

here in the sequestration, but left him to prosecute it in the ranking ; though there is nothing more usual than to receive such reductions, and allow them to repeat their reasons summarily. But the Lords inclined to let her possess, though it was but lamely founded, till it were formally quarrelled and taken away in the ranking, where Sir William would certainly prevail.

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1707. July 16. ALEXANDER DRUMMOND *against* THOMAS CALDERWOOD.

Mr Alexander Drummond, writer to the signet, as principal, and James Cockburn, writer in Edinburgh, as cautioner, grant bond to Janet Calderwood for 1000 merks, not to be payable but at the sight and by the advice of Thomas Calderwood in Dalkeith and Alexander Reid, goldsmith in Edinburgh. The said Janet being married to John Little, he pursues William Cockburn, the heir of the cautioner, before the Commissaries of Edinburgh, for payment ; and though he instructed that a considerable part of the sum was paid to the said Thomas Calderwood, and his receipt produced, yet the Commissaries repelled the defence ; because neither the said Janet herself consented, nor yet Alexander Reid, the other party, by whose advice it was to be uplifted. Whereupon William Cockburn was decerned, and accordingly made payment, and pursued Drummond, the principal debtor, to relieve him ; who repeated the foresaid defence, That he had made partial payments to Thomas Calderwood. And he likewise compearing in the process, did further allege, That the payments made by him could never be repelled, on pretence of the want of the said Janet's or Alexander Reid's consent ; but ought to be sustained, because he offered to prove, that what he uplifted was *in rem versum* of the minor, and applied for her necessary maintenance, education, clothes, apprentice fees, &c. Which the Commissaries still repelling, Mr Drummond was forced to pay it in to William Cockburn, the cautioner's heir. Whereupon Mr Drummond, as his last refuge in law, intents a process of repetition against the said Thomas Calderwood, for repaying the sums contained in his receipts, which the Commissaries had refused to allow, as being *indebite solutum*.

ANSWERED for Mr Calderwood,—That the Commissaries had committed gross iniquity in repelling his unanswerable defence, That whatever he uplifted was *in rem versum* to the minors ; and you Drummond nor Cockburn ought not to have acquiesced therein, but you should have suspended on that reason ; and, having neglected the remedy law gave you, can never recur against me ; but *tibi imputes*.

REPLIED,—This comes too late, and is neither competent nor relevant now : not competent, after two decreets, in both which you are compearing yourself, and proponing all you can say ; and not relevant, because twice repelled. And whether the Commissaries' sentence be *æqua* or *iniqua* is not the question, seeing you were not only certiorated of the whole procedure, but ought to have suspended for me ; which you having omitted, you must be liable in repetition of what is found to have been unwarrantably uplifted by you.

The Lords found an evident loss and hardship on both sides ; and that they were both *in damno vitando* ; the only question being, Which of them should

have suspended? The Lords found neither Cockburn nor Drummond ought to have paid on the Commissaries' decret, without suspension; and that the Commissaries should not have repelled that relevant defence of being *in rem versum*; and therefore found the said defence yet competent and relevant against the cautioner's heir, notwithstanding the Commissaries' decret; and assigned a term to prove it.

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1706 and 1707. MR WILLIAM AYTON of that ilk *against* The LADY AYTON and her CHILDREN.

1706. *February 23.*—MR William Ayton of that ilk *against* the Lady, his mother-in-law, and her Children. He, as heir served to Sir J. Ayton, his father, *cum beneficio inventarii*, pursues reduction of the provisions made by his father to my Lord Colvil's sister in his second contract of marriage, giving her twenty-two chalders of victual, and 40,000 merks to the bairns, besides £16,000 Scots he gave them since; which being exorbitant, and procured *delinimentis novercalibus*, and far beyond what the estate could bear, and contrary to the provisions made to him in his mother's contract, he craved to be reduced, as *contra fidem tabularum nuptialium*, the obligations of the first contract being onerous and prior, and so ought to be first performed.

ALLEGED,—The pursuer having served himself heir simply, and not as heir of provision and of the first marriage, he can never quarrel his father's deed, but is liable to fulfil all his obligations, and becomes both debtor and creditor; *aditio hereditatis* being *actus legitimus qui nec diem recipit nec conditionem*.

ANSWERED,—Though his retour does not expressly bear *ratione provisionis in contractu matrimoniali*, yet materially it imports it; seeing it mentions that *lator præsentium* is the son of the first marriage. Likeas, he is served on the Act 1695, *cum beneficio inventarii*; and having both the characters and capacities, as heir of line and heir of the first marriage in his person, he may make use of any of them that he pleases: as was found in *Livingston of Saltcoats'* case *against Mrs Margaret Menzies*; and between *Janet Kennedy* and *Matthew Cuming*.

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1707. *July 18.*—The case mentioned 23d February 1706, betwixt Lord Rankeillor and Lady Ayton, and now, on my Lord's death, transferred in his lady's person, was reported. And the competition falling betwixt Sir John Ayton's children of the second marriage, as assignees, and the executors-creditors of Sir John; it occurred to some of the Lords, whether the assignments were granted for implement of the provisions matrimonial, which relation to their mother's contract would make them more onerous. But, after inspection, it was found that they proceeded on the narrative of love and favour. And though the children declared, that they would make no other use of them than to fortify their provisions, yet it was urged, that this was contrary to the express will and narrative inserted by the father, in his assignments to them. The children further alleged,—That, in the case of the bairns of Douglas of Monswal, the Lords sustained provisions to bairns as preferable, in respect he had a sufficient visible estate at the time, able to pay both his debts and his bairns' provisions. But this interlocutor was altered after the Revolution.