

failure of issue of the said marriage, do pertain to the said disponees in the terms thereof, and that John Weir, of John's-Hill, the purchaser of the brieve, his claim for serving himself heir of provision to the said William Weir his brother, in virtue of the said contract of marriage, in the lands contained in the foresaid deeds of settlement, is thereby excluded; and decern and declare accordingly in the before repeated summons of declarator, at the instance of the said Mr. William Steel and others, disponees before mentioned."

1745. *February 13.* JAMES WILSON of Giles *against* THOMAS PURDIE.

This case is reported by Falconer, 1—76. (*Mor.* 10451.)

The following report of it by Lord Elchies, is bound up with Lord Kilkerran's papers.

"At the ingiving of the petition, *Feb. 22, 1744*, what follows was wrote on the Ordinary's own copy of it, which he sent to me by a macer, at advising petition and answers.

"Against my interlocutor, finding that Thomas Purdie is not bound to communicate to the petitioner the ease of the debt acquired by him, secured by inhibition, though he is made consenter to the bond, and though there was infestment on it before his father's disposition to him, and though I had before found in a question with his sisters, whose provision he was taken expressly bound by his acceptance to pay, he could not state that debt more than he paid for it.

"1704.—James Purdie was pursued in a count and reckoning at the instance of Samuel Purdie's children, and inhibition raised on the dependance, and, 1718, a long decreet obtained for L.6240, with annual-rent from the expiry of the tutory.

"1711.—He had granted a bond of provision to the respondent and other three younger children for 4000 merks, payable after his death, but with a power to alter.

"*June 5, 1711.*—He granted heritable bond on the lands of Westforth for 400 merks, and the respondent Thomas Purdie, his second son, is inserted in the docket as consenter and witness, and signs accordingly as both, but is not mentioned in any other part of the bond, nor had he then any interest in the lands.

"*November 28, 1711.*—James Purdie disposed these lands of Westforth to the said Thomas his second son, reserving his own liferent and power to alter, *Proviso*—That Thomas, by his acceptation to his two younger brothers and sister of 2400 merks, that is, 800 merks to each, and their lands expressly burdened therewith; and these lands are said to be only 206 merks of free rent, deducting feu and teind duties, &c.

"1720.—He granted an heritable bond of corroboration of the first 4000 merks bond, on the same lands of Westforth, in favours of his said four younger children, including the respondent, but allotted to him no more of it than ten merks; and the three children, and, I suppose, also the petitioner, were infest in that bond May 27, 1720.

"*October 20, 1720.*—The respondent's two younger brothers, Robert and Andrew, got from the said James Purdie, a tack of the lands for nineteen times nineteen years, at the yearly rent of 100 merks.

“ 1723 or 1724.—James Purdie died, and the said two youngest sons, Robert and Andrew, seized the possession on the said tack, and kept it till within these two years, and retained the rents for payment of the annual-rent of said 4000 merks.

“ 1725.—The respondent being threatened with a declaration of non-entry, took a charter of confirmation of his father's disposition, and was infeft ; but never thereon attained possession.

“ The respondent purchased two-thirds of the above great debt of L.6240, bearing annual-rent from 1703, from two of Samuel Purdie's children, and in 1739, adjudged from Christian Purdie, daughter of his eldest brother John Purdie, as charged to enter heir to her father and grand-father, for the accumulated sum of L.10200 ; but the other one-third is yet outstanding, and when he got possession the houses were ruinous, which cost him 1000 merks.

“ The respondent pursued mails and duties on his adjudication, and his younger brothers and sisters competed, and, June 19, 1741, I found that he could not use the debt purchased from Purdie's children, in prejudice of the 2400 merks wherewith he was burdened by acceptance of his father's disposition ; and he acquiesced.

“ And now, the petitioner Wilson also competes on his heritable bond of 400 merks, and insists, that he cannot use that debt either in his prejudice ; at least, that he cannot state it at more than he paid for it. But I found, that the acceptance of the gratuitous disposition from his father, did not bar him from taking the benefit of any other right or diligence purchased by him, in competition with the other creditors of the disponent, or oblige him to communicate to them the eases of such purchase. Petitioner says there is no difference betwixt his onerous debt, which was secured on the lands, and the children's provisions. *2do*, That he was taken consentor, because his father had then formed the resolution of giving him the land, and would have burdened him with the debt, but that it already affected the land. That it ultimately affected this land, without relief, against the eldest son ; and, therefore, it were *contra fidem* to purchase in other debts secured by inhibition to exclude it. That he was in the case with an heir *cum beneficio*, and must communicate eases ; and in sundry cases eases must be communicate by persons who are not themselves bound in warrandice, as in the case of superiors purchasing gifts of their own wards or marriages, or even forfeiture. The reason thereof is, that where divers persons are interested in one common subject, one of them purchasing in an incumbrance, is presumed to do it for the behoof of the whole, which must be the reason of the interlocutor in favours of the children, and not the personal obligation ; for if the subject had been evicted, that personal obligation would have been at an end.

“ ANSWERS state the fact as above, and say that the dispute is in vain ; because the children's provisions, and that he paid for the two-thirds of Purdie's debt, is more than the value of the lands, besides the other one-third yet outstanding.

“ *2do*, That though the petitioner is preferable to the respondent's disposition by his priority, yet the disposition is not burdened with it ; nor is the respondent, by accepting it, personally liable ; nor is he his father's heir, or apparent heir ; and, therefore, there is nothing to hinder him to purchase what rights he pleased. And that this differs from the younger children in this, that, by accepting the disposition, he was personally liable to them, which he was not to the petitioner.

“ *3tio*, That his consenting to the bond signifies nought, since he had then no right to the subject, nor got no valuable consideration for such consent, which, therefore, could

only import for such right as he then had, but could not hinder him to acquire other rights thereafter; and the brocard would not apply *jus superveniens auctori*, which is the case of a superior's heir acquiring right to his own ward, albeit he be not liable in warrandice, in case of eviction by another, yet acquiring the right himself. It is *jus superveniens* (and he might have added, that for that reason, such casualties acquired by the superior's apparent heir do not accresce, *Stair*, p. 249, and 381.) But a naked consentor is liable in no warrandice, *Spotiswood, Warrandice; Craig, Lib. 2, D. 4*, and bars not the consentor to evict upon superior rights; *23d February, 1667, Earl of Errol, against Hay of Cruninogat; 8th January, 1668, Forbes against Innes, Dirleton; and 27th June, 1681, Stewart against Richardson.*

“ I have stated this case, and the arguments the more fully, that it seems not without difficulty; and the difficulties are greater than perhaps I at first apprehended. Not, indeed, because of the consent; for that would not bar him from acquiring other rights: and the difference also betwixt the petitioner's case, and that of the other younger children, is manifest, because, by the tenor of the disposition, his sole acceptance made the respondent personally liable for the 2400 merks, whether he possess or uplifted or not, unless he were debarred, or the subject had been evicted; and he could not subsume that there had been any eviction by this debt, (though I do not know but I should have thought the disposition pretty effectually revoked by the subsequent deeds; *i. e.* bond of corroboration and tack in 1720, if they had been pled.) Whereas his acceptance of this disposition did not make him personally liable to the petitioner, though he could not compete with him; and the petitioner's only remedy was by action of mails and duties, or pointing the ground. And had he never accepted the disposition, his consent to the bond would not have hindered the respondent to compete on any other right acquired after that consent; and the question is, if his acceptance of the disposition alters the case?

“ As to which, it is to be considered how the law would have been as to this debt, though there had been no subsequent revocations, nor prior inhibitions. In that case, the petitioner would not only have been preferable to the respondent, but I doubt the respondent would have had no relief from his father's heirs, or out of his other estate, and that the intention of the disposition was no more than to give him these lands of Westforth, burdened with this 400 merks, and with the further burden of 2400 merks to the younger children. Indeed, every creditor of the father's, personal or real, at least every prior creditor, could have reduced the respondent's right so far as it was to their prejudice. But then the petitioner would have had relief against his father's heirs, of these debts. But as this debt was specially settled upon Westforth, and his consent taken to that deed, though before his own right to the lands, the meaning in giving him the lands, seems to have been that he should pay that debt; and when he pays it, the disposition has taken its full effect, and the implied warrandice is not incurred, though it does not mention this debt.

“ A gratuitous disponent, whose right is threatened to be challenged, may no doubt acquire other rights or diligences for defence of it, and may use them to their full extent to defend his right, such as he got it; and supposing the disponent liable in no warrandice, because the disposition was gratuitous, yet, if the diligence acquired were upon his bonds, the disponent may, notwithstanding, still compel him to pay his debts; yet, if they were truly acquired to prevent eviction, it would

be *contra bonam fidem*, and against law too, to suit execution against the disponent further than they cost him; and if the disponent's right were burdened in favours of other persons, the benefit ought to accresce to them, and that because of the privity and trust betwixt the disponent and disponent, by granting and accepting the disposition.

“And in the present case, if the respondent, instead of taking confirmation from the superior, had taken a gift of non-entry, that would have been preferable to the inhibiting creditor, and he might have taken the benefit of it to exclude him; yet, if his father's meaning was to give him the lands with the burden of the debt, I doubt whether he could use it to evade the debt; though I confess the decision, 23d *February*, 1667, seems pretty much contrary to the notion; and I confess I am still very doubtful of it, since his right is not expressly burdened with it.

“But then the fact now represented suggests another consideration. This disposition, 1711, was in effect revoked by the bond of corroboration and tack 1720, for nineteen times nineteen years, for a tack duty not equal to the annual-rent of the sum in the corroboration. Had the respondent not accepted the disposition, I should have had no doubt that he might purchase what rights he pleased. Now, suppose he accepted, yet, if the disposition had directly been revoked, the acceptance would have gone for nothing. It is true it is not directly revoked, because the property is not formally conveyed away; yet in effect it is revoked, and, therefore, it would be hard to bar him, by that acceptance, to acquire other rights; and had they been pled in the question with the other children, I do not know but it would have varied my opinion.

“What follows, was wrote at advising petition and answers the 13th *February*, 1745.

“The Lords altered.

“KILKERRAN and TINWALD both spoke for the interlocutor.

“ARNISTON and PRESIDENT spoke against it. I spoke last, but rather against it, upon the case as it was before me. But I thought the disposition revoked, and, therefore, the same as if it had not been accepted. Upon my speaking, several moved to remit it back to me, but the President put the question, adhere or alter? Kilkerran voted to alter. Tinwald did not vote. I voted *adhere* upon the revocation; but the Lords would not allow of that; therefore, I did not vote, and it carried by a narrow majority to alter*.”

1745. *July 30*. Creditors of ROBERT CUNNINGHAM *against* SUSANNAH CUNNINGHAM, his daughter, and MARY GAVIN, his wife.

THE said Robert Cunningham, who died in the West Indies, by his last will and testament, bequeathed to Mary Gavin, his second wife, in liferent, and to her daughter, in fee, his whole moveable estate in Scotland, and nominated his only son, Daniel Cunningham, his executor.

* The above report appears to have been written by Lord Elchies, as is proved by the following note, made by Lord Kilkerran, on the back of it. “Within is a copy of what Elchies had wrote on the margin and last page of the petition against his own interlocutor, in the case *Wilson of Gillies against Thomas Purdie*.”