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if any of the heirs preferably called either do or may exist. THE LORDS repelled the reasons of reduction, and sustained the sale of the lands made by Mishinish during his possession.

Mishinish, while in possession of the estate of Mackinnon, of which he was afterwards obliged to denude upon the supervention of a nearer heir, as explained above, had provided his wife in the locality of certain lands, part of the estate of Mackinnon. After the death of Mishinish, his widow having brought an action for the mails and duties of her locality lands, the LORDS, upon the same *ratio* on which they had given the former judgment, decerned for payment against the heir in possession.

*Fol. Dic. v. 4. p. 67. Fac. Col.*

\* \* \* This case is No 34. p. 5279, and No 35. p. 5290, *voce* HEIR APPARENT.

1781. July 4. KATHARINE CLARK *against* JOHN ROBERTSON and Others.

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A party conveyed his estate, to trustees, directing them to pay his debts, and account for the residue to his son. The trustees, without entering on the management, denuded in favour of the son, who became insolvent. A person to whom the father had been personally liable for an annuity, found to have no preference.

ALEXANDER HARVEY left a considerable estate to his three daughters, burdened with an annuity of L. 65 Sterling to Janet Clark, his relict. One of the daughters was married to Joshua Johnston; who, wanting money to throw into trade, prevailed upon his mother-in-law to make way for a sale of the subjects, by giving up her security, and accepting of a personal bond for her jointure, from him and the other partners of a company in which he was engaged.

Among these were John and James Jamieson, father and son; who, in this way, came to be personally liable for Mrs Harvey's jointure. John, some time before his death, executed a settlement in the form of a trust-disposition, whereby the trustees were directed to convert his estate and effects into money, for payment of "all his just and lawful debts," particularly certain family provisions therein mentioned, and to account to his son, James, for the residue.

Upon John's death, his trustees, without entering upon the management, executed a disposition, proceeding upon the narrative, that James had paid or given security for the provisions and debts specified in his father's settlement, and had become bound "to satisfy and pay other debts, and perform any other deeds that might be owing or prestable by his late father;" and, therefore, disposing to him, his heirs, and assignees, the subjects and rights vested in them by the trust-disposition above mentioned.

James accordingly took possession of every thing, and continued in good credit for several years. But, being engaged, as a partner, with Buchanan, Hastie, and Co. who failed, he found it necessary to convey his whole subjects, heritable and move, to trustees, for behoof of his creditors.

Against these trustees, Mrs Harvey brought an action for having it found, John Jamieson's heritable estate was really burdened with her annuity, for which he, along with Joshua Johnston and others, had given bond; that, in

virtue of that bond, and the trust-disposition executed by him, she was a real creditor upon his estate; at least, that the obligation constituted by said bond in her favour, was a preferable debt, in the question with a creditor of James Jamieson, or Buchanan, Hastie, and Co.

In the course of this process, Mrs Harvey died; but the cause was taken up by her sister, Katharine Clark, as having right to the bygone annuities; and, for her, it was

*Pleaded*; John Jamieson became debtor for the annuity in question, by joining as co-obligant in the bond granted to Mrs Harvey. The payment of his debts was one of the primary objects of the trust-deed executed by him; and all that James had right to was, the residue or reversion. The subsequent conveyances, from the original trustees to James, and from him to the defenders, had both of them that trust-deed for their basis; and, therefore, could carry no more of the estate belonging to John, than what remained free, after paying all his creditors.

Had James made up titles to the estate in question, as heir; and, after possessing it for three years, had conveyed it to trustees for payment of his debts, it may be admitted, that his father's creditors would have had no preference over his own; but, coming in place of the trustees appointed by his father, the purposes of that trust remaining unexecuted, he could not, in any way, disappoint the *ius quasitum* which his father's creditors had over the estate assigned to him. Had James himself been sole trustee, he could not have inverted the estate to the payment of his own debts; and, it does not occur, how his right should be rendered broader, by his coming in the place of the trustees.

*Answered*; James Jamieson's credit was such as fully justified his father's trustees in giving up the management to him; and, accordingly, they were absolved from an action at the instance of one of John Jamieson's creditors, who endeavoured to make them liable for his debt, on account of their having conveyed the estate to James, without taking security, that the purposes of the trust should be fulfilled.

James, however, stands in a very different situation. He was his father's apparent heir; the residuary legatee of all his effects; and, when he accepted of them without inventory or account, under the condition of paying his father's debts, he subjected himself universally to all such claims. He is, by the act 1695, by the express tenor of the settlement, and by every rule of law, liable to pay them to the last farthing.

At the same time, the creditors of John Jamieson have no real *lien* or preferable claim over the subjects. If they have, they must be preferred not only to James's personal creditors, but to such as, trusting to the public records, may have lent him money on the security of an estate which appeared to be altogether unencumbered.

But, that they have no such lien, is evident from this consideration, that, if

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the original trustees had exercised the power conferred upon them by the trust-disposition, and sold the subjects, a purchaser from them would have been safe; and, had the trustees, instead of fulfilling the purposes of the trust, applied the money to their own use, the creditors of John Jamieson would have been in no better condition than the private creditors of the former.

Even supposing that the subjects had been conveyed, without the intervention of trustees, to James himself, but under the same burdens and conditions as occur here, the obligation to pay "debts in general," could never have constituted a real security in favour of such creditors; Broughton *contra* Gordon, June 20. 1739, *infra h. t.*; Stenhouse *contra* Innes, February 21. 1775, *infra h. t.*; Camerons *contra* Creditors of Cameron, *see* APPENDIX. Neither is it very obvious how the word *trust* should make any alteration on the nature of the deed. Every disposition by a father to a son, with the burden of debts, is a trust; but still the burden remains personal, unless the debts are specially enumerated in the disposition, and engrossed in the investiture. Were it otherwise, the security of the records would be overthrown; and, henceforth, every settlement would be conceived in the form of a trust-conveyance to the heir, with a general burden of latent family-provisions, sufficient to cover the whole estate, and to prevent it from being affected by any debt he might contract.

In the present case, the record did not point out James as even nominally a trustee. He completed his feudal title upon the procuratory contained in his father's disposition, which the trustees had never exhausted, and appeared as absolute proprietor in his own right, with the burden only, which the law itself laid upon him at any rate, of paying his father's debts. To that effect, he was, no doubt, personally bound; but no real *lien* was created upon his property; Erskine's Institute, B. 2. T. 3. § 48. & 49.

*Replied*; It is of no consequence that the debt in question was not particularly mentioned in the trust-deed; nor is it necessary for the pursuer to contend, that her sister had a real *lien* over the subjects, which would have affected a singular successor. No such *lien* was created in favour of any of John's creditors; on the contrary, the trustees were empowered to sell the subjects; but, while they remain unsold, they are primarily liable to the granter's creditors, whose interest cannot be affected by the debts of the trustees, or those to whom they assigned the subjects.

It may be admitted, that, where the absolute property is conveyed, either to an heir or to a stranger, with the general burden of all the granter's debts, no real *lien* is established in favour of the creditors; but, here, there was no conveyance of property. The subjects were disposed in trust, for certain purposes particularly mentioned; and, so long as they are held under that title, they must, in the first place, be applied to those purposes.

THE LORDS found, "That Katharine Clarke had no preference over the other Creditors of James Jamieson for the debt in question."

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Lord Ordinary, *Justice-Clerk.* Act. *Wight.* Alt. *Ilay Campbell.* Clerk, *Tait.*  
L. *Fol. Dic. v. 4. p. 66. Fac. Col. No 71. p. 119.*

1786. November 15.

RICHARD THOMSON *against* Messrs DOUGLAS, HERON, and COMPANY.

THOMSON, in consequence of a contract entered into between himself and his man of business, disposed his lands to the latter, "heritably and irredeemably, in order that he might sell the same, and apply the proceeds for the behoof of Thomson." The disponee executed the procuratory of resignation, and obtained a charter from the Crown, on which he was infeft; but as he omitted to insert in the procuratory the above qualification of his right, it did not appear on the record. Being debtor to Douglas, Heron, and Company, he conveyed those lands to them, in security of his debt. Afterwards, others of his creditors adjudged the lands, but without taking infeftment.

Thomson instituted an action of reduction on the head of fraud, of the right obtained by his disponee, alleging that the latter had fraudulently failed to apply properly the value of the estate; in which action appearance was made for Douglas, Heron, and Company, and for the adjudging creditors. The pursuer

*Pleaded*; The right of the disponee was in the nature of a trust; the property of the estate still remaining substantially in the disponent; and the only power given to the disponee being that of disposing of it for a price, for which he was to be accountable to the disponent; his assuming the character of unlimited proprietor, in order to which he omitted to engross the conditions of his right in the procuratory of resignation, was a gross fraud, and must import a *labes realis* in the conveyance in question; especially as this was granted for a prior debt, and not for money instantly paid on account of such security.

*Answered*; "A purchaser or a creditor contracting upon the faith of the records, cannot be affected by any personal challenge upon the head of fraud, that may lie against the person with whom he contracted;" (see above in this Section.) Nor are the adjudging creditors in a different situation.

*Observed on the Bench*; If a disponee omit to engross in his infeftment those clauses which were meant by the disponent to limit or qualify his right; if, for example, a clause of redemption be so left out of the infeftment, the disponent by this fraud can in no shape be hurt. The right will not be unlimited; because what was truly bestowed on the disponee was only a limited right. But in the present case, the disposition imported absolute and unlimited property; although, as the counter-part of this grant, there arose a personal obligation on the disponee to render account. And whether this has been justly fulfilled, or

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A disposition was granted for the behoof of the disponent, but in the terms of an absolute conveyance. The disponee granted heritable security over the property to creditors of his own. Found effectual. But adjudgers, take *tantum et tale*.