

March 31. 1824. plied that the lands belonged to the disponent, and that they had been conveyed by him to the pursuer of the adjudication; and as the decree formed the warrant on which a charter and sasine from the superior might be obtained, the adjudger might thereby be enabled to make up an *ex facie* valid and effectual title to the property, and put it upon record, so that the party in possession of the estate would appear to be entirely divested, and on his death it would be impossible for his heir to serve to him as *ultimo vestitus et sasitus ut de feodo*. That it was true that, by the practice and law of Scotland, adjudications were allowed upon trust-bonds for sums of money, but such a proceeding was entirely different from that of an absolute conveyance of the property, seeing that it merely created a burden on the estate, and did not divest the person in possession of the fee; and although it was also true, that in some instances titles had been made up on adjudications proceeding on dispositions qualified with a back-bond, yet this had always taken place where the disponent was the true proprietor, and no other party was in possession.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed; 'and it is further ordered, that the appellant do pay to the respondent, Sir Alexander Inglis Cochrane, L. 100 for his costs.'

Appellant's Authorities.—4. Stair, 51. 9.; 3. Bank. 5. 101.; Tod, December 16. 1707, (190.); 3. Stair, 3. 47.; Govan, March 10. 1813, (not rep.); Beveridge, July 10. 1793, (5296.); Kerr, January 19. 1808, (No. 6. App. Adjud.)

Respondent's Authorities.—3. Stair, 2. 53.; 3. Bank. 2. 83.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 22.*)

No. 18. Sir C. B. CODRINGTON, Executor of the Countess of Bath,
Appellant.—*Fullerton—Stephen.*

Sir GEORGE F. JOHNSTONE, and Others, Trustees of Sir JOHN
JOHNSTONE, Respondents.—*Warren—Murray.*

Passive Tillc—Confusion.—A party having obtained himself served heir-male and heir of line of another, and having intromitted with the rents of an estate to which he had

right as heir-male; and having thereafter, within year and day of the death of the defunct, made up inventories, and brought a ranking and sale of the estate, and paid the debts of the defunct, and taken assignations to them in favour of himself, his heirs and assignees;—Held, (affirming the judgment of the Court of Session), 1. That by his service and intromissions he became universally liable for the debts of the defunct; and, 2. That they were extinguished by his having paid them; and, therefore, that his representatives could not, in virtue of the assignations, recover payment of them from an heir-male who afterwards succeeded to the estate.

March 31. 1824.

SIR JAMES JOHNSTONE was invested in the estate and barony of Westerhall, under titles containing a simple destination to heirs-male. On the 3d of September 1794 he died without issue, leaving debts to a considerable amount; and on the 12th of December of that year, his brother, Sir William Pulteney, expedite a general service as heir-male and of line of Sir James, and in virtue thereof took possession of Westerhall, and intromitted with the rents. Thereafter, on the 1st of September 1795, (being two days within the year from the death of Sir James), Sir William made up inventories under the Act 1695, c. 4. He then brought a process of ranking and sale of the estate of Westerhall, of which a sequestration was awarded, and judicial factors appointed by the Court of Session. After some delay, the creditors, whose debts were all personal, having insisted that the estate should be exposed to sale, Sir William paid the debts. The greater part of these debts was paid through the intervention of a trustee, who obtained assignations to them, and thereafter conveyed them by assignations to Sir William, his heirs and assignees. Some of the other assignations were taken directly to himself, and proceeded on the narrative, that they were intended for the purpose of preserving recourse against the representatives of Sir James Johnstone. No farther procedure took place in the ranking and sale, and it was alleged that the estate remained in possession of the judicial factors, who, however, accounted to Sir William, and not to the Court. No steps were adopted by Sir William to impose the debts which he had paid as real burdens on the estate of Westerhall, or to fix them upon the heir-male.

March 31. 1824.

1ST DIVISION.
Lord Gillies.

On the 30th of May 1805 he died, and was succeeded in the estate of Westerhall by his nephew, Sir John Johnstone, as his heir-male, and by his daughter the Countess of Bath in certain other lands, as his heir of line, and in his moveable estate as executrix. She died in July 1808, leaving a will, whereby she conveyed her moveable effects to the appellant, Sir Christopher Codrington, and another gentleman (since dead), as her executors. Thereafter Sir Christopher, as the surviving executor of her Lady-

March 31. 1824. ship, brought an action against Sir John Johnstone and his trustees, founding on the assignations to the debts in favour of Sir William Pulteney, and to which Lady Bath had right as his executrix; and concluding, that as these were the debts of Sir James Johnstone, Sir John, as representing him in the estate of Westerhall, was liable in payment of them, and ought to be ordained to repay them.

In defence, it was stated, that Sir William Pulteney had incurred an universal representation of Sir James Johnstone, by his service, intromissions, and other acts; that being thus debtor in the debts which he had acquired by assignation, they were extinguished in his person confusione; and that, as Lady Bath represented him universally, while Sir John Johnstone only succeeded as heir-male, the representatives of Lady Bath could have no claim against him for payment or relief of such debts.

On the part of the appellant it was alleged, that the service of Sir William had been obtained, not with the view of incurring an universal representation, but for the purpose of enabling certain debts to be recovered, belonging to a partnership in which Sir James Johnstone had been concerned, and as matter of evidence in a claim for the Annandale Peerage; that accordingly he had made up inventories within year and day of the death of Sir James, under which he had accounted for all his intromissions with the rents prior to the appointment of the judicial factors, and that those which had been subsequently paid to him were not more than sufficient to liquidate the interest of the debts which he had acquired. He therefore contended, that the general service could not, in the circumstances under which it was expedè, infer an universal representation; that neither could the intromissions have that effect; that besides, vicious intromission was not pleadable against the representatives of the intromitter; and therefore, as Sir William was not the universal representative of Sir James, the assignations vested in him and his representatives an active title to insist for repayment from the heir-at-law, who had succeeded to the property.

The Lord Ordinary, on advising condescendences, appointed the case to be debated, and at the same time issued the following note:—‘ The Ordinary has considered attentively the very
 ‘ long and elaborate written pleadings in the cause, in which,
 ‘ however, he has never had the advantage of hearing parties at
 ‘ the Bar. It appears to him, that the question chiefly discussed
 ‘ in these papers, as to whether Sir William Pulteney incurred
 ‘ an universal representation by the manner in which he entered
 ‘ heir to his brother, is one which, in whatever way it may be

March 31. 1824.

‘ determined, can have very little effect directly on the decision
‘ of this cause; and this not merely as the present is a question
‘ inter hæredes, and not with creditors, but because it is ad-
‘ mitted that the property left by Sir James Johnstone was more
‘ than equal to the amount of his debts. Now, as Sir William
‘ Pulteney, whether he entered heir to his brother cum beneficio
‘ or not, was undoubtedly liable for his brother’s debts to the
‘ extent of the property to which he succeeded by his brother’s
‘ death, it follows that he was liable for the debts in question
‘ which fell short of the value of that property. Under these
‘ circumstances it seems very difficult, in this view of the case,
‘ to hold that the debts which Sir William Pulteney so paid were
‘ not extinguished, but were preserved by his taking assignations
‘ to the same in favour of himself and of his heirs and general
‘ assignees, the persons who, failing himself, were, according to
‘ the general rules of law, responsible in the next place for pay-
‘ ment of such debts. This is not the case of an entailed estate,
‘ where the interest of the heirs in possession, as separate from
‘ the heirs of tailzie, is acknowledged and recognized. The estate
‘ of Westerhall was limited to heirs-male; but this was only a
‘ simple destination, under which, when Sir William Pulteney
‘ succeeded, he became proprietor in fee-simple of the estate, and,
‘ as such, when he permitted the estate to descend, agreeably to
‘ the investitures in favour of the heir-male, he was entitled to
‘ impose on that heir any burdens he thought proper. Sir Wil-
‘ liam Pulteney, therefore, by any declaration of his will and in-
‘ tention made habili modo, might have burdened the heir-male
‘ with payment of the debts in question; but it remains to inquire,
‘ whether the assignations taken by Sir William prove that such
‘ was his intention, and whether they amount to such a decla-
‘ ration of his intention as the law will give effect to in this case?
‘ In judging of this point, it appears to the Ordinary that it may
‘ be of consequence to attend to the circumstances under which
‘ the payments were made and the assignations taken by Sir
‘ William Pulteney. He had, as the Ordinary understands,
‘ previously instituted, and there was then in dependence, an ac-
‘ tion of sale, brought at his instance, as heir to his brother,
‘ under the Act of 1695. The legal object and effect of this ac-
‘ tion is to render the estate which is the object of it, primarily
‘ and solely responsible for the debts of the deceased; and it may
‘ therefore be considered whether the assignations, as having been
‘ taken during the dependence of this process, may not have a
‘ more powerful effect than could have been given to them if no

March 31. 1824., ' such process had been in existence. The question, in this point
 ' of view, seems to be not at all argued in the papers, and the
 ' Ordinary has therefore ordered it to the roll.'

Thereafter, on hearing parties, and advising memorials, his Lordship pronounced this judgment:—' Finds, that the late Sir
 ' James Johnstone, Baronet, died without issue on the 3d of
 ' September 1794, possessed of the estate of Westerhall, descen-
 ' dible under a simple destination in the investitures to his heirs-
 ' male, and leaving behind him debts to a considerable amount,
 ' all of which were merely personal: Finds, that on the 12th
 ' December of the same year, Sir William Pulteney, the brother
 ' of Sir James Johnstone, expedite a general service as heir-male
 ' and of line to Sir James; and finds it proved by the documents
 ' in process, that Sir William, subsequent to the service, had
 ' intromissions to a considerable extent with the effects of the
 ' deceased, and particularly with the rents of Westerhall: Finds,
 ' that Sir William Pulteney never procured himself served heir
 ' in special to his brother, nor ever made up titles to the estate
 ' of Westerhall; but finds, that on the 1st of September 1795,
 ' when very nearly a year had elapsed from the death of his bro-
 ' ther, Sir William gave up an inventory, with the view of obtain-
 ' ing the benefit thereof in terms of the Act 1695; and in the month
 ' of December thereafter, Sir William raised an action of rank-
 ' ing and sale of the estate of Sir James Johnstone: Finds, that
 ' said action was never brought to a conclusion, nor were the
 ' lands ever sold in consequence of it; but finds, that after raising
 ' the process, Sir William, by himself or a trustee, paid the debts
 ' in question, which had been due by his brother to a variety of
 ' creditors, from whom, instead of simple discharges, assignations
 ' were taken in favour of Sir William, his heirs and assignees:
 ' Finds, that the assignations do not express the purpose for
 ' which they were granted, except in one instance, where the
 ' assignation bears to be to the effect that the said Sir William
 ' Pulteney may operate his relief of the said sum from the repre-
 ' sentatives of the said Sir James Johnstone: Finds, that upon
 ' the death of Sir William Pulteney, his daughter, the late
 ' Countess of Bath, succeeded as his universal heir and repre-
 ' sentative to all his property, except the estate of Westerhall,
 ' which descended to the late Sir John Johnstone, as heir-male
 ' both of Sir William Pulteney and of Sir James Johnstone, the
 ' person last infest in that estate: Finds, that Lady Bath having
 ' afterwards died, and Sir John Johnstone having made up titles
 ' to the estate of Westerhall, the pursuers, as executors of Lady

‘ Bath, brought the present action against Sir John, concluding March 31. 1824:
 ‘ to have him found liable, as heir-male of Sir James Johnstone
 ‘ in the estate of Westerhall, for payment of those debts of Sir
 ‘ James which Sir William Pulteney had paid upon assignments
 ‘ as before-mentioned: Finds, that whatever may have been Sir
 ‘ William Pulteney’s motives or object in serving himself heir-
 ‘ male or of line to his brother, these can be of no consequence
 ‘ in judging of the legal effects of his service; and finds, that by
 ‘ his said service and subsequent intromissions, Sir William Pul-
 ‘ teney incurred an universal representation, from which he could
 ‘ not be relieved by his afterwards giving up inventories and
 ‘ bringing a process of ranking and sale: Finds, that notwith-
 ‘ standing the universal representation which he had thus in-
 ‘ curred, Sir William Pulteney, if he had made up titles to the
 ‘ estate of Westerhall, might have had it in his power to burden
 ‘ the heir succeeding to him in that estate with payment of the
 ‘ debts in question; but finds, that the necessary steps for that
 ‘ purpose were not taken by Sir William: Finds, that it does
 ‘ not appear, either from the assignments taken by Sir William,
 ‘ or from any other part of his proceedings, that he really had
 ‘ the intention of making Sir John Johnstone liable to relieve his
 ‘ heirs of the debts in question; and finds, at any rate, that if
 ‘ such was his intention, the same has not been carried into
 ‘ effect. Therefore sustains the defences, assoilzies the defenders
 ‘ from the hail conclusions of the libel, and decerns.’

The appellants then reclaimed, but the Court, on the 14th November 1817, refused the petition without answers; and on the 14th day of February 1818 they adhered, on advising another petition with answers.*

The appellant then entered an appeal to the House of Lords, and maintained that the judgments were erroneous, for these reasons:—

1. Because Sir William Pulteney, not having incurred, in relation at least to heirs, (whatever might be the effect in a question with creditors), a representation by his service or intromissions, beyond the extent of the inventory and the amount of the intromissions, he did not thereby become universally liable for Sir James Johnstone’s debts as heir-general: that, consequently, by having paid these debts, they were not extinguished confu-

* See Fac. Coll. 11th February 1818, where it is stated, that ‘ the Court were
 ‘ clearly of opinion that, in consequence of having served before making up inven-
 ‘ tories, Sir William had incurred an universal representation.’

March 31. 1824. sione; and as he had taken assignations in favour of his heirs-general, they were available to them against the heirs-male succeeding to the heritage, and representing the contractor of the debts. And,

2. Because, even if Sir William Pulteney had by his service incurred an universal representation as heir-general and heir-male, still it was competent for him, in the character of heir-male, to pay his brother's debts, and to render them available to his heirs of line against the heirs-male succeeding to Sir James's estate; and that the mode in which he had done this,—by taking assignations to these debts in favour of his heirs-general,—was both sufficient evidence of his intention to render them so available, and a competent mode of preventing their extinction confusione.

On the other hand, it was maintained by the respondents,—

1. That Sir William Pulteney, by his service as heir-male and of line to Sir James Johnstone, and by his intromissions with the estate, had incurred an universal representation, whereby he was personally liable for all his debts: that from the moment he was served he ceased to be an *apparent* heir, and as it was only competent for an apparent heir to limit his responsibility by making up inventories, he could not do so, seeing that he was not an apparent but an *entered* heir. And,

2. That as Sir William represented Sir James universally, and thereby became the proper debtor in his debts, and as he actually paid them, they thereby became extinguished confusione, and could not be kept up by obtaining assignations to them; and that the more especially, as he had done no act whereby to fix these debts, either upon the estate or upon the heir-male succeeding to it.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Appellant's Authorities.—1. Stair, 6. 5.; 3. Ersk. 8. 91.; 6. Code, 30. 25. § 2.; 1. Stair, 18. 9.; 1. Ersk. 4. 29.; White, June 10. 1673, (5207.); 3. Stair, 5. 21.; Allan, January 25. 1715, (3566.); Maxwell, July 12. 1717, (5210.); Robertson's App. Ca. 539.; 3. Ersk. 4.; Kerr, February 15. 1758, (15,551.)

Respondents' Authorities.—3. Ersk. 8. 52.; 3. Stair, 5. 17.; 3. Ersk. 4. 28.; 1. Stair, 18. 9.; Sir W. Forbes and Company, November 17. 1802, (No. 10. App. Tailzie); Johnston, July 21. 1679, (3042.); Robertson, November 27. 1751, (3044.); Campbell. February 17. 1747, (5217.)

WILLIAMS, BROOKS, and POWEL—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 23.*)

JAMES MILLER, and Others, Trustees of the late JOHN HAGGART,
Esq. Advocate, Appellants.—*Murray—Abercromby.*

No. 19.

Right Honourable CHARLES HOPE, Lord President of the Court of
Session, Respondent.—*Attorney-General Copely—Menzies.*

Jurisdiction—Reparation.—Held, (affirming the judgment of the Court of Session),
That an action of damages is not competent against a supreme Judge, for a censure
passed by him, while acting in his judicial capacity, on a Counsel practising at the
Bar, and engaged in the cause then before the Court, although it was alleged that
the censure had been made injuriously, and from motives of private malice.

THE late John Haggart, Esq. advocate, a practising lawyer at
the Scottish Bar, conceiving that he had been injured by certain
remarks made from the Chair by Lord Justice-Clerk Hope, after-
wards Lord President, on advising a cause in which he was counsel,
raised an action against his Lordship, in which, after narrating
that he had been for thirty years at the Bar, during which period
there had been five Judges in the Chair, by none of whom he had
ever been censured, proceeded to state the circumstances in these
terms:—‘ That, in the year 1809, a cause between the Duke of
‘ Athole and General Robertson of Lude depended before the
‘ Second Division of the Court of Session, wherein the Right
‘ Honourable Charles Hope then presided as Lord Justice-Clerk.
‘ That the Honourable Henry Erskine, Mr Matthew Ross, Mr
‘ John Clerk, and the pursuer, were counsel for General Robert-
‘ son; and it being deemed proper to submit an interlocutor pro-
‘ nounced by the Lord Ordinary to the review of the Court, the
‘ task of preparing a petition devolved on the pursuer. That after
‘ the petition was prepared, it was laid before the Dean of Faculty,
‘ who revised and corrected the press-copy. That when the peti-
‘ tion was put to the roll, it was appointed to be answered, and
‘ no animadversion was made on any of the expressions contained
‘ in it. That when the petition and answers came to be advised,
‘ the Right Honourable Charles Hope, Lord Justice-Clerk, not
‘ only censured expressions used in the petition, but expressed
‘ himself towards the pursuer in terms that greatly hurt his feel-
‘ ings. That on the 11th of April 1809, the pursuer wrote his
‘ Lordship, calling to his recollection the expressions he had made
‘ use of, and expressing a hope that an explanation would be
‘ given. He received the following answer:—“ Granton, 12th
‘ April 1809. SIR,—I have the honour to acknowledge the

April 1. 1824.

2D DIVISION.
Lord Pitmilley.