

No 13.

2do, As it appeared from the deed itself, that the Doctor was then making a general settlement of his whole funds, no doubt could be entertained but that the adjudication and house in Dundee were meant to be included. His intention appeared also to be sufficiently declared, as the phrase 'heritable means and effects' comprehended lands and houses as well as *nomina debitorum*; and the house in question certainly made a part of the Doctor's heritable means and effects.

Independent of this general argument, it was to be observed, that the adjudication did not fall to be considered as a right of property. The Doctor never had been in possession, the legal was still current; so that it was merely a security for the accumulate sum. The grounds of debt were still subsisting as a part of the creditor's title; and as these, in this case, must fall under the conveyance of 'debts and sums of money,' the adjudication, as inseparable from the debt, must of consequence be carried by the settlement; and the express point had been determined in the case, *Wades contra The Heirs of Marshal Wade*, No 20. p. 221. and No 14. p. 5018.

The Judges were unanimous that the deed was a disposition and not a testament; but upon the general principle, that heritage is never understood to be conveyed unless positively expressed, the majority were of opinion, that the words 'means and effects, heritable and moveable,' were not sufficient to comprehend the house in Dundee. It was therefore found, "That the house in Dundee, disposed by Dr Brown, does not fall under, and is not carried by his deed of settlement to the trustees, and with regard thereto assoilzies; and as to the other heritable subjects, decerns against the defenders in terms of the libel."

Lord Ordinary, *Justice Clerk*.

For Rachael Brown and Sisters, *D. Rae*.

For Bower, &c. *Macqueen, Crosbie, Nairn*.

*R. H.*

*Fac. Col. No 15. p. 32.*

1773. November 16.

GEORGE, LORD KINNAIRD, *against* MAGDALEN, Lady-Dowager of KINNAIRD.

It having been adjudged by a final decree of the Court, in November 1770,\* in an action at the instance of Joseph Austin, and others, "in respect of the acquiescence in, and homologation of the division of the common, and decrees-arbitral in question, by the predecessors of Lord Kinnaird, that the pursuers are entitled to payment from the representatives of Charles Lord Kinnaird, of the sums libelled as his share of the expense of the said division;"—the next point was, how far these claims affect both the heir and executor of the said Charles, Lord Kinnaird, or only the executor?

THE LORD ORDINARY 'found Lady Kinnaird, the executrix, liable in this expense, as being a moveable debt.'

And the COURT adhered on a reclaiming petition and answers.

*Act. Ja. Fergusson.*

*Alt. Rae.*

*Clerk, Campbell.*

*Fol. Dic. v. 3. p. 266. Fac. Col. No 90. p. 227.*

\* Not Reported.

No 14.

A claim for a defunct heritor's share of the expense attending the division of a common, in which he had an interest, found to be a debt that affected the executor.