

No 12. hended; as if the tacks were for stock and teind, and these assigned: So upon circumstances was found, 27th February 1672, Scot against Muirhead, *voce* TEINDS; 29th June 1698, Callendar against Carruthers, *IBIDEM*. Here the tack of the lands in question, which was assigned, bore a duty for all other demands whatsoever, thereby excluding any claim of teind: The price was twenty-two years purchase, an adequate value, as there was no house, nor policy, on the ground; and the disposition contained an obligation to relieve from bygone stipends, without saying any thing of future ones, which were only payable out of teinds; and the teinds have been possest without quarrel from the disponer since the disposition in 1711.

*Duplied*, In both the decisions cited, the circumstances were much stronger than in the present case; but the material difference is, that in them the question was with the disponer or his heir, where there was room to argue from presumptions of what was intended to be disponed; but here it is with singular successors who had got a real right, which it was impossible the disponee could have on his disposition, as there was no warrant therein for an infestment in the teinds; though it might have been sustained as a virtual disposition against the disponer, on which a title might have been completed, either by a further voluntary right, or by diligence.

On the first report, it was remitted to the Lord Ordinary to enquire in what manner the disponer's own right was constituted, and it appeared the lands and teinds of Tilliboall were erected into a barony, of which Briglands was part, and he infest therein; on which it was hinted, that perhaps there was never an infestment on these tiends; and so the disposition, if it were explained to comprehend them, with possession thereon, carried them without infestment: But the determining this point was superceded; by observing a nullity in the creditors' infestment on their adjudication of the barony, to wit, that it contained no symbol at all; so that both rights were personal.

THE LORDS found, That the purchaser of Briglands had a right to the teinds as well as the stock, preferable to that of the creditors' adjudgers; and, therefore, both stock and teind ought to be struck out of the sale.

Reporter, *Tinwald*. For Dunning, *Williamson*, Alt. *Scrymgeour*. Clerk, *Gibson*.

*Fol. Dic. v. 3. p. 297. D. Falconer, v. 1. No 269. p. 361.*

1756. December 14.

JAMES NEIL, Merchant in Ayr, *against* JOHN CAMPBELL of Skerrington.

CATHCART of Drumjoan was debtor to M<sup>r</sup>Rae in a certain sum by bond.

He died leaving three heirs portioners, the said M<sup>r</sup>Rae, William Campbell, and Abigail Rankin, mother to the defender.

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Sale of an  
estate with  
all right in  
the seller,

In the 1727, he had disposed his estate to Lord Cathcart, reserving a power to alter; and, in consequence of that power, some short time before his death, he made a settlement of his whole estate upon the defender's mother.

Lord Cathcart got a disposition from M'Rae and Campbell, the other heirs-portioners, of their right of succession, and brought a reduction of Drumjoan's last settlement.

M'Rae, by his disposition to his Lordship, "as one of the apparent heirs-portioners of Cathcart of Drumjoan, sells the lands of Drumjoan, and certain other lands, with all right, which he, as one of the apparent heirs-portioners aforesaid could pretend thereto; and further assigns to him the heirship moveable, and all the moveables to which he had right as one of the nearest of kin; all which he obliges him to warrant from his own and his successor's facts and deeds allenarly; and to renew these presents, if necessary, for effectually denuding himself of the premisses, as one of the heirs-portioners foresaid." And Lord Cathcart becomes bound to free M'Rae of all payment, hazard, and danger of any debts of the said Cathcart of Drumjoan.

Lord Cathcart's action of reduction ended in a submission and a decret-arbitral, awarding the estates of Cathcart of Drumjoan to the defender and his mother, and obliging them to relieve Lord Cathcart of all debts due by the said Drumjoan, which may any ways affect his Lordship or the said M'Rae or Campbell, from whom he derives right as heirs-portioners foresaid.

Neil, assignee by M'Rae to the bond above mentioned, due by Drumjoan, pursued Abigail Rankin and her son for payment; and concluded, that the transaction between M'Rae and Lord Cathcart, was an *emptio venditio hereditatis*; M'Rae sold to his Lordship all interest which he had in the estate, heritable and moveable, of Cathcart and Drumjoan, as one of the heirs-portioners and nearest of kin to him. This debt was no part of the right of succession sold; it did not belong to M'Rae the seller as heir-portioner, but as a creditor to Drumjoan; that therefore it was not conveyed to Lord Cathcart, who was only *emptor juris hereditarii*; it is a debt subsisting in the person of M'Rae *qua* creditor, and conveyed to the pursuer. This is agreeable to the principles of the Roman law, *L. 2. pr.* and § 4. *D. De Hær. vel. Act. vend.* and *L. 2. § 18, 19. D. eod.* where the very point in question is determined.

*Answered* for the defender, He is no further liable for the debt than Lord Cathcart would have been. And M'Rae's disposition to his Lordship, though it does not expressly convey this debt, yet it necessarily implies a virtual conveyance of it, after which M'Rae could not have pursued his Lordship for payment, without incurring the warrandice in his disposition. A disposition of property is understood to convey every right in the person of the disponent affecting that property. Rights acquired after the date of the disposition do *ipso jure* accresce to the disponent. One having a right in security consenting to a disposition of the subject affected, such consent imports effectually a pas-

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does not convey a debt in his person against the estate.

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sing from all right in the subject. The principles of the Roman law do not apply to this case. Here was no *emptio hæreditatis*, which is an *emptio universitatis lucri et damni*: For, *imo*, Lord Cathcart only purchases the lands of Drumjoan, and others mentioned, without any general clause, comprehending the whole estate to which M'Rae had right as heir to Drumjoan. *2do*, By the disposition, he came under no obligation to pay the whole debts of Drumjoan. The words of the obligation are, to relieve M'Rae of all payment, hazard, and danger from Drumjoan's debts; but that cannot include the debt in question; for M'Rae was in no hazard or danger from this debt in which he himself was the creditor.

"THE LORDS repelled the defences pleaded for the defender, and found him liable for the whole debt pursued for."

Act. Miller,

Alt. Brown.

Clerk, Forbes.

Fol. Dic. v. 3. p. 297. Fac. Col. No 220. p. 320.

1766. June 25.

ARCHIBALD ARBUTHNOT, Merchant in Edinburgh, against ROBERT ARBUTHNOT, Esq.

No 14.

A father executed a general disposition to his eldest son, and afterwards assigned certain bonds in security of a provision to his second son. A sum of interest due on one of these bonds above the amount of the provision, was found to belong to the second son.

ALEXANDER ARBUTHNOT merchant in Edinburgh, in the year 1753, executed a general settlement of his whole effects, in favours of Robert his eldest son; at the same time, burdening him with the payment of his debts, and of the provisions to his younger children, with an express exception of such particulars as he had conveyed to them.

Of equal date with the above mentioned settlement, he, by bond, obliged himself, his heirs, executors, and successors, to pay to Archibald Arbuthnot his second son L. 3000 Sterling at the first term after his death; after which the deed proceeds in the words which follow, and which gave rise to the question between the parties: 'And for the more ready and sure payment to the said Archibald Arbuthnot, of the foresaid sum of L. 3000 Sterling, with interest thereof, as is before mentioned, Wit ye me to have assigned and disposed, as I, by these presents, assign, transfer, and dispo to, and in favour of the said Archibald Arbuthnot, his heirs, executors, and assignees, the sums of money principal, contained, and to be contained in a list or inventory made, or hereafter to be made, and subscribed by me, relative hereto, with the penalties that shall be contained in the securities for the said principal sums, and with what interest shall be due thereon, at the time of my death, and all time coming, so long as the same shall remain unpaid; and which list or inventory, with these presents, shall have the full effect of a special disposition and assignation, as much as if every article thereof were herein particularly inserted and expressed, with full power to the said Archibald Arbuthnot and