

be the means of uniting the nation to concur in promoting the noble and generous intention of the Court to improve the law, and establish it on a better footing. [Alluding to a bill which the judges had been deliberating upon.]

GARDENSTON. In a matter of law I may hesitate, but a matter of fact shall always determine me. After so many decisions upon this point, it is neither proper nor decent to vary. Were we to pronounce a different judgment now, it would be a solitary decision, and consequently of no authority.

On the 18th December 1770, "The Lords sustained the reasons of reduction of the trust-disposition libelled, in so far as the pursuers have an interest therein;" adhering to Lord Gardenston's interlocutor.

*Act.* D. Rae. *Alt.* J. Montgomery, &c.

*Diss.* Kaimes, Pitfour, Coalston, Monboddo.

N.B. On report of the Lord Gardenston, the Lords repelled the objection to the arrestment, "that it was laid on in the hands of the trustees after the money of the debtor had been recovered of them, and lodged in the bank;" without a vote. The same judgment had been given, *25th February 1770, Monro against Trustees of Dunlop.*

---

1770. December 22. HUGH M'KAY *against* CHARLES BLACKSTOCK.

#### EXECUTOR—LIS ALIBI PENDENS.

The Executor of a party, deceased in Jamaica, had found security in terms of the law of the island. He was sued in the Courts of Jamaica by a creditor of the deceased. Happening to come to Scotland, the pursuer had him apprehended on a *meditatione fugæ* warrant. The Lords ordered him to be set at liberty.

BLACKSTOCK was creditor to the deceased Hugh M'Kay of Jamaica, to whom the above-mentioned Hugh M'Kay was executor, and in that character had found security for his intromissions in Jamaica, in conformity to the laws of the island. Blackstock commenced an action in the Courts of Jamaica against M'Kay, as executor, for the recovery of his debt; but, M'Kay having come to Scotland during the dependance of that action, Blackstock gave in an application to the Sheriff of Edinburgh, and had him apprehended as *in meditatione fugæ*, and incarcerated by a warrant which ordered him to be detained until he should find caution *judicio sisti*, in any action brought, or to be brought against him for payment of the debt in question, in the courts of Scotland. M'Kay presented a bill of suspension and liberation, on advising which the following procedure took place.

COALSTON. It was determined, in *Sir Archibald Grant's* case, that an executor having found security in England, was not bound to account here. This is reasonable, for otherwise matters would become inextricable. The only diffi-

culty is, that it is averred that the suspender has absconded from Jamaica. But then this averment is not offered to be proved, and the intelligence from Jamaica does not imply that such is the case.

On the 22d December 1770, “the Lords ordained the suspender to be set at liberty.”

*For M<sup>c</sup>Kay, A. Lockhart. Alt. H. Dundas.  
Reporter, Kaimes.*

1771. *January 23.* JAMES CHALMER *against* ROBERT HAMILTON.

#### PROVISION TO HEIRS AND CHILDREN—FACULTY.

Provisions to children executed in consequence of a reserved faculty, and inserted as a burden on an heritable bond granted by the father to one of his Creditors, whether effectual against personal creditors?

[*Faculty Collection, V. p. 194; Dictionary, 13,054.*]

AUCHINLECK. The £5000 bond granted to Mr Hamilton was in effect for £5000, minus 6000 merks; for to that extent there was a power of charging reserved. This reserved power was an estate in the father, and therefore is affectable by his creditors. To this, neither Mr Hamilton, nor the daughters of Hugh Montgomery could object. If the daughters got their provisions antecedent to the contracting of the debt in Chalmer's person, such provisions cannot now be challenged.

COALSTON. This bond is of a very singular form. I do not remember ever to have seen one of the kind. There is a reservation of liferent, and of a faculty to burden to the extent of 6000 merks, for provision to the children. The first was certainly affectable by creditors, though intended for Montgomery's own aliment: the second is a power to burden for a special purpose. Should be sorry if such reservation was not affectable by creditors, for it would be the source of much fraud. This question was never specifically determined. Bonds of provisions must be proved delivered. *Here* no proof of delivery.

PRESIDENT. It does not appear that Montgomery ever exercised his powers as to *Jean*, one of his daughters, nor that he was under any obligation whatever to settle any part of the 6000 merks on the daughters of his daughter Mary; which, however, he did.

On the 23d January 1771, the Lords “remitted to the Ordinary to find that the share of *Jean*, not provided by Hugh Montgomery, must go to his creditors;” altering Lord Kennet's interlocutor.

*Act. R. Blair. Alt. H. Campbell.*

N.B. In the report of this case in the Faculty Collection, it is said that the Lords refused the petition, and remitted *simpliciter* to the Ordinary.