

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.

Act. *Ipse.*

Act. *Sir James Nasmyth.*

Clerk, *Gibson.*

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

No 6.

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-

No 7.

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.

No 7.

nation, the pursuer's father was denied of all right to the contract of marriage, which must stand good; and it could be of no import, in point of right, whether the new obligation became, in all its parts, effectual or not; and no regrefs was competent to the cedent.

THE LORDS found, That it was not competent to the defender to propone on the assignation granted to his father, without acknowledging the passive titles.

No 8.

A person was bound, by contract of marriage, to convey his estate to the heir of the marriage. He conveyed to his eldest son; but inserted a clause, empowering himself to alter at pleasure. The son was infest, and died; the father exercised his reserved power after his death, and conveyed to his second son. The eldest son's widow claimed terce. Found the might plead upon her husband's infestment; and yet impugn the reservation contained in it as gratuitous, and in prejudice of the contract of marriage.

Reporter, *Lord Cullen.*A&C. *Archibald Stewart, jun.*  
Clerk, *Dalrymple.*Alt. *Alex. Hay.**Fol. Dic. v. 3. p. 33. Edgar, p. 169.*1731. *January 26.*FEA *against TRAIL.*

A PERSON, whose estate in his contract of marriage was provided to the heirs of the marriage, did thereafter, in implement of the contract, dispone his estate to his eldest son; but reserving to himself a power to alter at his pleasure. The eldest son having died infest, and his relict claiming a terce, it was objected by a second son of the marriage, to whom the father, in virtue of the reservation, had gratuitously disponed the estate after the eldest son's death: That the eldest son's infestment, upon which the pursuer's claim was founded, was evacuated by the conveyance in his favours; and that if the pursuer did plead upon her husband's right, she must take it as it stands.

*Answered,* The reservation must be held *pro non adjecta*, being repugnant to the limitation in the contract of marriage; and the pursuer's husband had never accepted of the disposition to tie him down to the unreasonable condition.

THE LORDS found the pursuer might plead upon her husband's infestment, and yet impugn the reservation therein contained, as being gratuitous, and in prejudice of the contract of marriage.

*Fol. Dic. v. 1. p. 48.*1740. *January 16.*JOHN M'KEAN *against* ELSPETH RUSSELL.

No 9.

A creditor, in a bond to himself in life, and certain substitutes in fee, exercised, on death-bed, a reserved power to uplift without their consent.

JAMES M'KEAN being creditor to Sir Harry Innes, in a bond for 2000 merks, payable to himself, if in life, and, after his decease, to certain other persons; containing a power to James, at any time in his life, to uplift, receive, and discharge the same, without consent of the persons whose names were therein-mentioned, did, on death-bed, exercise this faculty, and gave it away, not only from the heirs at law, but likewise from the substitutes.

In a reduction, on the head of death-bed, it was pleaded for the heir at law, That the death-bed deed did evacuate the substitution, whereby there came to be place