steps to secure payment of what is due to them. To produce this effect, no precise form of words have been fixed, and, therefore, whether children have a *jus crediti*, or a mere *spes successionis*, is always a question of construction turning upon the intention of the contracting parties. If from the deed the intention was to confer a *jus crediti*, then this must rule, and the children are entitled to take steps during the father's life, and to rank as creditors on his estate, according to the priority of their diligence. No doubt the provisions here are made payable after the death of the father, but this is immaterial, because it is declared that they shall bear interest from majority or marriage, and whenever either of those events happen, the *provisions become due*, and both or one of these events might happen during the father's life.

After hearing counsel, it was

Ordered that the interlocutors be affirmed.

For Appellant, *Ro. Dundas, Ro. Cullen, Geo. Daniell.*
For Respondent, *Sir John Scott, William Tait.*

WM. CHALMERS, Town-Clerk of Dundee, JOHN PETER DU ROVERAY of London, and Others, the postponed Creditors on the Estate of Redcastle, . . . *Appellants;*

ALEX. ROSS and JOHN OGILVIE, for themselves and certain other Creditors of RODERICK and KENNETH MACKENZIE of Redcastle, whose debts were not included in the Trust-Disposition; HECTOR MACKENZIE, and BOYD and HANNAH MACKENZIE, daughters of the said KENNETH MACKENZIE; and JOHN MACKENZIE, of the City of Edinburgh, for self and on behoof of Others, the second and subsequent adjudging Creditors of the said estate of Redcastle, *Respondents.*

House of Lords, 1st June 1795.

REAL BURDEN, OR PERSONAL RIGHT — TRUST-RIGHT.—A trust-deed was granted, conveying an estate, for certain uses, but without declaring these uses real burdens upon the estate. A list of the debts, and names of the creditors for payment of whose debts the

trust-deed was granted, was made up and subscribed by the granters, with reference in the trust-deed to this list as relative thereto, and a direction that it should be inserted in the register of sasines, along with the infeftment to follow thereon, which was done accordingly: Held that these debts were not created real burdens on the estate.

Roderick Mackenzie, late of Redcastle, became a party to his son's antenuptial contract of marriage, whereby he disponed the estate of Redcastle to himself in liferent, and to his said son, Kenneth Mackenzie, and his heirs, in fee, securing at same time, by same deed, a jointure of £200 per annum to his wife, and granting to the younger children a provision of £2000.

Kenneth Mackenzie took infeftment upon the warrant for sasine, and thereby vested himself with the fee of the estate, subject to his father's liferent.

At the time of the marriage, Roderick Mackenzie was indebted in considerable sums, and for several years afterwards, both he and his son allowed the interest to run on unpaid, and they also contracted several additional debts, which rendered some arrangement of their affairs necessary. With this view they executed a trust-deed, empowering the trustees to levy the rents and proceeds of the estates, and apply them in payment of the interest due upon the debts, and the surplus divided betwixt the father and son; there was also a power in the trust-deed to sell, if necessary, for the payment of the debts of both the father and the son. A list of these debts was made up at the sametime, containing the names of the creditors, the amount of their debts, and a docquet signed *unico contextu* with the trust-deed, bearing a reference thereto; while the trust-deed contained a reference to this signed list, and appointed the same to be recorded in the register of sasines, along with the infeftment to follow thereon. Infeftment was so taken, the trustees entered on the management of the estates, and continued so for several years, during which several attempts were made to sell the estates, but ineffectually.

Roderick Mackenzie having died, the trustees finding it not easy to sell the estate to the satisfaction of Kenneth Mackenzie, resolved to give up the trust; and accordingly reconveyed the estate in favour of Kenneth Mackenzie, in terms of the destination in the above contract of marriage. That the creditors might not suffer by their relinquishing the trust, they granted this reconveyance under burden of these several debts.

1795.

CHALMERS, &c. v. MACKENZIE'S CREDITORS.

It was meant and understood that Kenneth Mackenzie would take infeftment on this reconveyance, in order to render these debts real burdens upon the estate, so as to secure them a preference against all subsequent contractions. But Mr. Mackenzie did not take infeftment under this reconveyance, so that the title to the estate in his person remained on the footing of the contract of marriage.

The creditors thereafter began to adjudge the estate, and a judicial sale was afterwards brought, under which the estate was sold, and brought £25,000, a price considerably short of paying the creditors their full debt.

In the ranking of the creditors, the common agent proposed to prefer the creditors whose debts were specified in the list relative to the trust-deed over the other creditors not therein included. The objections embraced in the previous appeal as to the children's provisions, and the objection to the whole adjudications led, except the first, were stated.

The objection stated to the trust-deed creditors, was as follows: "That by the conception of the trust-deed, the debts "in question had not been rendered real burdens upon the "estate; that, therefore, and as the trustees had given up "the trust, and allowed the judicial sale to proceed, the "creditors could derive no preference in virtue of that deed, "but ought to be ranked upon the grounds of debt and "diligences produced for them respectively, according to "the ordinary rules of law."

Jan. 27, 1791.

On report to the whole Lords, the Court pronounced this interlocutor:—"In respect that the debts were not rendered "real burdens on the lands by the trust right, and in respect "that the trust right has been given up and abandoned, "they refuse the desire of the petition, and adhere to the "interlocutor of the Lord Ordinary." On second petition the Court adhered.

Feb. 15, 1791.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—It is quite clear that a proper heritable security may be created in the form of a trust-deed. A debtor may dispone his estate to one creditor, with power to sell the estate in satisfaction of his debt. In like manner, he may dispone his estate to all his creditors, in the same terms and for the same purpose; and when such security is completed by infeftment, the whole debts due to the creditors, in whose favour it is granted, will of course be

1795.

CHALMERS, &c. v. MACKENZIE'S CREDITORS.

effectually secured upon the lands. But where the creditors are numerous, it is troublesome to give a security in these terms; and, for that reason, it is common to convey the estate to trustees, with power to act for the whole creditors, and to sell the estate, and apply the price in payment of the particular debts specified in the disposition and infeftment following upon it. By such a deed, the debts are as completely and as effectually rendered a real burden upon the estate as when it conveyed to one creditor or to all the creditors *nominatim* in security of the debts due to them. "Where a debtor," says Mr. Erskine, "conveys a land "estate to his creditors, for their security of payment, such "conveyance makes the debts due to them heritable, though "they had been orginally moveable, since they are by that "deed secured over the debtor's heritage; and the law is the "same, though the estate should be conveyed to a trustee for "behoof of the creditors; for the trustee being only a name, "the trust-deed is considered in the same light as if it were "granted to the creditors themselves." And it being thus unquestionable that a real security may be created in the form of a trust-deed, the point to be considered is, Whether such was truly the object, the nature, and the effect, of the deed in question? It is apparent from every clause in the deed that such was the object of it, and the intention of parties. It is granted for the payment of these, "*conform to a list subscribed by the granters*," and that list is appointed to be registered, which was done accordingly, and all acted on the faith that these creditors were preferable.

Ersk. B. 2, t. 2, § 15.

Pleaded for the Respondents.—According to the law of Scotland, a real lien or burden, in security of the payment of any debt or sum of money, may be created upon lands, or other heritable estate, by deed of disposition, granted either directly in favour of the creditor himself, or in favour of a third party, burdened with the payment of a sum of money due to that creditor. When intended to be created in this form, it is requisite that the dispositive clause of the deed shall expressly bear that the lands are disponed with and under the burden of the particular debt; the creditor, and the amount of the debt must be particularly specified; and, lastly, the instrument of sasine taken upon the deed, must, in like manner, express the burden. The sasine, when duly recorded in the proper register, completes the right and the burden.

According to the same law, a deed, conveying a landed

estate, may be conceived in such manner as to create a personal obligation upon the disponee to make payment of a debt mentioned to a creditor named, but not to create any real burden upon the lands disponed in favour of that creditor; and that is precisely the situation which, by the conception of the trust-deed in question, these creditors, mentioned in the list, are placed. No more is imported than a simple declaration that the receiver shall be bound to make the payment, or that the deed is granted for the purpose of such payment. And it adds nothing to the force of the right though this clause be inserted in the sasine, and appear upon the record. No real burden has therefore been created, and nothing but a personal obligation on the trustees to execute the purposes therein set forth appears.

After hearing counsel for five days, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Wm. Adam, Thos. Macdonald.*
For Respondents, *Sir J. Scott, Wm. Tait.*

THOMAS MARTIN and Attorney, . . *Appellants.*
JAMES MARTIN, RICHARD STONE, and J. FOOTE, *Respondents.*

House of Lords, 17th June 1795.

ADJUDICATION—HERITABLE OR MOVEABLE—APPROBATE AND REPROBATE—FOREIGN WILL—HOMOLOGATION.—A party domiciled in England, executed a will in the English form, leaving only a liferent of part of his estate to his heir at law, his eldest son, remainder to other heirs. The residue of his real estate, "*not by him otherwise disposed of,*" he bequeathed to his three younger sons, equally between them. No special mention was made of three several bonds due by the York Buildings Co., upon which adjudications had been led against their estates in Scotland. After enjoying his liferent under this will for sixteen years, the eldest son raised a declarator, and claimed the bonds as heritable estate, which an English will could not carry. Held, that as he had taken benefit so long under his father's will, he could not now reprobate the same.

The appellant's father, Joseph Martin, died worth £100,000, consisting of real and personal estate in England, where he was domiciled. He had four sons, of whom the appellant was the eldest, but having incurred his father's displeasure, he, by his father's will, was only provided with a liferent of the surplus rents, payable out of his father's estate of Cheshunt, remainder in tail male to the use of his son or sons of his