

Sir Patrick Home, Baronet, - - Appellant; Case 15.  
 Sir Robert Home, Baronet, - - Respondent.

*Et e Contra.*

27th May 1712.

*Fraud and Circumvention.*—Circumstances sufficient to reduce deeds upon this ground. Being so reduced they stand as a security only for the onerous causes thereof.

*Inhibition.*—By marriage contract the husband is bound to resign the estate to himself, and the heirs male of the marriage, and inhibition being used thereon he was disabled to dispose of that estate gratuitously, in prejudice of the heir male of the marriage.

*Representation.*—This heir male being served *Hæres masculus et provisionis* to his father is found liable by the Court to warrant his father's deeds, but the judgment is reversed.

*Trust.*—A second Son having accepted from his Father a tack of the estate for payment of debts and having afterwards taken a disposition of that estate from his elder brother, the trustee is obliged to count and clear the onerous cause of this disposition, at the suit of the son of the said elder brother, (whom the Court had found to be *heir-male.*)

Fountain-  
hall, 24  
June, 1 Dec.  
1698. 12  
January, 5  
July 1699.  
7 July 1702.  
10 Feb. 170  
July, 17,  
Dec. 1708.  
21 Nov.  
1711.  
Forbes, 16  
July, 1708.

SIR John Home of Renton, Baronet, deceased, had two Sons, first Alexander, (afterwards Sir Alexander) the father of Sir Robert, party in these appeals, and second Patrick, (afterwards Sir Patrick) the other party therein.

On the 30th of September 1670, Sir John executed a settlement or entail of his lands and estates, upon his eldest son and the heirs therein mentioned; but not having been registered, and no infestment having been taken thereon, it was after Sir John's death cancelled or destroyed by his son Sir Alexander; and the precise terms of it are not agreed upon by the parties. On the 6th of October thereafter, Sir John executed a disposition or conveyance of his whole unentailed and personal property to his said son Alexander, upon the following recital. "And seeing by  
 " disposition of tailzie dated the 30th of September last, I have  
 " disposed my lands, &c. to Alexander Home my eldest son, &c.  
 " therefore wit ye me, for the better and more effectual  
 " payment of my debts, that my lands, living, and estate may be  
 " disburthened of the same, to have given, granted, and disposed  
 " to the said Alexander Home, with the reservations, conditions,  
 " and limitations after mentioned;" then follows the enumeration of the particulars conveyed, and the conditions of the conveyance, that Alexander Home should be bound by his acceptance to sell such part of the subjects conveyed, as consisted in lands apprized, or taken in execution for debts, and also such part thereof as consisted in moveables, and to do exact diligence for recovering debts due to Sir John, and to apply the price of subjects sold, or money recovered within year and day after Sir John's death in payment of debts, and that the said Alexander Home should have no power to dispose of any part of the said entailed estates, till the unentailed and personal estate was sold, and applied for payment as aforesaid; and Alexander was further disabled

disabled from disposing of the said personal and unentailed estate, or any part of it otherwise than as aforesaid, or to do any deed, whereby it might be affected or evicted; and if the said Alexander should act contrary thereto, then his right was to become void, and the right of the whole was to devolve on Sir Patrick, for the same ends and purposes.

On the 13th of May 1671, Sir John further executed a lease of his entailed estate, in favour of his second son Sir Patrick, who was then an advocate, expressing the cause to be for payment of his debts, and children's portions, that his entailed estate might be disburthened, to commence from the next term after Sir John's decease, and to continue five years, and so from five years to five years, till the whole of the debts and portions should be paid; the said Sir Patrick paying yearly to Sir John's relict 88*l.* 17*s.* sterling, to Alexander the eldest son 111*l.* 2*s.* sterling, and applying the surplus for payment of debts and children's portions; and Sir Patrick was thereby bound to count and reckon yearly for his intromissions, at the sight of Charles Maitland of Hatton, afterwards Earl of Lauderdale, and George Home of Kaimes, Sir John's brother. Sir Patrick was thereby also to have deduction of what expences he should be at not only in managing the said entailed estate; but also all charges and expences which he should be at in pursuing or defending any action or plea at law on account of the said estate, or in pursuing or defending any action competent to, or that might be moved against Sir John's heirs, and successors.

Sir John died soon after in July 1671, and Sir Patrick entered to possession of his landed estate, by virtue of the said lease. On the 28th of August 1671, Sir Alexander by a deed in which Sir Patrick joined him, conveyed the bulk of the unentailed and personal estate, consisting of an apprising upon the estate of John Renton of Lammerton, for the sum of 1243*l.* sterling principal money, 1800 sheep, 280 lambs, 50 oxen, 25 milk cows, 3 bulls, 10 calves, 21 horses, 50 bolls of wheat, 110 bolls of barley, and 310 bolls of oats, to the said George Home of Kaimes, in security to him of a certain debt due to him, and for his relief from certain other debts, wherein he was cautioner, for and with the said Sir John Home.

Disputes arising between the brothers Sir Alexander and Sir Patrick, Sir Alexander in 1673 brought an action of count and reckoning against Sir Patrick before the Court of Session; and after various proceedings in that action, the Court on the 23d of December 1675 allotted part of the estate to Sir Alexander, for payment of his annuity, and ordered the count and reckoning to proceed.

On the 27th of April 1678, a contract was executed precedent to the marriage of Sir Alexander Home, with Margaret the daughter of Sir William Scott, then deceased, whereby in consideration of that marriage and of 10,000 merks, the portion of the said Margaret Scott, Sir Alexander obliged himself to settle an annuity of 2000 merks, out of the said estate upon his lady, and

to settle the lands, and baronies belonging to him, upon himself and the heirs male of that marriage. And on the 21st of July 1690, a settlement to that effect was executed by Sir Alexander with concurrence of the persons named in the contract of marriage, at whose instance execution was appointed: this settlement was registered, and inhibition served thereon against Sir Alexander.

The action of Court and reckoning mean time proceeded without intermission, and in July 1694, when it had already lasted 21 years, Sir Patrick was not brought to a final account: but the rental of the estate and all other proofs being made and considered, the Court remitted the account to be stated by the Lord Ordinary in the cause, in order to their final decree.

While matters remained in this situation on the 31st of October 1694, just before the Session began, Sir Patrick procured from his brother Sir Alexander a disposition whereby he sold and disposed to Sir Patrick, his heirs, and assignees, his whole lands and estate, and discharged him of all his intromissions therewith; and Sir Patrick by acceptation thereof became bound to pay certain debts therein particularly mentioned, and all other the debts of the said Sir John Home, and Sir Alexander reserved his own life-rent of part of the estate. Of same date, Sir Alexander executed a separate discharge to Sir Patrick, of his whole intromissions in virtue of the said lease and otherwise, proceeding upon the recital that Sir Patrick had rendered a just account thereof to Sir Alexander.

Sir Alexander's lady, and her son Robert then a minor, as creditors by the marriage contract, within a very short space after the date of these deeds, made an application to the Court of Session to set aside the same as procured from Sir Alexander, a man weak and unfit for business, by fraud and circumvention, and in prejudice of the heir of the marriage whose right could not be defeated by Sir Alexander's gratuitous deeds; but in this they did not succeed.

Sir Alexander died upon the 27th of May 1698, and after his death his son Sir Robert, (party in the present appeals) being still a minor, by his curator brought an action against Sir Patrick before the Court of Session to waken the former action of count and reckoning, and to reduce and set aside the said disposition and discharge of the 31st of October 1694, upon the said ground that they had been fraudently obtained from Sir Alexander without any onerous cause, and that Sir Alexander by his marriage contract being obliged to resign his lands in favour of himself, and the heirs male of the marriage upon which inhibition had been used, he could make no gratuitous disposition and discharge to Sir Patrick in prejudice of the heir male of the marriage. The Court on the 12th of January 1699, allowed a probation to either party on the following points: viz. To the said Sir Robert Home, for proving the qualities of fraud and circumvention, and to the said Sir Patrick Home for proving his defences to take off the said qualities, and also to the said Sir Robert for proving the rental, casualties and value of the estate

Appealed  
from by Sir  
Robert.

and the time of Sir Patrick's intrusions with the rents thereof, and the compositions obtained by him from creditors; and to Sir Patrick for proving the debts affecting the estate disposed to which he had acquired right, and which were undertaken to be paid by the disposition thereof, together with the public burdens and other legal deductions from the said estate. Witnesses and other proofs were adduced, and the Court on the 10th of February 1708. "Having advised the debate and testimonies  
" adduced and writs produced, and founded on for either party,  
" found the onerous cause and valuable consideration of the  
" foresaid discharge and disposition granted by the said Sir  
" Alexander Home deceased, to Sir Patrick Home in 1694,  
" and produced in this process, sufficiently instructed to free  
" Sir Patrick from fraud and circumvention."

Appealed  
from by Sir  
Patrick.

Against this interlocutor Sir Robert reclaimed, particularly insisting upon his father's marriage contract and inhibition thereon; after a hearing the Court on the 16th of July 1708, "found  
" that the obligation in the said contract of marriage betwixt  
" the said Sir Alexander Home and Dame Margaret Scott his  
" Lady, whereby the said Sir Alexander is bound to resign the  
" estate in favour of himself, and the heirs male of the mar-  
" riage, with the inhibition raised thereon, did disable him to  
" dispose of that estate gratuitously, in prejudice of Sir Robert  
" who was heir male of the marriage."

Appealed  
from by Sir  
Robert.

Sir Patrick reclaimed, insisting that Sir Alexander Home was, by the clause in the marriage contract, heir and might dispose of the estate; and further that Sir Robert was served heir male general to his father and so obliged to warrant all his father's deeds, and consequently could not call in question the said disposition and discharge. The Court heard parties in their own presence upon these points: viz. "Whether by the retour Sir  
" Robert be heir of provision only, and not liable to warrant  
" his father's disposition in favour of Sir Patrick, as being con-  
" trary to the provision in Sir Robert's father's contract of  
" marriage; or if heir male also, and thereby liable to warrant  
" his father's disposition." The brief upon which the services proceeded, bore that the person to be served was heir of provision, the retour run in these words, "*hæres masculus et pro-*  
" *visionis quondam Domini Alexandri Home, virtute contractus*  
" *matrimonialis confect. inter dictum Dominum Alexandrum et*  
" *Dominam Margaretam Scott de dat. 27 Aprilis 1678, per quem*  
" *contract. dictus Alexander obligavit se, &c. providere totas et*  
" *integras terras et baronias de Renton, &c. in favorem dicti*  
" *Alexandri & hæredum masculorum tunc procreand. inter illum*  
" *et Dominam Margaretam*" &c. The cause being heard on this matter the Court on the 17th of December 1708, "Having  
" advised the debate with the retour and other documents in  
" process, found Sir Robert Home was served not only heir of  
" provision, but also heir male general." And to this interlocutor the Court adhered on the 5th of January 1709.

Appealed  
from by Sir  
Robert.

Sir

Sir Robert afterwards insisted upon a new ground: viz.  
 " That Sir Patrick having accepted of the lease of the said  
 " lands from the said Sir John Home deceased he became  
 " thereby a trustee for the use of the said Sir Alexander Home ;  
 " and that therefore Sir Alexander could not grant, nor Sir  
 " Patrick accept of the said disposition or discharge." After a  
 hearing the Court on the 12th of January 1709, " found  
 " that the respondent as heir or otherwise representing his  
 " father Sir Alexander, is not obliged to warrant the disposition  
 " of the lands to Sir Patrick Home, or discharge of intromissions  
 " by virtue of the lease or omissions ; but found that Sir Robert  
 " Home by virtue of Sir Patrick's accepting of the said lease,  
 " may quarrel the said disposition and discharge, in so far as the  
 " same was not granted for an equivalent onerous cause." And  
 this interlocutor was adhered to on 27th of January thereafter :  
 And the Court on the of 11th February 1709, " found that Sir  
 " Patrick was obliged to count and clear the valuable consideration  
 " for which the said discharge and disposition were granted."  
 On the 17th of July 1711, the Court did for that purpose refer  
 the said account to the Lord Ordinary to be audited by him.

Appealed  
 from by Sir  
 Patrick.

Appealed  
 from by Sir  
 Patrick.

Upon Sir Patrick's petition, the cause was reheard, and the  
 Court on the 20th of November 1711, " found that Sir Robert  
 " Home was not bound to warrant his father's disposition or  
 " discharge, but that he might controvert the same, in so far as not  
 " granted for valuable considerations, and therefore ordered Sir  
 " Patrick to account before the Lord Ordinary in the cause."

Appealed  
 from by Sir  
 Patrick.

The original appeal was brought from " several interlocutors or  
 " decrees of the Lords of Council and Session pronounced the  
 " 16th of July 1708, the 12th January 1708-9, the 11th of  
 " February 1708-9, the 17th of July 1711, and 20th of  
 " November 1711, on behalf of Sir Robert Home Baronet."

Entered, 18  
 January  
 1711-12.

And the cross appeal " from several interlocutors or decrees  
 " pronounced by the Lords of Council and Session the 10th of  
 " February 1708, the 17th of December 1708, and the 5th of  
 " January 1709."

Entered, 8  
 April 1712.

*Heads of Sir Patrick's Argument on the Original Appeal.*

It could be no breach of trust in Sir Patrick with respect to  
 Sir Alexander, to accept of an absolute conveyance of the  
 premises from Sir Alexander, because he being entitled to the  
 reversion after the trust of the lease discharged, might dispose of  
 the lands as he thought fit ; nor with respect to the creditors in  
 whose favour the lease was made, because all their debts were  
 satisfied and paid and they do not complain.

By the interlocutor 12th January 1709, Sir Alexander might  
 have sold the estate to Sir Patrick for an onerous consideration ;  
 and by the interlocutor of the 10th of February 1708, the Court  
 found the onerous consideration of the purchase proved : and  
 such onerous consideration appears upon the very face of the  
 disposition, for there the debts due by Sir John Home and Sir

Alexander are recited, and all these debts together with the rental of the estate were under the view of the Court, when they found the onerous consideration sufficiently instructed.

Sir Alexander to whom Sir Patrick was made accountable by the lease having in his lifetime commenced an action against Sir Patrick for such account, and having, after the same had depended before the Court of Session from 1675 to 1694, given Sir Patrick a full and general release and discharge for all the rents received by him, in which it is declared, that Sir Patrick had made just account and reckoning for the rents received by him by virtue of the lease, Sir Robert ought not now to be admitted as heir to his father to controvert the same.

*Heads of his Argument on the Cross Appeal.*

(Sir Patrick denies the alleged facts, that Sir Alexander was a weak man, and imposed upon: he allows that he entertained apprehensions of witches, but states that many good men had similar notions, and that several people of late had been executed in Scotland for witchcraft.)

The deed of entail alleged to have been executed by old Sir John is not extant or exhibited in the cause, so that no argument could be brought from it: and no entail could be made but with the burden of the grantor's debts. If any such entail were made it was cancelled by Sir Alexander, as he acknowledged upon oath before the commencing of any action against Sir Patrick, and so the terms of it cannot be known.

Soon after the date of the foresaid disposition and discharge, Sir Robert and his guardians applied to the Court of Session, to have the same set aside upon the same grounds, which he afterwards insisted on in the present cause. But the Court by three several interlocutors or decrees on the 14th of November 1694, the 4th of December thereafter, and the 13th of November 1695, refused to admit the said reasons, and dismissed the action: and these decrees are not appealed from.

The onerous cause of this purchase appears upon the very face of the deeds; In these the rent of the estate, amount of debts and reserved annuities are particularly set out; it was evident, that a fund could not be raised from the rents to pay the annual burdens, and discharge the debts. Several creditors also had adjudged, and, but for Sir Patrick's interference, would have carried off the estate.

With regard to Sir Robert's service, the Court in considering this point, called for the whole papers relating to that service, all which expressly bear Sir Robert to be served *heir male and of provision*. The claim given in to the jury bears expressly that he claims himself to be served heir male and of provision: and the depositions of witnesses adduced, prove that he is heir male and of provision; and the verdict of the jury bears the same, as does the extract of the retour from the Chancery which is the conclusion of all. What was alledged by Sir Robert in the

Court

Court below, that it was only a mistake of the clerk in adding the particle *et* between the words *masculus* and *provisionis* in the retour; and that the brieve which was the warrant of the service bore only *heir of provision* and not *heir male*, is of no moment. For the brieve is only a short piece of form in two or three lines, for a warrant to summons the jury, which passes of course; and it is never regarded how the party is designed there, seeing the same jury serves all different sorts of heirs. When once the jury is met, the party has it still in his option to explain himself by his claim or petition, as to the nature and kind of heir he designs to be served. And it cannot by law be admitted to allege, that after a writ is recorded, the same is false by a pretended mistake of the clerk.

And further Sir Robert oftner than once designed himself heir male in the Court below; and being heir male he is consequently bound in warrandice, which is so certain a principle in the law of Scotland, that Sir Robert has not appealed against the interlocutor of the 2d of December 1708, on that head.

*Heads of Sir Robert's Argument on both Appeals.*

(Sir Robert in return details the different facts inferring imbecility on the part of his father, and lesion towards his father and himself; but these facts cannot be stated with precision from the appeal cases)

With regard to the retour, the word *et* between *masculus* and *provisionis* was inserted during Sir Robert's minority by a mistake of the clerk, and ought not to be made use of to his prejudice. For 1st. The brieve or warrant, which regulates the retour, was only to serve him heir of provision. 2d. The action was brought by Sir Robert, expressly as heir of provision, and Sir Patrick for many years answered on that title; and 3d. There was no inheritance in which Sir Robert could succeed to his father as heir male general.

Sir Robert humbly hopes, that after such sinister practices used by Sir Patrick to defeat the wise and just provisions of his father, to circumvent a weak brother, to deprive the creditors of their just debts, and Sir Robert his nephew of his whole inheritance, and even to reduce him, his wife, and children to beggary, (he having no other estate than what depends on the event of this action) and as nothing more is required of Sir Patrick than that he should come to a fair account that the house will reverse the decrees or interlocutors appealed from by Sir Robert, and set aside the said disposition and discharge on which they were founded, and affirm the decrees or orders appealed from by Sir Patrick with exemplary costs.

After hearing counsel, *It is ordered and adjudged that the several decrees or interlocutors complained of in the appeal of the said Sir Patrick Home be affirmed, and that the said petition and appeal of the said Sir Patrick Home be dismissed; and that the several decrees or interlocutors pronounced the 10th of February 1708, the 17th of*

Judgment,  
27 May,  
1712.

*December 1708, and the 5th of January 1709, complained of by the said Sir Robert Home, in his said petition and appeal be reversed: And it is further ordered and adjudged that the release or discharge, and the grant and disposition made by Sir Alexander Home, to the said Sir Patrick Home, complained of by the said petition, and appeal of the said Sir Robert Home having been gained by fraud and circumvention, be so far reduced and set aside as to stand a security only for any onerous cause, or valuable consideration paid, or made good by the said Sir Patrick Home for the same, and that the said Sir Patrick do account for the rents and profits of the trust estate granted to him by Sir John Home by lease the 13th May 1671; and for all other sums of money, debts, or moveables contained in the aforesaid discharge and disposition which belonged to the said Sir John Home, and were received by Sir Patrick Home, and which ought to have been applied for the debts charged upon Sir John's estate; and he allowed on such account what he really and bona fide paid or expended in the just execution of the trust expressed in the said lease, or as the onerous cause or valuable consideration of the said discharge and disposition of the said Sir Alexander to the said Sir Patrick.*

For Sir Patrick,      *Edw. Northey. Sam. Mead.*  
 For Sir Robert,      *Thos. Powys. Rob. Raymond.*

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The decision of the Court of Session on the point of *representation*, though here reversed, is founded upon in the *Dictionary* vol. II. *hac voce*, p. 345. Indeed, as the Court of Session afterwards ordered Sir Patrick to clear the onerous cause of the deed on account of the trust, their judgment on the point of the representation was virtually done away and being therefore but interlocutory ought not perhaps to have been stated as an existing decision.