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the pursuer cannot insist to make the defender liable, as representing Sir Thomas, by her father's accepting with the said quality in the disposition, otherwise than in the terms, and with the conditions and quality thereof; because he, as assignee by the daughters, did formerly make use of that disposition, and obtained the benefit and advantage of the quality therein contained, libelling, that thereby Richard had undertaken the payment of the 11,000 merks to the younger children, with annualrent, and by his acceptance was bound to pay the sum. And the specialty and difference of the case lies in this, that a creditor pursuing upon his bond as his active title, and recovering a disposition *per preceptionem* to instruct the passive title, cannot be tied by any affected quality in the disposition; and therefore, if the daughters had pursued on their father's contract, and overtaken the defender as representing, by accepting that disposition *per preceptionem*; though the first pursuit had been but for a part, they might have pursued for the rest, without regard to that quality or restriction; but, seeing they did libel upon and produce the disposition to Richard as their active title, because it did contain a provision to the younger children, and have obtained the benefit of it, they cannot now object against the other conditions and qualities of it, that it was accepted, as well as given, with the foresaid burdens allennarly.

It was *replied*, The pursuer did not, at that time, know of the contract of marriage, and provisions therein contained, and so could not be understood to pass from the benefit thereof; for no man is presumed *suum jactare*.

THE LORDS found, That the pursuer having founded upon the said disposition as his active title, and as containing a burden and provision in favours of the younger children, his cedents, he cannot now insist to make the defender liable for any greater sum for her father's accepting of that disposition, containing the quality foresaid, without prejudice to the pursuer to insist against the defender upon any other passive title, or to affect any other means and estate of Sir Thomas, for payment of the superplus of the daughters' provisions, as accords.

*Fol. Dic. v. 1. p. 49. Dalrymple, No 39. p. 49.*

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Found that a party might found on the concession and acknowledgment, in a paper granted by the contrary party, and at the same time might deny the other facts which made against him, alleged in the same paper.

1715. July 22.

SIR PATRICK HOME *against* The EARL of HOME.

IN an action of exhibition at Sir Patrick Home's instance, against the Earl of Home, of an old apprising, grounds thereof, &c. it being, among other things, *alleged* for his Lordship, That the disposition granted, by Sir Patrick's remote author, of the apprising, was lying by the granter the time of his decease; and, therefore, that it not being a delivered evident, another person who got a posterior disposition, and whom the Earl represents, ought to be preferred: And, for proving the allegiance, the Earl having produced a petition to the Lords, given in by Sir Patrick's immediate author, wherein he acknowledges, That the said papers were lying by his cedent the time of his decease; the said petition, containing also a narrative of another matter of fact; which, if proven, or acknow-

ledged, would overturn the Earl's defences: The question came to turn on this, Whether the Earl was obliged to take the said petition, he founded on, as it stands? Or, if he could found upon one part thereof that makes for him, and leave out another which makes against him?

And it was *contended* for the Earl, That he was absolutely free to found on the judicial acknowledgment contained in the petition, without being obliged to take the contents of the petition entirely together; because, that even in a judicial oath, where the tie is greater; yet when it contains extrinsic qualities, the oath is divided; and any acknowledgment therein stands binding for the party, while the extrinsic qualities are rejected, unless otherwise proven. Now an oath is of more weight, because *ita juratum est*; whereas Sir Patrick had nothing to support the stories in his author's petition, but his author's naked and ultroneous assertion; for example, If, in the present case, it had occurred, that when Sir Patrick's author gave in the petition, the other party had alleged that the writ was undelivered, and referred the same to the petitioner's oath, and that he had deponed in the very terms of his petition, certainly it might have been pleaded, that the defence was proven by the oath, and yet still the petitioner was obliged to prove the other matters of fact in the petition, and consequently that the oath might have been divided, and not taken as it stood.

*Answered* for Sir Patrick: That oaths bearing extrinsic qualities do not concern the present case, which relates to one individual writ, containing matter of fact, which cannot be divided: And, if the Earl had adduced witnesses for proving the writ to be lying by the defunct, and if they had deponed in the terms of the petition foresaid, their depositions could not have been divided, but would have been taken entirely as they stood, to prove against the Earl as well as for him; so that seeing the Earl produced the said petition, and made use of it *in modum probationis*, it must be taken entirely as it stands, and cannot be divided.

It was further *urged* for Sir Patrick: That his allegiance was founded, not only upon the certain rule and principle of law, *quod approbo non reprobo*: But also it is clearly determined by the common law, in *L. 7. ff. de bon Libert.* where it is said, 'Nam absurdum videtur, licere eidem partim comprobare judicium defuncti partim evertere.' And *Eod. tit.* 'sed iniquum est, nec oportet liberto hoc indulgeri, quia non debet ex parte, obligationem comprobare, ex parte tanquam de iniqua quaeri?' And *L. 16. ff. de admin. Tutor:* 'Sed verius se putare, posse tutorem eam conditionem adolecenti deferre, ut id quod gessisset tutor in contrahendis nominibus aut in totum agnosceret; aut a toto recederet.' *L. 11. ff. de Neg. Gest.* 'quod si in quibusdam lucrum factum fuerit, in quibusdam damnum, absens pensare lucrum cum damno debet.' And the gloss upon that law says, 'approbare quaedam et quaedam reprobare non potest quis, sed debet vel omnia approbare vel omnia reprobare.' And Jason upon *L. 55. ff. de Legat 1.* 'approbatio quae fit ut eodem instanti reprobetur, not debet attendi.' And Anton. Faber in his

No 6. Ration. upon *L. 13. § 26. ff. de Action. Empt.* says, ‘*Quid ergo si venditionem, pro parte approbare velim, pro parte vero improbare? Non sum audiendus, quia absurdum est, unum eundemque actum pro parte approbare, pro parte improbare.*’

*Answered* for the Earl: That the common brocard *quod approbo non reprobo*, takes place in single facts, and where the subject is one, but not where the same is complex. For *V. G.* each party in pleading, may lay hold on what is judicially acknowledged by the other; and by taking instruments thereon it stands fixed: But when a variety of facts is alleged, a contradictor's laying hold on his party's acknowledgment of one, does nowise tie him to the acknowledgment of all the rest: For this were, as if when a charge and discharge is offered in a count and reckoning, and the parties obliged, by the act of *federunt*, to acknowledge or deny, it should be thereupon contended, that the acknowledgment of one article, should tie to the acknowledgement of the whole. *2do*, The Viscount of Stair plainly says, *Inst. p. 523.* That the brocard can only be understood as to the same individual:—So it is further cleared from the disposition of the common law, whereby it is evident, that ‘*confessio non ultra prejudicat, quam quoad interrogantem, Gloss in L. Fin. ff. de interrog. in jur. fac. Et scriptura privata facit fidem contra proferentem, non pro eo, nisi ab adversario fuerit probata, L. 26. § fin. ff. Depof. Confessione factæ in judicio datur fides contra se, sed non pro se, Gloss. fin. ad L. 1. C. de Confess. Scriptura potest tenere pro parte, et pro parte non tenere, Gloss. in L. 1. C. de Latin. Lib. toll.*’ And both *Zoefius* and *Perezus* state the present question very plainly, ‘*Quæri possit an necesse sit litigans totam acceptet confessionem, an vero et partem tantum acceptare valeat, partem rejicere?*’ And both answer, ‘*Si separata sint capitula nihil implicat partem confessionis acceptare, partem rejicere, Zoefius ad Tit. de Confes. Perez. ad Tit. Cod. eod.*’

*Replied* for Sir Patrick: That the citation from Stair is plainly contrary to what the Earl asserts; for there, treating of the *jus accrescendi*, in the case of legacies, he says, That the accrescence is necessary; and the portion accrescing cannot be rejected; because it befalleth by one integral right, which either must be accepted wholly, or rejected wholly, and therein *approbans, non reprobat*. As to the citations out of the common law, they do not meet the case: For *L. 26. § fin. ff. depof.* does not concern the case less or more: And *Zoefius* and *Perezus* are of a downright contrary opinion, particularly *Perezus*, upon the title of the *Cod. de Confessis. N. 15.* where he states the question, ‘*Sed dubitatur an debeat totam acceptare confessionem, an vero sufficiat partem acceptare? Quod non videtur ex ratione, quod circa eundem actum non admittatur divisio; et in omni prope materia, totum acceptare debeat, aut reprobare.*’

THE LORDS at first inclined to find, That the contents of the petition could not be divided, but must be taken entirely together; but, upon fuller information, and petition and answers,

Their Lordships found, That the Earl might found on the concession and acknowledgment in Sir Patrick's cedent's petition; that the disposition granted to him was lying by the granter the time of his decease; and at the same time might deny the other facts alleged, and offered to be proven in the same petition.

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Act. *Ipse.*

Act. *Sir James Nasmyth.*

Clerk, *Gibson.*

*Fol. Dic. v. 1. p. 48. Bruce, p. 161.*

1725. February 16.

ALEXANDER GUN of Westerholmsdale, against JOHN SUTHERLAND of Little Torboll.

By contract of marriage betwixt Donald Gun and Margaret Sutherland, daughter to John Sutherland of Little Torboll, there was stipulated L. 1000 Scots of tocher, to be paid to the said Donald Gun, by the said John Sutherland as principal, and Alexander, his brother, as cautioner.

Donald assigned this claim to Alexander and William Sutherlands, sons of the principal debtor, equally between them; and they, at the same time, granted a bond to Donald for the like sum to be paid *pro rata*.

Alexander Gun, son to Donald, as heir to his father, brought an action against John Sutherland, now of Torboll, for payment of the said sum, as representing John Sutherland, his grandfather, debtor in the contract of marriage; and the said Alexander, his father, and William his uncle, debtors in the bond; all upon the passive titles.

The defender acknowledged that he represented his uncle William, who was debtor in the half of the sum in the bond; but denied his representing his father Alexander; and, as to John, his grandfather, whom he did represent, his defence was, that he was only debtor by the contract of marriage, to which the pursuer had now no right, his father having been denuded of it by the assignation in favours of Alexander and William Sutherlands.

It was *answered*, That the defender could not found on the assignation, in so far as concerned his father's right to the one half of the sum in the contract, without subjecting himself to the passive titles, as representing his father; for that would be to lay hold of, and plead upon a right granted to his father, whom he refused to represent; and, besides, the cause of the assignation was the granting of the bond: So that the *res gesta* was, in effect, a mutual contract, and the defender could not take the benefit of one part of it without performing the other.

*Replied* for the defender: That the assignation being both to his father and uncle, the last of whom he represented, he might plead on that paper, because of his uncle's interest in it, without representing his father: That, by the assign-

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Found that it was not competent for a son to propose a defence upon an assignation granted by his father, without incurring the passive titles.