No 116.

is heir of a marriage.—It was *duplied*, That *præceptio hæreditatis* cannot be extended to the heir of a marriage, who is in some sort a creditor by the contract of marriage, and therefore at most can be liable *in quantum est lucratus*.—It was *triplied*, That though the heir of the marriage be a creditor as to the heir of line, yet not as to his father's creditors, but as to them, he represents his father as debtor, if he immix himself in his father's heritage, by accepting dispositions of his land or annualrents; though assignations to bonds taken to the heirs of the marriage being liquid might only import *quoad valorem* as to any heir, yet accepting and using a disposition as to lands and annualrents, that is an universal passive title.

The Lords found it a relevant passive title, that the defender had accepted and used a disposition of his father's lands and annualrents, wherein he would have succeeded as heir of the marriage; and repelled the exception of the order of discussing, seeing the eldest son was neither entered heir nor had any thing to enter heir to.

Fol. Dic. v. 2. p. 35. *Stair, v. 2. p.* 863.

No 117.
Found in conformity with More against Ferguson, *supra*.

1698. *November* 16. Elliot of Swineside *against* Elliot of Meikledale.

Simeon Elliot of Swineside, as assignee to the sum of 2000 merks, being the remainder of a tocher of 8000 merks, contracted by the deceased Adam Elliot of Meikledale with his daughter, pursues William Elliot, now of Meikledale, as representing his father upon the passive titles.

For proving the defender's representation, the pursuer produced a charter of the lands of Meikledale, in favours of the defender's father in liferent, and his eldest son of a second marriage to whom the defender is heir in fee, with a faculty to the father to burden the lands, not exceeding the third part of the value; and insisted to make the defender liable as successor to his father by the foresaid disposition after contracting of the pursuer's debt.

The defender *alleged*, That his father having a sufficient estate beside the lands of Meikledale, he might lawfully provide the fee thereof to a younger son, who was not *alioqui successurus*, without subjecting that son to any debt; and, for instructing that the father had a sufficient estate, repeated the inventory of the confirmed testament lying in process.

The pursuer *answered*, That the defender being executor confirmed, and having repudiated and reduced the testament, he cannot found upon it to prove a separate estate; "which answer the Lords sustained."

The defender further *alleged*, That, albeit the testament was not probative, yet the defence of a separate right being relevant, he offered to prove his allegeance by the pursuer's oath of knowledge.

The pursuer *answered*, That the allegeance of a separate estate existing, that might now be affected for payment of the pursuer's debt, was relevant; but

esto there had been a moveable estate, which is not now extant, at least appears not, no such separate estate is sufficient to exclude a lawful creditor, in competition with a son who got the fee of a considerable land estate after the pursuer's debt; because moveables pass *de manu in manum*, without writ, and possession gives a right, and in time the very species thereof is consumed; and therefore, albeit there be an order of discussing heirs, yet no creditor is bound to discuss executors.

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The defender *replied*, He is no ways to be considered as an heir, but only as a conjunct and confident person, receiving a gratification after contracting of the pursuer's debt; and it is sufficient to purge the presumptive fraud in the father, and to elide the act of Parliament 1621, that there was any sufficient estate at the time that the fee was taken to the defender, and that the debtor continued to have a sufficient separate estate to pay all his debts to his death. And, for further clearing of this point, the defender doth cite very many decisions, 21st June 1677, Hopepringle against Hopepringle, No 12. p. 4102, where a father having granted a bond after he had disponed his estate to his son, reserving a faculty, "THE LORDS found it was the presumed will of the father, that the bond should burden his executry in the first place." June 22d 1680, Grant against Grant, No 8 p. 100, where a bond to a child being quarrelled by a creditor, "the LORDS sustained the defence, that the father had a sufficient separate estate at the time." The like 11th December 1679, Creditors of Mousewell against Children of Mousewell, No 60. p. 934; 30th June 1675, Clerk against Stewart, No 46. p. 917; 6th March 1632, Laird of Garthland against Sir James Ker, No 45. p. 915; and in a case quadrating in every circumstance, 10th November 1680, M'Kell against Jamieson and Wilson, No 47. p. 920, "the LORDS found, That a disposition of a tenement made to a grandchild by a daughter was not quarrellable by an anterior creditor;" seeing the disponer had a sufficient estate, whether by infeftments, moveables, or bonds, notwithstanding that the disponer had no sons, and that his daughters were his appasent heirs, and that he reserved his liferent, and a faculty to burden, as in this case.

It was *duplied* for the pursuer, That he doth not insist upon the act of Parliament 1621, for reducing the fee in favours of the son as fraudulent, but he insists against the defender as heir to his brother, who is heir of tailzie to his father the debtor, by taking the fee in favours of a son after contracting of the pursuer's debt. And as to the practiques adduced, they are not parallel; for they are generally in the case of particular rights, or provisions to younger children, whereby the children were made creditors to their father, which the LORDS did sustain, as being rational provisions, made by parents having estate to pay their debts, and without fraud.

The only decision founded on, that doth approach to the case in hand, is that of Mr M'Kell against Jamieson and Wilson, 10th November 1680, where

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the grandchild might have been pleaded to be an heir of tailzie *per præceptionem*, and so liable to the debt; but the case was not so pleaded, nor under the LORDS' consideration when determined.

In this case, the pleading did not so clearly distinguish the title whereupon the defender might be overtaken, whether upon the act of Parliament 1621, or as an heir of tailzie; but the LORDS did difference the case in the reasoning, "and found the defender liable as heir of tailzie *per præceptionem*, by progress, to his father, who purchased the said lands by his means, after contracting of the pursuer's debt, and also reserved a faculty to burden the fee."

The defender having reclaimed, representing that the original fee, in favours of the son of the second marriage, was anterior to the pursuer's debt; but that the father and son resigned, and took a new charter, with a faculty to burden, posterior to the pursuer's debt;

Upon which the LORDS, by interlocutor of the 29th November 1698, "found the defender was not liable as an heir of tailzie, the original fee being taken to the son before the pursuer's debt, albeit it was but three days prior, and the disposition retained by the father till the new resignation; but allowed a further hearing how far the defender was liable by virtue of the reserved faculty. *Vide* 16th December 1698, *inter eosdem*, No 22. p. 4130, *voce* FACULTY.

Fol. Dic. v. 2. p. 35. Dalrymple, No 3. p. 4.

1717. *January* 24.

MR JOHN HENDERSON *against* JANET WILSON and COLONEL LAWSON, her Husband.

No 118.
A son obtaining a disposition from his father was thereon infeft, and in possession. He dying before his father, could not be liable *præceptione hæreditatis*, but his heir was found liable, serving to him in that special subject, and possessing after the father's decease.

MR JOHN HENDERSON pursues Janet Wilson, as representing her father, on this ground, that the defender's father disponed his estate to Francis Wilson, his eldest son, who thereupon was infeft, and in possession *præceptione hæreditatis*, and the defender, the Colonel's Lady, is heir to, or otherwise represents her said brother, and thereby is liable to the pursuer's debt, which is anterior to the father's disposition in favours of the eldest son.

The defender *alleged*, That her brother could not be liable *per præceptionem*, because he died before his father; and, though he had accepted the disposition, and been in possession during his father's life, he might have abstained after his father's decease, and thereby would not be liable personally; and as little can the defender be liable as representing him.

It was *answered*, The defender is liable, albeit the brother was not; because she was heir served and retoured to her brother in the estate which her father disponed to him, at the least that she continued to possess the said estate after the death of her father; and, as her brother would have been liable, if he had continued his possession after the decease of her father, so the defender having