

IMPLIED POWER.

1721. February 8.

MR DAVID SPENCE *against* MR. ALEXANDER ELPHINGSTON.

THE late Archbishop of St Andrews disposed a sum to Alexander Ross, his eldest son, in life-rent, and his heirs in fee; failing of which, to James his second son, and his heirs in fee; in which substitution, though James was designed to be fiar, yet, by some clauses in the deed, his power was restricted, that he could do no deed in prejudice of his children. Afterwards, by a contract betwixt the brothers, James discharges the substitution in his favours, and agrees that his brother Alexander should have the disposal of his own portion; whereupon Alexander makes a disposition to Lady Balmerino, his sister, in life-rent, and her son Mr. Alexander Elphingston in fee. The Lord Balmerino being debtor in part of the sum disposed thus to Mr. Alexander Elphingston, David Spence, a creditor of James Ross's, arrests in his hands, and (Alexander Ross being now dead) pursues a furthcoming of the annualrents that fell due since his death; founding his claim in this manner, that since Alexander Ross's disposition to his sister and nephew was null as to the principal sum, (which it was allowed to be, because Alexander could not dispoise upon the fee, except in consequence of his brother James's discharge, and James could not discharge in prejudice of the substitution), it must also be null as to the annualrents, which could only be carried as a consequence of the principal; and therefore concluding, that James and his creditors should be found to have access to the annualrents, as if the discharge had never been granted. On the other hand, it was *contended* for Alexander Elphingston the dispoinee, that though the disposition be not found effectual for the principal sum, as flowing *a non habente potestatem*, it must be good as to the annualrents; which, without question, James Ross had the absolute disposal of after his brother's death, by virtue of the substitution, and which he has virtually disposed in the contract and discharge above mentioned; so that now he cannot be heard against his own deed.

The question came shortly to this, "How far this discharge of the substitution, which, as to the principal matter intended by it, was ineffectual, was

No 1.

A disposition, null for want of power in the granter, as to the principal sum, found yet to carry the annualrents over which he had power, though not expressly conveyed.

No 1. nevertheless sufficient to convey to Alexander a power of disposing the annualrents which should grow during the lifetime of James, though no mention was made of these annualrents, or of any power of disposal thereof." And it was *pleaded* for the arrester, That James Ross has neither expressly nor virtually assigned or discharged these annualrents; for, as to the discharge of the substitution *in toto*, which is admitted he could not do, since it is a void deed as to what was thereby directly intended, it must be ineffectual as to the conveyance of the annualrents; which only would be carried as a consequence thereof, were it entirely valid. James indeed had the disposal of these annualrents during his lifetime; this power he might have exerted, by granting direct assignations to the annualrents, as a principal subject; but, *quod potuit non fecit*, he chose to make a deed, which, if valid, would in consequence have carried the annualrents as an accessory; but since this deed is null, it can have no consequences or accessories. In a word, Mr Elphingston can have no claim to these annualrents as an accessory; because, if the principal deed be null, so must its accessories. He can have no claim to them as a principal distinct right, because there was no such conveyance made to him; and therefore he can have no right to them at all. To clear this point from analogy, Mr Spence shall produce a few instances where this ground of law takes place. A person interdicted may assign the rents of his lands without consent of his interdictors; a disposition of these lands made by him would imply a right to the rents; and yet, if this disposition were reduced *ex capite interdictionis*, it is certain law it would not subsist to carry the rents. An heir of entail, under prohibitory and irritant clauses, may assign the rents of his lands, *cum effectu*, during his life; a disposition made by him, would virtually contain an assignation to the rents; and yet if that disposition were reduced, as flowing *a non habente potestatem*, it would not maintain the dispositive in possession of the rents. Again, an heir of entail, empowered to set long leases, but not to alien, by disposing, gives the purchaser power virtually, to set what tacks he pleases; a tack set by such heir would be valid, and yet tacks set by the purchaser, in virtue of the right received from him, would be good for nothing.

On the other hand, it was *contended* for Mr Alexander Elphingston, That wherever any person disposes a subject, though his disposition may not be valid to the full effect intended, through defect of the disposer's right, it will carry whatever interest he has in the subject; which Lord Stair expressly holds forth, B. 3. T. 2. § 1. and gives the reason at the same time with the authority. But to come close to the argument, it is allowed, that Mr Elphingston's right to the annualrents is neither as an accessory, nor by virtue of a direct assignation of that subject, as a principal right; yet it will not follow that he has no right. There is a *third* branch, upon which Mr Elphingston founds, and the way he lays his claim is precisely thus: Though the discharge in the mutual contract of the substitution was null, and consequently could not carry the annualrents as an accessory, it nevertheless implied a valid obligation, upon the

granter of this discharge, to make these annualrents effectual to Alexander Ross, and of consequence to Mr Elphingston his disponee; but it is an uncontroverted principle, that an obligation to grant a disposition is virtually a disposition; and, therefore, though Mr Elphingston has no direct positive disposition to the annualrents, he has what the law reckons equivalent thereto. To answer the examples produced on the other side: As to the *first*, A person interdicted cannot dispoise the rents of his lands without his interdictors; he may indeed discharge bygone rents, or assign them from term to term; for then they are considered as a moveable subject, which interdictions do not touch; and accordingly these will remain with the disponee, though the disposition be voided *ex capite interdictionis*; as would also the whole rents during the life of the interdicted person, if it were not, that a disposition to rents in time to come, is an heritable subject, falling under interdiction; so that this example turns strongly against its maker. As to the other examples, they do not apply to the present case. It is indeed true, that a disposition by one under prohibitory and irritant clauses, will neither convey the lands nor the rents; but the reason is, because the disposition irritates the disponent's own right; and consequently any pretence of right in the disponee. But suppose one to be possessed of an estate, not under irritancies, but under an obligation not to alter a certain order of succession, notwithstanding whereof, he gratuitously disposes to a third party; if the next heir of the investiture raise a reduction, he will not prevail further than he is lesed; but, *ita est*, he suffers no prejudice by the disposition during the disponent's life, which therefore, for the rents during his life, would subsist to the acquirer. And it would be absurd to pretend, that the heir prevailing in his reduction, the rents would fall back to the disponent; and yet this is precisely the case in hand.

THE LORDS found, that supposing the father's destination did disable his sons to discharge the mutual substitutions, as to the fee of the sums disposed to them by the father; yet found the conveyance made by Alexander to Lady Balmerino and Mr Elphingston, by virtue of the mutual contract, is effectual for the annualrents of these sums bygone, and in time coming, during James's lifetime.

Fol. Dic. v. 1. p. 441. Rem. Dec. v. 1. No 24, p. 53.

1747. November 10.

MR JOHN FOULIS *against* The VESTRY of the Chapel at the foot of Blackfriars Wynd, Edinburgh.

THE late Lord Chief Baron Smith founded a chapel at the foot of Black-friars wynd, for the celebration of divine service, according to the liturgy of the Church of England, providing, 'That no minister should be capable of officiating in the said chapel who was not qualified, by taking the oaths to the

No 1.

No 2.

The founder of an episcopal chapel gave the vestry power to chuse.