

contravener's descendants might sometimes prove ineffectual, which would in no respect be adverse to public expediency, or the general principles of jurisprudence.

The Lord Ordinary sustained the reasons of reduction.

A reclaiming petition was followed with answers, and the Court afterward ordered a hearing in presence.

When the cause was advised, the Judges were far from being unanimous; but on the grounds stated for the defender, the Court, by a majority, 'altered the judgment of the Lord Ordinary,' and 'sustained the objection to the pursuer's title.'

And on advising a reclaiming petition against this judgment, with answers, they 'adhered.'

Lord Ordinary, *Armadale.*

Act. *H. Erskine, M. Ross, Rae.*

Alt. *Solicitor-*

*General Blair, Wolfe-Murray, P. Murray.*

Clerk, *Menzies.*

R. D.

*Fac. Coll. No. 226. p. 513.*

1802. *November 17.*

SIR WILLIAM FORBES, J. HUNTER and Company, *against* LORD DUNCAN.

By contract of marriage, (6th May 1766,) between George Cockburn Haldane and Bethia Dundas, Robert Haldane of Gleneagles 'bound and obliged himself, his heirs, executors and successors, to content and pay to the said George Cockburn, his heirs, executors or assignees whatsoever, all and hail the sum of £5000 Sterling, and that at the first term of Whitsunday or Martinmas next, after the death of the said Robert Haldane, with annualrent, penalty, &c. And for the more security anent payment of the said sum of £5000 Sterling, the said Robert Haldane obliges himself and his foresaids to grant good and sufficient heritable security therefore upon his lands and estate of Gleneagles, or other lands and heritages belonging to him, in the terms herein after specified,' for securing the provisions stipulated in favour of his future wife; the fee to go to the children; 'whom failing, to the said George Cockburn, his own heirs and assignees whatsoever.'

Robert Haldane (9th June 1776) executed the following settlements:

1. A strict entail, prohibiting alienation, burdening, &c. of Gleneagles and others, in favour of 'himself, and the heirs-male of his body; whom failing, to the said Mr. George Cockburn, advocate, his nephew, and the heirs-male of his body; whom failing, to Lieutenant-Colonel Alexander Duncan, younger of Lundie, his nephew, and the heirs-male of his body; whom failing, to Captain Adam Duncan, (now Lord Viscount Duncan,) his brother-german, and the heirs-male of his body.'

\* 2 D

No. 9.

No. 10.

A debt due by the entailor to the heir of entail, extinguished in his person, on his succeeding to the unentailed as well as entailed property of the entailor.

No. 10.

2. A trust-disposition of the estate of Airthrey ‘ to Lord Barjarg, Lord Kennet, Mr. Abercromby of Tullibody, Mr. Wellwood of Pitliver, and the ‘ said Mr. George Cockburn his nephew, as trustees.’ This deed, though declared to be in trust, contained full powers to sell, for the following purposes ; *1st*, For payment of Mr. Haldane’s debts, to the extent of £14,000 Sterling of principal, with the interest current from his death ; and in the discharge of this part of the trust, the trustees were to be regulated by a list to be made out by Mr. Haldane ; and failing such list, which does not appear ever to have been made out, then they were authorised to pay any debts they thought proper to the above limited extent ; and, *2dly*, For the reversion of the estate, the trustees were to account to Captain James Haldane of the Duke of Albany East Indiaman, the truster’s nephew.

3. A disposition of the estate of Gask, with the same destination of heirs as in the estate of Gleneagles, and with the same conditions and provisions, except that the heirs are in this last only prohibited from gratuitously selling or burdening the lands, or other heritages therein mentioned, ‘ or do any gratuitous ‘ act or deed, by which they may be burdened or adjudged, or anywise evicted ‘ from the said heirs of tailzie, or whereby the destination and order of suc- ‘ cession may be anywise prejudged, hurt, or changed.’

The destination and settlement of Gask, and the other heritable property conveyed therewith, lays upon these lands the burden of a jointure of an annuity of £ 400 Sterling, payable to the widow of the granter ; and as to his other debts, it contains a provision and declaration in these words : ‘ That these ‘ presents are granted by me, with the burden, and my said heirs, by accepta- ‘ tion hereof, shall be bound and obliged, to make payment of all just and law- ‘ ful debts and obligations that shall be due and prestable by me the time of ‘ my decease, together with my funeral charges, and such gratuitous bonds, ‘ obligations or donations, as I may happen to grant and execute in favours of ‘ any person or persons whatsoever, by a writing under my hand at any time ‘ in my life, and that in so far allennarly as the sum of £14,000 Sterling, part ‘ of the price and value of the estate of Airthey and others, destined to clear ‘ the same, by a trust-disposition, of this date, granted by me to the said Mr. ‘ George Cockburn and others, of the said estate of Airthrey and others, may ‘ be insufficient to answer and clear the same ; to which extent of principal ‘ sums, as at the period of my death, my heirs herein before named, as well as ‘ the lands and estate before disponed, are, as I now propose, to be relieved ‘ out of the estate of Airthrey and others, and price and produce of the same.’

*Lastly*, By a fourth deed, Robert Haldane, in the event of the failure of heirs of his own body, assigned and disponed his whole moveable estate, so far as not contained in any of the preceding deeds, ‘ to and in favour of the said ‘ Mr. George Cockburn, his nephew, and the heirs-male of his body ; whom ‘ failing, to the other heirs of tailzie and provision substituted to him, and his

‘ heirs-male aforesaid, in a deed of entail executed of this date, of the lands and baronies of Gleneagles, Haldane and others.’ No. 10.

This settlement contains a provision and declaration, almost verbatim the same with the settlement of the estate of Gask, for rendering the disponees and executors liable to his debts and deeds, so far only as the same should not be cleared by the £14,000, payable for that purpose from the estate of Airthrey; to which extent of principal sums, ‘ as at my death, my said executry, and others hereby assigned and disposed, are, as I now propose, to be relieved out of the estate of Airthrey and other subjects, and prices and produce of the same.’

The entailer died in 1768 without issue, and George Cockburn, the first existing substitute, succeeded in terms of the above settlements. The entailer’s debts far exceeded the £14,000 due from the estate of Airthrey; besides, as the bond for £5000 was expressly set apart for Mrs. Cockburn’s jointure, and provisions to the children, it was not paid by these trustees out of that fund.

On the death of Mrs. Cockburn, and the survivance of only one daughter, by the original terms of the contract the £8000, (of which the £5000 for which Robert Haldane had become bound formed a part,) which had been secured to the family was reduced to £3000, and the residue came into George’s person, descendible to himself, his heirs and assignees. Considering the residue as a separate estate in himself, and being a debt of the entailer, he negotiated several loans of money upon it; the last of which was by an assignation, to the extent of £740, to Sir William Forbes and Company, being indebted to them in that sum on his cash-account.

By the death of George Haldane, and the failure of prior substitutes, the succession opened to Lord Duncan, who objected to payment of the claim made on this bond, on the plea, that by George succeeding to the entailer, it was extinguished *confusione*.

The Lord Ordinary (24th January 1801) sustained the defences.

The pursuers reclaimed, and

Pleaded: The succession of Gleneagles, and the other property acquired from the entailer, was taken up in the character of heir of tailzie and provision, whereas, the debt being descendible to heirs and assignees, is a fee-simple. The two characters are perfectly distinct; and extinction *confusione* cannot be pleaded against a debt which stood in the creditor’s person as a fee-simple, because he succeeded to the debtor as heir of entail. A personal creditor succeeding as heir to the debtor, does not extinguish the debt, because the executor is primarily liable; as little does an heritable creditor, if he does not succeed *in universum jus*; Stair, B. 1. Tit. 18. § 9; Ersk. B. 3. Tit. 4. § 27; Cumming against Irvine, 4th January 1726, No. 9. p. 3042; Murray against Neilson, 27th January 1728, No. 10. p. 3043; Gordon against Maitland, 1st December 1757, 2d Art. No. 359. p. 11164; Ker against Turnbull, 15th Fe-

No. 10. bruary 1758, No. 103. p. 15551 ; Boyd against Boyd, 22d June 1779, (not reported.) Debts of the entailer, though paid by the heir of entail, may be kept up as debts against the estate. The intention to keep up this debt is clear and decided, being almost constantly made use of for the purpose of borrowing money, so that it scarcely ever was in George's own person. It would be a dangerous doctrine, if creditors, relying on the security of an entailer's debt, were to be deprived of it by the averment of a future heir of entail, that it was extinguished by the intromission of his predecessor with some other subjects of the entailer's ; for thus their security might be cut down, while they were totally ignorant of any such operation going on, and a debt of the entailer would afford no security at all. If the funds for payment of the entailer's debts have been misapplied by the intermediate heir, the future heir of entail may have an action against his general representatives, but he cannot refuse payment of a debt due by the entailer, now in the person of an onerous purchaser ; Gordon against Maitland, 1st December 1757, 3d Art. No. 359. p. 11165.

The estate of Gask was, it is true, disposed under the burden of paying the entailer's debt, so far as not paid from the trust-estate of Airthrey. But this does not strengthen the obligation to pay off these debts, as wherever an estate is disposed, whether under the fetters of an entail or not, the donee must be liable in payment of the debts, to the full value of the estate he receives. As long as any part of the estate belonging to the entailer exists, it must be liable for his debts ; and while they stand in the person of an onerous creditor, it is not enough that he had separate funds from which they might have been discharged, for every fund that was left by him is alike liable for this burden.

Besides, the estate of Gask could be sold for the debts of George Cockburn himself, and might be exhausted by his creditors. It was thus his own money ; and if he had, with part of the price, paid off this debt of the entailer's, he might have kept it up as a debt against the entailed estate ; and his creditors were entitled to have this done, that the fund for their payment might suffer no diminution.

The entailer's moveable estate was very inconsiderable, and could go but a short way in payment of his debts. Besides, the £5000 is truly an heritable debt, and can only affect the heritable estate ; because the deed which constitutes the debt, contains also an obligation to grant real security for it over the estate of Gleneagles and others. The personal estate, then, is not the fund from which it is to be paid.

Answered : It may be true, that a service as heir of tailzie to a particular subject is not an universal representation, so as to extinguish debts which were due by the defunct to the heir of tailzie before the succession ; but still the debt of the entailer was extinguished in the person of George Cockburn, not merely because he succeeded to the entailed estate, but also to the unentailed estate of Gask, and to the whole moveable property of his uncle, which he intromitted with, without inventory or confirmation, and consequently was his

universal representative in all debts, heritable and moveable. This distinguishes the present from all the cases referred to by the pursuer; particularly that of Maitland, where, besides this, the heir succeeded through his mother to the entailed estate, and to the fee-simple of the debts affecting the estate through his father, who had purchased them with his own money; and it would have been unjust to hold, that by succeeding to the entailed estate, upon which he could not borrow a single farthing, he should lose the succession which opened to him through his father.

No. 10.

The obligation to pay off the debts, is the condition of taking up the estate, and he cannot make it more lucrative than his ancestor has done for him. If, instead of allowing him to succeed to the unentailed property, he had transferred to him effects to a similar amount, by an irrevocable deed *inter vivos*, neither he nor his representatives could have claimed payment of the £5000, *quia debitor non præsumitur donare*. The gift will be held *pro tanto* as an extinction of the debt; and *multo magis* if it be to a greater amount, although it should not even be clogged with any obligation for payment of that or any other of the donor's debts.

The obligation by the entailer was to pay this £5000 to George Cockburn, his heirs, executors, or assignees, and he was to lay it out for the purposes of the marriage. The entailer indeed became bound to secure it on Gleneagles, in favour of the creditor; but this obligation was fulfilled, as he received not only security but payment of it, by the various settlements made in his favour.

The Court, considering that George Cockburn was himself liable to pay his uncle's debt, by the nature of the settlements executed in his favour, held, that he could not assign the bond in question to any of his own creditors, as the moment it came into his person it was extinguished *confusione*, and never could be again revived. They accordingly adhered.

Lord Ordinary, *Armadales*. Act. *H. Erskine, Hay, Forbes*. Agent, *T. Cranstoun, W. S.*  
 Alt. Lord-Advocate *Hope, M. Ross*. Agent, *A. Duncan, W. S.* Clerk, *Pringle*.

F.

*Fac. Coll. No. 59. p. 133.*

1806. May 23.

CLARKE against BRUCE.

No. 11.

SEE this case *voce* WARRANDICE, No. 98. p. 16643. relative to the consequences in a question with a creditor, where a tailzie is defective in the clauses against selling.

1807. May 14.

SMOLLET'S Creditors against SMOLLET.

No. 12.

MR. COMMISSARY SMOLLET (20th August 1769) made a general disposition of his property in favour of trustees for the purchase of land to be entailed

Personal  
debts con-  
tracted by the