The second appeal brought by the respondents, in reference to the decrees of absolvitor in the former actions, was quite unnecessary, as the interlocutor of the Court below has reduced those decrees.

Pleaded for the Respondents.—By the law of Scotland the right of legitim cannot be excluded by a deed of a testamentary nature. The deed executed by Mr. Millie, senior, though purporting to be a *bona fide* and absolute transference of property in favour of the appellant, was never carried into effect during the lifetime of the grantor, who continued in full possession of all his property so conveyed, for at least three years subsequent to the date of the deed; and had actually entered into a transaction within a few months of his death, which was utterly exclusive of the validity of the deed 1791 as an absolute and irrevocable conveyance *inter vivos.* This was the submission entered into by him in regard to this daughter's claims, which necessarily implied that this deed could not bar these claims; and that she had not otherwise discharged them. The decision in the House of Lords, in Lashley *v.* Hog, must govern the present question. It is impossible in principle to distinguish that case from the present. The transfer of stock had been made, in that case, to the son, as the conveyance was executed in the present, for the purpose of disappointing the legitim, but old Mr. Hog had continued, notwithstanding the transfer, to receive the dividends, as old Mr. Millie, notwithstanding the conveyance here, continued to receive the rents and profits; and your Lordships found that all such stock, the dividends of which had been so received, was subject to the claim of legitim.

July 16, 1804. Vide ante, vol. iv. p. 581.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Sir Sam. Romilly, Wm. Adam, Mat. Ross.*
For Respondents, *Wm. Alexander, Arch. Campbell, David Boyle.*

ARTHUR DINGWALL FORDYCE, Esq. of Culsh, Trustee on the Sequestrated Estate of John Durno, Advocate in Aberdeen, *Appellant;*
SIR JOHN GORDON of Park, Bart., & ALEX. MOIR, *Respondents.*

House of Lords, 26th March, 1807.

CONVEYANCE IN SECURITY—ACT 1696, c. 5.—Cautioners for a col-

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lector of taxes had, on becoming security, procured from him an absolute and irredeemable conveyance of his heritable estate, upon which they were infeft. It was admitted by them that they had never entered into possession, and that, in fact, they held the conveyance as a security only for any loss they might incur for the collector's intromissions. On his bankruptcy, his trustee brought a reduction of this conveyance, as granted in security of future debt, and therefore void under the statute 1696, c. 5. Held the conveyance good, and not reducible under the act, it being *ex facie* an absolute and irredeemable disposition. Affirmed in the House of Lords.

Mr. John Durno, Advocate in Aberdeen, was, for many years, Collector of Taxes for the County of Aberdeen, and the respondents were his cautioners in a bond, binding themselves to be responsible for his duly accounting and paying all the amount of taxes collected by him into the public treasury.

He became bankrupt in July 1798, owing of debt to the crown the sum of £6103. 12s. 3d. for arrears of taxes, besides £15000 of personal debt due to other creditors. The bankrupt had heritable property amounting to £6000.

On becoming security for Mr. Durno, the respondents, it turned out, had obtained absolute and irredeemable conveyances to all his heritable property. The appellant, as trustee, brought the present action of reduction to set aside these conveyances, as granted without any just or true value, but in mere relief and security for future debts, and therefore null and void, in terms of the act 1696, c. 5.

It was admitted by the appellant, that these dispositions sought to be reduced, were *ex facie* absolute and irredeemable dispositions to the property. Upon them infeftment had followed; and these infeftments were recorded. On the other hand, it was admitted by the respondents, that they had never paid any price or value for the conveyances, —that, though conceived in the form of absolute conveyances, yet they were granted to them in relief and security of Mr. Durno's future intromissions, for which they had become liable in terms of their cautionary obligations, and that they had never entered into possession of the subjects, but that Mr. Durno had continued to possess these as formerly. These facts being conceded on both sides: It was argued for the appellant, That as Mr. Durno's receipts of the public money were all, or most of them, subsequent to the sasines in favour of the respondents, and as the amount

of these was uncertain, the sums varying from day to day, according as he received or accounted for the public money, the situation of the respondents was exactly similar to that of cautioners in a cash account with a bank; and, in the case of Brough *v.* Selby, it was found that an heritable security, granted to such a cautioner, was good only as to the money advanced prior to the infeftment. Agreeable to this decision, and many others decided in the same way, he contended that the dispositions, as securities, ought to be restricted to the sums advanced prior to the date of the sasines. For the respondents, it was argued that the statute 1696 could not apply to the circumstances of this case. It did not apply to dispositions *ex facie* absolute and irredeemable, but only to those which *ex facie* of the deed itself showed they were merely in security for future debts. In the case of Selby, the deed which the Court set aside, was a disposition which bore *in grœmio* to have been granted to Selby, to secure him from the consequences of his cautionary obligation. But, in this case, the deed sought to be reduced was an absolute and irredeemable disposition to the property, which does not fall under the act of Parliament. The words of that act, which has reference to this transaction and question, are, "And "because infeftments for relief, not only of debts already "contracted for thereafter, are often found to be the occa- "sion or covert of frauds, it is therefore further declared, "*that any disposition or other right that shall be granted* "*for hereafter*, for *relief* or *security of debts to be contracted* "*for the future*, shall be of no force as to any such debts "that shall be found to be contracted after the seisine or "infeftments following on the said disposition or right, but "prejudice to the said disposition and right, as to other "points," as accords." Dispositions in security are alone here referred to. And the act cannot be construed to apply to absolute conveyances. When frauds appear, the common law affords a remedy, but, in matters of statutory provision, the enacting clause must be taken as it stands, and cannot be extended beyond it.

Mar. 2, 1791. Fac. Coll. vol. x. p. 351, et Mor. 1159.

The Lord Ordinary repelled the reasons of reduction. And, on several representations, he adhered.

On reclaiming petition to the Court the Lords adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

June 24, 1801.
July 10, ——
Jan. 29, 1802.
Feb. 16, ——
Mar. 3, ——
May 15, ——
June 24, ——

Pleaded for the Appellant.—The deeds sought to be reduced, though conceived in the form of absolute and irre-

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deemable dispositions or conveyances, were in fact dispositions in security of future debts. And although this does not appear on the face of the deeds or record, yet, as it is judicially admitted by the respondents, that admission ought in law to be equivalent to a declaration made to the same effect in a back bond. Besides, this view is both consistent with the spirit of the act 1696, and the views of the legislature in regard to it, and ought to be given full effect to.

Pleaded for the Respondents.—The act of Parliament 1696, had for its object a particular species of obligations and securities, common in those days, which, from their uncertainty, both as to extent and nature, defeated the important institution of the public registers, and led besides to many acts of fraud. To this object the statute was confined; and that the means might properly correspond with the end, the prohibition is singly directed against dispositions in security of debts which are undeclared and unknown. While the dispositions now objected to by the appellant, so far from being indefinite, are absolute and complete transmissions of the full right of property, changing entirely the person of the holder, and by public registration notifying that change to the world. To hold that such deeds were within the enactment of the statute, were to extend the statute beyond what the legislature intended. This view of the statute is conformable to the opinion generally expressed in courts of law in regard to this statute. And the point has therefore been

Feb. 16, 1782. Mor. 1154.

set at rest, ever since the case of Riddle and Nibble. The judicial admission of the respondents in regard to the deeds, to the effect that though appearing *ex facie* absolute, yet in reality they were securities for future debt, cannot affect these deeds, or the rights of parties under them, nor entitle the appellant to plead the benefit of the statute.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For Appellant, *W. Alexander*, *Adam Gillies*.
For Respondents, *Wm. Adam*, *James Gordon*.

NOTE.—Unreported in the Court of Session.