

proportion, to be calculated *intuitu* of the whole estate, stock, and teind, which was once in the person of the father; being moved thereto upon these reasons, that this debt being the father's debt, the pursuer was heir by progress to the whole stock, having succeeded to her brother as heir, and who was successor *titulo lucrativo* to her father, by a right of infeftment granted in his own time; and as her brother, if he had lived and paid the debt, could have craved no farther relief, so the pursuer, being heir to him, and in law *una et eadem persona*, could be in no better condition; and besides, heirs-portioners, or all those who are conjoined in societies, whereby they have interest by succession or contract *in re communi*, and all benefit or burden, they ought to share according to their several interests or proportions, upon that principle, *quem sequitur commodum eundem et incommodum*, which is a principle founded on common equity and reason; and therefore, as she succeeded to more than four parts of the father's estate more than the defender, she was liable to as much more of the debts, and could crave no farther relief.

Gosford, MS. No 588. p. 333.

1716. July 12.

MARION and MARGARET WRIGHTS against WILLIAM and GEORGE SMITHS.

THOMAS WRIGHT, merchant in Dumfries, having been twice married, obliges himself, in the contract of marriage with the first wife, to secure her in L. 1000 in liferent, and the children in fee; and to the second 2000 merks in the same manner: The only child of the first marriage being married to Mr Patrick Smith, the second wife of Thomas, after his decease, paid the said L. 1000 to the said child of the first marriage, and Smith her husband; after which, the said child of the first marriage, with consent of her said husband, granted bond to Sir Patrick Maxwell, whereupon he led an adjudication against her, as lawfully charged to enter heir to her father, and adjudged from her some lands, &c. in Dumfries; which adjudication was disposed by Sir Patrick to William Smith, son procreated betwixt the said Mr Patrick Smith and the said deceased Agnes Wright; and the Magistrates of Dumfries are charged to infeft the said William upon the said adjudication.

Upon this there is a process upon the passive titles, raised at the instance of the children of the second marriage, after serving heirs-portioners to their father, against the said William Smith a minor, upon the ground of the act of Parliament 1695, cap. 24. concerning the obviating the fraud of apparent heirs.

Answered for the defenders; That the pursuers being served heirs-portioners, their claim is extinct *confusione*.

Replied for the pursuers; That, as they succeed to the two-thirds of their father's inheritance, so far indeed the debt is extinguished *confusione*; and

No 10.

No 11.

In a process at the instance of two heirs-portioners against the third, for payment of a debt due to them by the defunct *singulari titulo*, the Lords found, that the debt was extinguished by confusion as to two third parts, to which they succeeded as heirs-portioners, but granted decree for the other third.

No 11. therefore they only insist against William Smith, who doth represent his mother as one of the three heirs-portioners, for the third of their provision, in which he must be liable, as having purchased the foresaid adjudication.

*Duplied* for the defender; That a service in indefinite terms is an universal representation, and therefore a total extinction of the pursuers claims, which must certainly take place, unless they had cognosced themselves heirs of provision, or of the second marriage, in which case only the extinction would have been partial. Further *alleged* for the defender, That he could not be liable in behaviour, being minor, and not capable to accept a disposition, which was necessary to infer behaviour; and, *2do*, That he did not possess the land adjudged.

*Answered* for the pursuer, to the 1st; That nevertheless the defender must be liable in the terms of the act, unless he repudiate or renounce the benefit of the said adjudication; because, by purchasing it, he had acquired a right to a legal diligence affecting his predecessor's estate, which is all that the act requires to infer behaviour, just as it holds in the case of a successor *titulo lucrativo*. To the 2d, *answered*, That the foresaid clause in the act of Parliament establishes a behaviour in two cases, viz. if the apparent heir either possesses his predecessor's estate, or acquire and purchase any right thereto, or to any legal diligence affecting the same.

'THE LORDS found the defender liable in the passive titles according to the act of Parliament 1695, unless he renounce the right purchased for him to the tenements and acres belonging to his predecessor; and sustained the defence of extinction of the debt by confusion, in virtue of the general service for two-third parts to which the pursuers succeed as heirs-portioners; but repelled the same as to the other third part.'

Act. *Fleeming*.

Alt. *Ila Ferguson*.

Clerk, *M'Kenzie*.

*Fol. Dic. v. 1. p. 356. Bruce, v. 2. No 17. p. 21.*

No 12.

1717. July 12. MAXWELL of Monreith *against* HOUSTON of Calderhall.

AN heir male evicting the estate from the heirs of line who had entered, and upon the faith that the estate was their own, had paid several debts; the question occurred, if relief was competent to them against the heir-male. It was *pleaded* for them, That he ought to be ultimately liable who enjoyed the defunct's estate, seeing it is most rational, that the defunct's debts should be paid out of his effects; upon this footing stands the relief betwixt the heir and executor.—THE LORDS found no relief competent.

This was reversed by the House of Lords. See APPENDIX.

*Fol. Dic. v. 1. p. 356.*