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sionary right which was reserved to Margaret Jamieson and her children *nascituri*, by the assignation to her father, and which undoubtedly fell under the *jus mariti*.

*Answered* for Margaret Jamieson, and her brother William, their father being then dead; The proviso, that in case of Robert Jamieson's predeceasing his daughter, the subject assigned should return to her in liferent, and to her brother in fee, failing heirs of her own body, was no more than a substitution, and cannot be considered as a right subsisting in her person at the time of the marriage, so as to fall under the *jus mariti*.

'THE LORDS adhered to their former interlocutor, in so far as it found the assignation in favour of Robert Jamieson preferable to the legal assignation by the subsequent marriage; but remitted it to the Lord Ordinary to hear parties upon the effect of the substitution contained in the said assignation to Robert Jamieson, and the claim of the husband's creditors founded thereon.' See HUSBAND AND WIFE.

For the Assignees under the Commission of Bankruptcy, *Lockhart*.  
*Walter Stewart and Ferguson.*

For the Jamiesons,  
Clerk, *Home*.

*A. W.*

*Fol. Dic. v. 3. p. 153. Fac. Col. No 117. p. 276.*

1764. July 24.

The REAL CREDITORS, against The PERSONAL CREDITORS of JOHN GILLESPIE.

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A person held lands by disposition and infeftment, which were afterwards reduced. While he possessed the lands he granted heritable bonds. After the reduction, his personal creditors insisted the heritable bonds were granted a *non habente potestatem*, and were not preferable. The heritable bonds were preferred.

UPON the 10th of September 1720, Mary Young, proprietor of the lands of Greenhill, with consent of Alexander Renton her husband, granted an heritable bond to John Gillespie, for infefting him in an annualrent corresponding to the principal sum of L. 333 : 6 : 8.

In 1721, the said Mary Young and her husband granted another security of the like nature to Gillespie, for infefting him in an annualrent corresponding to the principal sum of 2000 merks.

Upon these two bonds Gillespie was duly infeft.

In November 1723, Gillespie obtained an adjudication upon these two bonds against Mary Young and her husband, adjudging their several rights and interests in the hands of Greenhill, for the accumulated sum of L. 8906 : 6 : 8; but no charter or infeftment followed upon this adjudication.

Several other bonds were afterwards granted by Mary Young to Gillespie; and, upon the 15th of December 1732, her husband being then abroad, she sold the lands of Greenhill to him at the price of 19,600 merks, out of which he was allowed retention of 14,000 merks, as the amount of the debt due to him.

Gillespie was infeft upon the disposition of sale, and entered into possession; but Renton the husband, having returned to this country, he, in 1742, brought

a reduction of the sale in his wife's name, upon the head of facility, fraud, and lesion.

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This process was carried on very slowly for some years.

During the dependence, Gillespie granted two heritable bonds over these lands of Greenhill, one upon the 28th of May 1746, to Andrew Waugh, for L. 400 Sterling; and another upon the 21st of February 1749, to James Fleming, for 4000 merks. Upon these bonds infestment followed.

Gillespie having likewise contracted sundry personal debts, he, in the year 1752, executed a trust-disposition of the lands of Greenhill to John Smith writer to the signet, for behoof of his creditors; and Mr Smith having been infest upon this disposition, the lands were exposed to sale by public roup, and purchased by James M'Harg at the price of 30,000 merks.

No procedure had taken place in Mary Young's process of reduction from the 2d of February 1748; but, in the year 1756, after her own and her husband's death, it was awakened by Mr Michael Menzies advocate, as trustee for her children; and a proof having been allowed, Mr Menzies prevailed, and, in June 1759, obtained an interlocutor, whereby the Court 'Found the reasons of reduction of fraud and circumvention relevant and proven; and therefore reduced the disposition granted by Mary Young to John Gillespie, and infestment following thereon; and decerned accordingly.'

Against this interlocutor, M'Harg the purchaser, and the Creditors of Gillespie, preferred a petition, in which it was strenuously insisted for the real creditors, That, as they had contracted with him upon the faith of the records, they ought not to be hurt by the antecedent fraud and circumvention used by Gillespie in procuring the disposition from Mary Young. But this petition was refused, and the Court adhered to their former interlocutor.

The sale to Gillespie being thus reduced, the sums due to him on his heritable bonds and adjudications were ascertained, by interlocutors of the Court, to amount, at Martinmas 1756, to L. 6758 : 7 : 6 Scots; upon which a debate ensued betwixt his heritable and personal creditors. The former insisted for a preference in virtue of their heritable bonds; the later contended, that, as Gillespie's disposition was totally reduced, the heritable bonds were granted *a non habente*, and all the creditors fell to be ranked *pari passu*.

*Pleaded* for the real creditors: *imo*, The disposition by Mary Young to Gillespie, though reduced at the instance of the trustee for her children, must still subsist as a security for the debts due to him out of the estate, and of consequence the infestments granted by him to his real creditors must afford them a preference. The only effect of the reduction, which proceeded upon the inequality of the bargain, was to give the former proprietor a preferable right to the lands, and to set aside the disposition so far as it interfered with that right. But it was not the intention either of the process or of the Court, to reduce the disposition any further than the pursuer's interest was concerned. With respect to every other person, the deed reduced must be considered as effectual. This

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takes place in reductions *ex capite inhibitionis*, or *ex capite lecti*, and even in reductions and improbations; and there is no distinction with respect to reductions upon the head of facility, lesion, and circumvention. On the contrary, the Court has, in such cases, been in the practice of reserving dispositions set aside upon these grounds as a security to the disponee for the sums which he had actually advanced. It was so determined in the case of Irvine of Cove, 19th July 1751. See PERSONAL AND REAL.

2do, The heritable bonds granted by Gillespie, and the infeftment following thereon, implied a conveyance of every right which stood in his person; for it is an established point, that a deed may be effectual to carry rights which are not specially mentioned in it, and the law does not so much regard the words and the form of the deed, as the purpose and intention of it. See Sheriff of Tiviotdale against Elliot, *voce* IMPLIED ASSIGNATION; Beg against Beg, *IBIDEM*; Sinclair against Coupar, *voce* VIRTUAL; Muir against Fullarton, *IBIDEM*; Colonel Erskine against Hamilton, *voce* IMPLIED ASSIGNATION; New College of St Andrew's against Sir Alexander Anstruther's Creditors, *IBIDEM*.

*Answered* for the personal creditors: *imo*, It is unnecessary to enquire what judgment might have been pronounced, if Gillespie, or those in his right, had insisted for a reservation similar to that in the case of Irvine of Cove. It is sufficient that no such judgment was pronounced in the present case; and as, by the decree of the Court, the disposition to Gillespie, and the infeftment following thereon, 'were declared to have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, nor effect, and to make no faith in judgment, nor outwith the same in time coming;' so, upon the plainest principles of law, the rights communicated by him to his creditors must fall of consequence. Besides, though Gillespie had, during the pendency of the reduction, insisted that his right to the lands should be sustained as a security for the sums due to him, the Court would not have sustained it to that effect; for, in the *first* place, he had no interest to make the demand, being already fully secured by the former infeftments in his person; and, in the *next* place, as, long before the decree of reduction, he had conveyed his estate to a trustee for the behoof of his whole creditors, there was thereby a *jus quæsitum* to every one of them; and therefore, whatever the Court might have done, if the question had been solely betwixt Gillespie himself and the pursuer of the reduction, it would not have interposed *ex nobili officio*, when persons having an interest could show that they might be hurt by such interposition; *lastly*, it is a material circumstance in this case, that none of the money now in question was advanced by Gillespie upon the faith of the right of property which he got from Mary Young; but was all advanced long before that period upon other securities. In questions of this kind, it makes a material difference, whether the party was, *ab ante*, creditor upon another account, or whether his *jus crediti* arises from money advanced upon the faith of the right brought under challenge.

In the last case, a defender may be entitled to insist to be put in *statu quo* by the pursuer's restoring to him whatever was advanced in consequence of the transaction; and, if he runs any risk of losing, the Court will, *ex æquitate*, give him relief by sustaining the deed challenged as a security for the money so advanced. But, where the money was not given upon the faith of the deed challenged, but was, *ab ante*, lent upon the faith of the party himself, or upon any other security, it ought to remain upon that security; and there is no ground in equity for giving any farther relief.

The case of a reduction *ex capite inhibitionis* does not apply; because such reduction, in its own nature, can go no further than to empower the creditor to affect the subject. When his debt is satisfied, the right of the disponee stands firm to all intents and purposes. In like manner, a decret of certification, in an improbation, which proceeds only upon a fiction of law, does, in its own nature, go no farther than to secure the interest of the pursuer; and it may therefore subsist in the person of the defender for any other purpose where the pursuer's interest is not affected. But, where a deed is actually improved upon a proof of the forgery, it never can stand in the person of the defender for any purpose whatever; nor can he found upon it even in a question with third parties, with whom the pursuer in the improbation has no concern.

As to the case of a reduction *ex capite lecti*, it tends to support the plea of the personal creditors; for, although such action can only be pursued by the heir, or those in his right, and so is not competent to the creditors of the defunct; yet, after the deed has been reduced by the heir, it will be competent to the creditors to take the benefit of it, and attach the subjects that fell under the disposition reduced; and, by the same rule, although the creditors of John Gillespie, could not have insisted in the reduction of Mary Young's disposition to Gillespie, yet, now that it is reduced, they certainly are entitled to avail themselves of it.

2do, The two heritable bonds granted by Gillespie cannot imply a conveyance of the infestments of annualrent that stood in his person. It is certain, that Gillespie never intended to convey these infestments to his creditors. He considered himself as absolute proprietor at the time, and in that character he granted to them the two heritable bonds in question. But, even though his intention had been ever so clear, it was not carried into execution *habili modo*. The infestments which he gave to Messrs Waugh and Fleming can have no stronger effect than if he had infest them expressly in an annualrent to be uplifted out of the annualrents that subsisted in his own person. Now, although Gillespie might have conveyed these annualrents to his creditors, to be holden either of himself or his superiors, yet it is clear that an infestment of annualrent in these infestments of annualrent could vest nothing real. A full and absolute disposition, by which the disponent is totally denuded, may indeed imply a conveyance of every inferior right that was in his person; but it will not thence follow, that, where a person, in the character of proprietor, grants an inferior right out of the lands, such grant will imply a conveyance of every other infe-

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rior right in his person. If he has not denuded himself of these other rights *habili modo*, they will still remain with him, and may be afterwards conveyed by him, or carried off by legal diligence. See 18th March 1631, Laird of Clackmannan against Laird of Allardyce, *voce* IMPLIED ASSIGNATION.

The decisions founded on by the real creditors do not apply. In the case of the Sheriff of Tiviotdale, the right under which the party claimed was an absolute right of property, and was therefore justly found to comprehend a right of reversion. In the case of Beg, there was likewise an absolute right of liferent granted; and, in the case Sinclair against Coupar, an assignation to mails and duties in all time coming was very properly found to imply an obligation to grant a formal conveyance of the lands; because nothing else than a right of property could be meant or intended by it. The other cases proceeded entirely upon a mistaken idea, (which was understood to be the law, until it was corrected by the judgment of the Court in the case of Bell of Blackwoodhouse against Garthshore 1737, No 80. p. 2848. ;) that a simple conveyance was sufficient to denude the granter, if his right was only personal. None of these decisions, therefore, apply to the present case.

‘ THE LORDS preferred the real creditors.’

For the Real Creditors, *Johnston.*  
A. W.

For the Personal Creditors, *Wight et M<sup>c</sup>Queen.*  
Fol. Dic. v. 3. p. 155. Fac. Col. No 141. p. 327.

No 86.

In a competition between the singular successor of a reverser, entitled to redeem upon an elusory presentation, and the heir of the nominal fiar; the singular successor preferred.

1783. January 22. EARL OF LAUDERDALE *against* EARL OF EGLINTON.

THE Earls of Lauderdale and Eglinton having both laid claim to the patronage of the parish church of Dundonald, their respective pretensions came to be tried in mutual processes of declarator.

The titles of both claimants were derived from one source, the family of Abercorn, but were thus differenced :

In 1742, John Earl of Lauderdale was *infeft* in his patronage, among other subjects contained in a charter under the Great Seal, purporting to have proceeded on a disposition, granted by James Earl of Abercorn; the charter and sasine, but not the disposition, were produced. It did not, however, appear that these subjects had ever, from that time downward, been transmitted by any of the posterior title-deeds of the family of Lauderdale; the present Earl having made up his title by adjudication on a trust-bond.

On the other hand, the Earl of Eglinton connected his title with that of the Earl of Angus, as disponee of James Earl of Abercorn. The Earl of Angus, indeed, did not obtain a charter of those subjects for eleven years subsequent to the date of that on which Lord Lauderdale's claim was founded; but then the right was regularly transmitted from him to Lord Eglinton, by an uninterrupted series of titles, extending through the whole intermediate period.