

No 15. right to his son with the burden of debts contracted, or to be contracted by him, none can contract with the son, but with the burden of these debts; yet the father's creditors with whom he contracted before or after, remain with respect to one another as personal creditors, till they rank and secure themselves by habile real rights or diligences, though they be real creditors as to the son's deeds, who hath no right but with the burden of the father's debts.

THE LORDS found, that the bond granted to Tullimorgan was no real burden upon the estate of Rutherstane, which could affect or prejudice the disposition in favours of the Town of Aberdeen.

Fol. Dic. v. 1. p. 293. Forbes, p. 288.

1717. January 17.

ABERCROMBIE of Glasshaugh *against* GRAHAME of Buchlyvie.

No 16.

A son accepting a disposition from his father, wherein was retained a faculty to burden, alienate, &c. was made personally liable for his father's debts, *in valorem* of the subject disposed.

GRAHAME of Buchlyvie being convened by Abercrombie of Glasshaugh, upon this special passive title, that the defender's father, who contracted the debt, had made resignation of his estate in favours of the defender his son, whereon the son was infeft, having reserved full power and faculty, notwithstanding of the son's right of fee, to sell and dispone the lands, contract debts, and grant real securities, &c.; and upon which infeftment, the defender did, upon the demise of his father, enter into the possession of the said estate; and therefore the pursuer *contended* that he should be liable for his debt *in solidum*, for these reasons:

1mo, That the deference belongs to our law above all others, in that the utmost care and provision is therein made for the security of creditors against the devices and frauds of debtors and their apparent heirs, and to obstruct apparent heirs their enjoying their predecessors' estates, without paying their debts; and several separate and distinct passive titles are with us introduced, which are not known in any foreign country.

2do, That an heir in general is either liable upon a service, or by an immixtion with the rents of his predecessor's estate, without regard to the extent thereof; and this from the rule in the common law, *Quod hæres est eadem persona cum defuncto*.

3tio, If a debtor should dispone to his apparent heir a branch of his estate to become effectual in the granter's lifetime, though there did remain with the granter an estate never so extensive, yet the receiver would be liable for the granter's debts contracted prior to the date of the disposition and infeftment; and whether the heir succeed by a conveyance, or *ab intestato*, law makes no distinction, but he is still liable, nor is the representation restricted *ad valorem*; and, though the passive title of successor *titulo lucrativo* is the most restricted of any; yet that restriction only takes place when the disposition takes effect

by infeftment and possession thereon during the life of the granter; but that the disposition shall be made to an apparent heir, which only takes effect after the granter's decease, the same would involve the apparent heir, to whom the right is granted, (if he shall make use thereof,) in an universal representation; and in this case Craig thus gives his opinion: ' Si quis successioni proximus in feofamentum acceperit, per resignationem ejus qui succedere debet, et terras post mortem defuncti, quarum usus fructus reservatus erat, possederit, habetur pro hærede, et erit hæreditariis actionibus obnoxius. Dixi, si possederit; nam resignatio et subsecuta sasina eo insciente et ignorante fieri possunt.' And this is plainly the present case, since here there was truly a *præceptio hæreditatis*.

4to, Here the defender had by the infeftment only a nominal fee, the effectual right thereof (as appears by the above clause) remaining with the father, and the effect of the disposition superseded till the father's decease.

5to, It were absurd in our law, if an heir's service in a special subject of the smallest value, or an heir's intromitting with the smallest part of the rent of his father's estate, should be made obnoxious to the whole creditors of the defunct without limitation; and yet that an apparent heir, who, upon the decease of his father, by a voluntary deed of the said father, should succeed to an absolute fee, which, while his father lived, was of no value or import in his person, that he should be liable *in valorem*.

Answered for the defender, to the *first*; That here there can be no fraud, nor intention of fraud, to disappoint creditors, where the debtor had conveyed his estate to his son; but at the same time took care that the estate should be liable not only to all the debts wherewith he should burden it, but that the son should be personally liable *in valorem*.

To the *second*, *answered*; That the defender was not heir, nor had an *animus* of immixtion so as to behave, by his intromission, being a singular title constituted and made public by a charter and sasine two years before contracting of the debt in question; so that, if there had been no reserved faculty, the creditor could have had no access either against the defender's person or his estate, the father by the constitution of the right being but a naked liferenter.

To the *third*, *answered*; That this is a plain confirmation of what the defender pleads, *i. e.* that he ought not to be liable for the debts contracted after, which is the case of the authority cited from Craig, and of our passive title of preception and successor *titulo lucrativo, &c.*

To the *fourth*, *answered*; That it was certainly true, that the father, by his deed, might evacuate the son's fee; but if by this deed he had disposed the estate to a third party, it can never be said that the son, by being once in the fee, would be liable to all his father's debts; for this fee being qualified, the pursuer can have no other access to it, than in the terms of the quality, in which terms the son possessed, and no otherways.

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To the *fifth, answered*; That it were sufficient to answer in the terms of a known rule in law, *non omnium quæ a majoribus constituta sunt ratio reddi potest*; but indeed the reason of the difference is, that the *animus* of being heir is directly by the service, and presumed by the immixion, but excluded by possessing on a singular title; and though by the law, where a person is once heir, the consequences are as extensive against him as can be imagined; yet no man is bound to be heir universally against his intention.

'THE LORDS found the defender liable *in valorem* of the subject conveyed by the disposition and resignation whereupon the charter proceeded.'

Adhered to, after a reclaiming petition.

Act. *Hay.*

Alt. *Grahame.*

Clerk, *M^cKenzie.*

Fol. Dic. v. 1. p. 292. Bruce, v. 2. No 48. p. 63.

* * Dalrymple reports the same case :

CAPTAIN ABERCROMBY pursues Buckleyvie, for payment of a debt due by the defender's father, on this ground, that he had possessed the estate of Buckleyvie, by virtue of a charter and infestment in favours of the father in liferent, and the defender in fee, containing a power and faculty to the father, by himself alone, at any time in his life, to sell, dispoen, burden, or affect the lands, in hail or in part, irredeemably or under reversion, as he should think fit, and grant all writs, or otherwise dispose thereupon, or burden or affect the same as freely, as if the fee of the said lands had never been granted in the son's favours, declaring the said charter and infestment as to the same, to be of no moment during the father's life.

It was *alleged*; The bond libelled was posterior to the defender's fee, so he could not be liable *per præceptionem*; and albeit the disposition contained a very ample faculty to the father to burden or alter, yet he had not exercised the faculty; and whatever could be alleged, that the estate might be subject to diligence, yet the defender could not be liable personally upon the quality of the charter, as was found 21st June 1677, Pringle *contra* Pringle, No 12. p. 4102., observed by my Lord Dirleton, where a father having dispoened his estate to his eldest son, with a faculty to burden it with a sum, and having afterwards contracted a debt far within the faculty, and the creditor pursuing a declarator that the lands were affectable, 'THE LORDS found, that the pursuer ought first to discuss the executry, and the lands were only liable *in subsidium*;' much less would the creditor, in that case, have had access personally against the son.

It was *answered*; That the cases were not parallel; for there the faculty was only to burden the estate with 5000 merks. The debt was but 1000 merks, which might have been recovered out of the moveables, and the pursuer only libelled a declarator for affecting the lands; whereas here the faculty was very ample, to act as freely as if the son had not been fiar; and further bears, that

the infestment shall be of no effect to the son during the father's life, so that the son's right takes only effect at the father's death, and the infestment is *præceptio hæreditatis*, the son being but a nominal fiar during the father's life.

' THE LORDS found the defender liable *in valorem* of the subject disposed.'

Dalrymple, No 164. p. 229.

No 16.

1719. *February.*

Competition betwixt THOMAS ROME, Merchant in Antigua, and the CREDITORS of Provost Graham in Dumfries.

IN the year 1629, George Rome purchased the lands of Clowden, and took the disposition to Thomas Rome, his son, in fee, and to himself in liferent; with power to him, the father, to dispoise the lands irredeemably; wadset them, or any part of them; or grant annualrents one or more to be uplifted out thereof, notwithstanding of the fee's being taken to the son. In the year 1635, the said George Rome granted bond to one Ballantine, for which adjudication was obtained of the lands of Clowden, at a time when not only was the debtor dead, but the estate conveyed from the son into the person of an onerous purchaser; and the adjudication by progress coming into the person of Thomas Rome, merchant in Antigua, a competition arose betwixt him and the Creditors of Provost Graham, standing then in the right of the said lands.

And it was *alleged* for these Creditors, That Mr Rome's right flows *a non habente*, George Rome, the granter of the bond upon which the adjudication was led, being only liferenter of the lands of Clowden; and though he had an express power by the disposition, to sell, dispoise, burden, &c. the lands without reserve, not having specifically exercised that power, by granting any infestment upon the land, his personal bond could not affect it, unless Ballantine the creditor had adjudged the faculty from him during his own life; which he did not, but after his death, when the faculty was expired; after which, the debt could not become real upon the lands by any adjudication. And here it was observed, that the fee flowed not from the father reserving to himself a liferent, but from a third party, which made rather a stronger case: In a disposition with a reserved liferent, and faculty to burden, &c. it may be thought that the fee is truly reserved, in so far as the faculty reaches; but, where the fee is disposed to one, and a faculty to burden to another, there the faculty is merely personal, and not the consequence of a fee.

It was *answered* for Mr Rome; *imo*, He who has a liferent, with a power to dispoise, burden, impignorate, &c. is in the eye of the law *really* fiar, his liferent is an *usus fructus causalis*, and his debts affect the subject, as much as the fee had been *formally* stated in his person. This seems to be an unquestionable principle; and, for that reason, a creditor needs do no more, but adjudge these

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A person having purchased an estate, took the same to himself and to his son in fee, reserving to himself power to dispoise, wadset, &c. He granted a personal bond without relation to the faculty, on which the creditor adjudged the estate, not only after the death of the father his debtor, but after his son was denuded, and a purchaser from him infest. The Court found the adjudication would have been valid, while the estate remained in the son's hands; but it could not affect a singular successor.