon bonds of provision granted to them by their father, and the Child of the second marriage having adjudged for the provision in her mother's contract of marriage; both craved to be ranked *pari passu* with the creditors.

Alleged for the Creditors; The Children cannot be brought in equally with them; because, contracts of marriage and bonds of provision are but the father's destinations in favours of their Children, whereupon no diligence could be used against the father in his lifetime, as was decided, February 10th 1688, in the case of the Creditors and Children of William Robertson, No 36. p. 4929. And seeing children can have only a share of their parents' means, they can pretend to nothing till his debts be satisfied; that only being ours *quod deductis debitis est nostrum*.

Answered for the Children; 1*mo*, Those of the first marriage contended, that they were not only Creditors to their father *jure naturæ*, whereby parents are obliged to provide for their children; but also were onerous creditors to him, in respect of a great tocher he got with their mother, and their bonds were prior to the contracting of the Creditors' debts, and therefore they ought to be preferred, December 11th 1679, Creditors *contra* Children of Mouswell, No 60. p. 934. 2*do*, The Child of the second marriage *pleaded*, That her provision was conceived in her mother's contract of marriage before the date of the Creditors' bonds, which was an onerous, and no latent deed; and the Lord Preston's children of the second marriage were brought in with his creditors according to their diligence.

Replied for the Creditors; The provisions must be considered only with respect to the father's condition at his death, at which time being insolvent and bankrupt, he could do no deed in prejudice of his just and lawful creditors; as is clear from the practick betwixt the Creditors and Children of Robertson, No 36. p. 4929., and that of Inglis *contra* Boswell, November 14. 1676, No 236.