

No 118. darkness there to enjoy the profits, and, as much as can be, conceal the same from creditors.

Answered for the defender, *imo*, That the passive titles, in so far as they are penal, do not affect the heir, who is only liable *in valorem*, when the passive title is not established in the predecessor's lifetime, which is founded upon the nature of all penal actions, which are extinguished by the death of the delinquent.

2do, Francis himself, if he had been pursued when his father and he were alive together, could not have been liable in more than the value of the subject disposed; for the acquiring a right by an heir before the death of his predecessor, is not a passive title to make the apparent heir liable in his predecessor's lifetime universally, though a creditor be founded in the act of Parliament 1621 to reduce it; but the vitiosity and passive title are founded on this, that an apparent heir pretends to bruik his predecessor's estate after his death, by virtue of a disposition made by the predecessor to him; for our law has not prohibited all commerce betwixt fathers and their children, nor made it penal, only when such dispositions after a father's death are made use of by the son, or any other heir than the law has insroduced; but, since Francis predeceased, the passive title of successor *titulo lucrativo*, &c. could not be applied to this case; nor could his heir or successor, who found that he was vested in the right of the said lands, be further liable than for the value.

“THE LORDS found the defender being served heir in special to her brother, in the subject disposed to him by her father, relevant to make her liable for the debts of the father contracted before the disposition, &c. *præceptione hereditatis* of the father; but found, that no other representation of her brother could be relevant to make her liable, excepting intromission with the rents of the lands disposed; and that such intromission could make her liable only *in valorem*, she not being specially served.” This interlocutor was reclaimed against, and adhered to. See PERSONAL and TRANSMISSIBLE.

Act. *Ila.*

Alt. *Binning.*

Clerk, *M'Kenzie.*

Bruce, v. 2. No 50. p. 68.

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In an action on the passive titles, it was insisted for the pursuer, that the defender was universally liable upon the passive title of heir served of

1745: June 6:

MERCER against SCOTLAND.

It is an established point, that clauses burdening with debts, when in dispositions to particular subjects, are understood as intended by the granter only for the security of creditors, and not to subject the disponee *ultra valorem*; but whether such clauses in dispositions *omnium bonorum* did not admit a different consideration was the question in this case.

Adam Mercer, writer in Edinburgh, by his disposition in 1732, “assigned and disposed to Mary Graham, his spouse, in liferent, and to the children pro-

created or to be procreated between them, whom failing, to his children of any other marriage in fee, whom failing, to Elizabeth Mercer his sister (passing by James Mercer his brother and heir at law) and the lawful issue of her body, whom failing, &c. all and sundry debts owing to him, heritable or moveable, and all and sundry goods, gear, and every other thing whatsoever that should pertain to him at his death, with this provision and declaration, that the right, and every person who should claim thereby, should be burdened with the payment of all his just and lawful debts, and reserving a power to alter at any time in his life."

Adam Mercer having died in the year 1740 without issue, Andrew Scotland, the only child of Elizabeth, who had predeceased her brother Adam, confirmed himself executor-creditor by the foresaid disposition; and there being a debt due to Adam, secured by infestment, Andrew Scotland obtained a decree against James Mercer his brother and heir at law, to make up titles and denude thereof in his favour, as having right thereto by the disposition, and thereon led an adjudication; he likewise served himself heir of provision in general to Adam Mercer his uncle, in virtue of the said disposition.

In a process at the instance of Laurence Mercer, son to Sir Laurence Mercer of Aldie, for a debt due to him by Adam the defunct against Scotland upon the passive titles, two questions occurred, *1mo*, Whether the defender was liable universally as heir served, or only *provisione tenus*; as to which *vide* of this date *inter eosdem, infra*; *2do*, Whether or not he was universally liable upon the clause burdening him with the payment of the disponent's debts.

It was for the pursuer *alleged*, That although such burdens in dispositions to particular subjects were never otherways understood than as only intended for the security of creditors, yet universal conveyances of a man's whole estate, heritable and moveable, were truly destinations of succession, the acceptance whereof has been always held to infer an universal passive title, even though not containing burdening clauses, and much more so when there was such a burdening clause as was in this case; that were it otherways where the *universitas bonorum* is disposed, it would be impossible for creditors to ascertain the value.

Notwithstanding this, as the defender was not *aliqui successurus*, the LORDS "found him not universally liable, but only to the value of the subjects disposed."

1745. June 6.—In the case stated of this date *inter eosdem, supra*, it being insisted on for Laurence Mercer the pursuer, That Andrew Scotland the defender was universally liable upon the passive title of heir served of provision in general, *virtute dispositionis* from Adam Mercer his uncle of his whole estate, heritable and moveable, that should pertain to him at his death; it was *alleged* for the defender, That his service had proceeded from mistake, and was truly

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provision in general, *virtute dispositionis* from his uncle of his whole estate, heritable and moveable, that should pertain to him at his death. Alleged for the defender, that his service had proceeded from mistake, and was inept, as there was nothing in the defunct, by virtue of that disposition, to be carried by a service; and that the only proper method to denude the defunct of the fee, was by an action against his heir to denude; at least, as the service was only as heir of provision, it could at most subject the defender *provisione tenus*. The Lords found the defender not universally liable, but only to the value of the subjects disposed.

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erroneous and inept, as there was nothing in Adam the defunct by virtue of that disposition, to be carried by a service; and that the only proper method to denude Adam the defunct of the fee, was by an action against his heir to denude; at least, *2do*, As the service was only as heir of provision, it could at most subject the defender *provisione tenus*.

Answered for the pursuer, That the service was no less regular, than if Adam Mercer had first instituted himself, which was said, wherever it was done, to be an unmeaning thing, as he could take nothing by it that was not already in him; for that in the one case as well as in the other, a disposition to an *universitas bonorum* was always considered as a destination of succession. The cases of Dundonald, No 3. p. 1274, and Annandale, (*see* APPENDIX), were mentioned as instances, where titles had been made up by service in like cases with the present; and it was said, that although the service, as heir of provision in a particular subject, did only subject the heir *in valorem*, yet as such dispositions *omnium bonorum* are considered as destinations of succession, it is a consequence that the service subjects universally.

Replied for the defender, That though it may be true that instances may have been of such services, as where there is no hazard by the representation, lawyers are ready to advise every method they can think of, *valeat quantum*, which may have been the case of the instances mentioned; yet it was said, there was no instance of any judgment upon the question, Whether a service to a person in virtue of a disposition which gave nothing to the disponent, was a proper title? and much less of any judgment subjecting the person so served to an universal passive title.

THE LORDS, without distinguishing the two points, " Found the defender not universally liable, but only to the value of the subjects disponed."

Fol. Dic. v. 4. p. 44. Kilkerran, (CLAUSE.) No 4. p. 121; and No 6. p. 370, (PASSIVE TITLE.)

* * * D. Falconer reports this case.

1745. June 5.—ADAM MERCER, writer in Edinburgh, made a general disposition of all he should have at his death to his wife, if she should survive him, in liferent, and to the children of the marriage, in fee; which failing, to his children of any other marriage; which failing, to Elisabeth Mercer, his sister-german, and to the lawful issue of her body; ' With this special provision and: ' declaration, that that right, and all and every person or persons who should: ' claim any benefit thereby, either of liferent or of fee, should be burdened: ' with the payment, and the hail debts and sums of money that should be due, ' addebted, and resting to him at the time of his decease, and every thing else: ' that should then pertain and belong to him, should be burdened with the: ' payment of all his just and lawful debts.'

Andrew Scotland, at Powmilk of Aldie, Mr Mercer's nephew by his sister, was confirmed executor on this disposition, and also pursued James Mercer, the defunct's brother and heir at law, to make up titles, and denude of an heritable debt, and thereupon led an adjudication; but, before extracting the decret, he served himself heir of provision; and the retour bears, 'That he was hæres provisionis secundum dispositionem totorum et singulorum debitorum, pecuniæ summarum, aliorumque bonorum,' &c.

Laurence Mercer of Aldie pursued Mr Scotland, as representing his uncle, in which process this question occurred, Whether he was liable universally, or to the value of what he had got by the succession?

Pleaded for Aldie, The defender, abstracting from his service, is liable universally, as having accepted a general disposition, with the burden of debts.

Pleaded for Mr Scotland, He is a singular successor; and universal successors only are universally liable; heirs are *fictione juris eadem persona*; but this does not apply to disponees, whom it would be hard to subject to an universal representation, as the law has not given them the benefit of entering by way of inventory. By the Roman law, a legatar is not liable *in solidum*; and there is no difference in this respect betwixt a particular legacy and a *legatum omnium bonorum*. In the present case, there are several donations to different persons, and a liferent constituted to his wife, all which are bequeathed, subject to his debts, which could not be universally. And, *lastly*, This case of a disposition *omnium bonorum* was decided 8th December 1675, Thomsons against the Creditors of Alice Thin, No 141. p. 5939.

Replied for Aldie, Whatever might be the case of a simple disposition *omnium bonorum*, yet it can never be disputed, that one, with the express burden of debts, must make the acceptor universally liable; this is the most favourable of all passive titles, founded on the consent of parties, while the others are either fictions of law, or penalties introduced in favour of creditors. If an executor were named with this provision, he would be liable *in solidum*, nor could an heir, instituted on these conditions, make use of the benefit of inventory; and the defender, who is confirmed executor, is not to be considered as a legatar, but as an universal successor; and yet it is apprehended, that, even the accepting a legacy under this burden would make him liable.

The case of Alice Thin is involved in many circumstances; and all that was found was, that the acceptor of a disposition, with the burden of debts, was not liable universally; but here, by the clause, the person of the acceptor is bound.

Pleaded further for Aldie, The defender is served heir of provision; and, consequently, represents the defunct.

Answered, The service was quite improper and erroneous, and can be of no effect, as the disposition was not so much as to the disponent himself in liferent, but directly to the disponees of what he should have at his death; so that the

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person then called needed no service ; the fee of the subjects remained with Mr Mercer, and went to his heir, from whom the disponee behoved to claim them ; but there was no fee vested in him by the disposition, and there is nothing to hinder the *jus crediti* to remain *in pendent* ; and suppose a land estate to have been left in this manner, the procuratory of resignation would not have been carried by a service.

Replied, Mr Scotland is served heir to his uncle, and by that title has recovered one debt ; and it is impossible to say what more he may have intromitted with.

This service was the only proper title, since Mr Mercer never denuded himself of the subjects ; he calls his disponees institutes and substitutes, and reserves power to alter ; so that the fee remained in him.

THE LORDS, 11th December 1744, in respect of the general service, found the defender liable in the debt pursued for.

On a reclaiming bill and answers, 23d January 1745, they found him not universally liable, but only to the value of the subject disposed ; and 5th June, on bill and answers, adhered.—*See REPRESENTATION.*

D. Falconer, v. i. p. 89.

Act. *L. Craigie.*

Alt. *Da. Graham.*

Clerk, *Gibson.*

SECTION II.

How far the Disposition must be onerous, to elide the Passive Title.

1637. January 14. COURT against WEMYSS.

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It was covenanted in an eldest son's contract of marriage, that the tocher should be applied for redeeming a wadset ; and that the lands wadset should be disposed by the father to the eldest son and his heirs.
A disposition by the father,

ONE Mr David Courty, Minister, to whom umquhile Mr John Wemyss of Lothaker was addebted 1000 merks, pursuing Wemyss, his son, *hoc nomine*, as successor to him, *titulo lucrativo post contractum debitum*, to pay the debt foresaid ; and for instructing him to be successor, producing a sasine of the lands of Lothaker, proceeding upon his father's resignation ; and the defender *alleging*, That he could not be found successor by that sasine, because, the same was granted to him for satisfying of a contract of marriage, made betwixt the defender and his spouse, and the defender's father, and Ronald Murray, father to his said spouse, on the one and other parts, by the which contract it was appointed, that the sum of 8000 merks, contracted to be paid to him in tocher, should be paid to Mr James Wemyss, Commissary of St Andrews, for loosing from him of the lands of Lothaker, contained in the said sa-