

Mar. 3, 1826. ship of this case upon this gentleman, your Lordships cannot proceed upon it: it would be the most dangerous doctrine in the world, if your Lordships, or the Court below, were to proceed upon the supposed hardship of the case, if this hardship should induce you to decide against the stipulations. Whatever may be the opinion as to the hardship of the case, it does not appear to me that the party has sustained any damage in consequence of any violation of this agreement; he has not brought himself within that provision that entitles him to damages,—the Lord Ordinary having found that no breach of the agreement had taken place,—but, as it appears to me, making a new contract on his part, and finding that, in consequence of what has happened, this gentleman is to receive remuneration; there being nothing pointing to remuneration under such circumstances, but, on the contrary, the articles provide he is to receive no remuneration. They contemplate his return in the Prince Regent, in which case it does not provide that he is to receive any additional remuneration, but he is to be content with his share of the profits.

On the whole, therefore, I must say, notwithstanding the great reluctance and great diffidence which I feel upon all occasions whenever I differ from the decision of the Court below; yet when I entertain a very clear opinion that the decision of the Court below cannot be supported, it is my duty to express that opinion to your Lordships; and if your Lordships do not give any intimation of an opinion different from what I have expressed, it is my duty to move your Lordships that these interlocutors be reversed.

JAMES CAMPBELL—MONCRIEFF and WEBSTER, Solicitors.

No. 6.

CLAYTON and Others, (LOWTHIAN'S Heirs-Portioners,)

Appellants.—*Shadwell—Abercromby.*

R. LOWTHIAN, ROSS, and Others, (Executors of LOWTHIAN,)

Respondents.—*Adam—Keay.*

Heir and Executor.—A purchaser of an estate over which there was an heritable debt, having bound himself to pay it as part of the price, and received a discharge of the price on that footing; and having granted a personal bond of corroboration to the creditor,—Held (affirming the judgment of the Court of Session) in a question between the heir and executor of the purchaser, that the debt was heritable, and formed a burden on the heir.

Mar. 3, 1826.

2d DIVISION.
Lord Cringle-
tic.

IN 1777, Mr Mackenzie purchased the estate of Netherwood, consisting of the lands of Conheathrig and others, and Mr Lowthian was cautioner for payment of the price. In order to pay a part of it, Mr Mackenzie borrowed £10,000 from Glover; to whom he granted an heritable bond and disposition in

security over the estate, on which infestment was taken, and Mar. 3, 1826.
 Lowthian bound himself to see the interest paid. Prior to his death, Mackenzie executed a disposition of his estate in favour of trustees, inter alia, for payment of his debts, and soon thereafter died, in 1781. His principal personal creditor was Mr Lowthian, who entered into an arrangement with the trustees for the purchase of the property, and an assignment to him of the whole effects of Mr Mackenzie. While this was in contemplation, Glover (who, through the death of Mackenzie, had lost his personal obligation for payment) pressed the trustees and Mr Lowthian for a personal bond of corroboration. To this the trustees declined to accede, and at this time Mr Lowthian also refused to agree.

The sale of the estate to Lowthian was carried into effect in February 1782, by a disposition granted by the trustees on the narrative 'that he (Mr Lowthian) has fully satisfied us anent payment of the said stipulated price, of which he, his heirs and successors, are hereby for ever discharged.' They therefore disposed the lands, &c. to him and his wife, in conjunct fee and liferent, and to his wife, and her heirs and disponees, in fee; but under the declaration that 'the said Richard Lowthian and Sarah Aglianby, spouses, are to take upon themselves the payment of the whole heritable debts affecting the lands and estate of Netherwood, and fishing of Castle-Dykes, above disposed.' Infestment followed, but the instrument did not contain any reference to this obligation.

In exchange for this disposition, Mr Lowthian granted to the trustees a deed of exoneration and discharge, narrating a variety of prior proceedings, and that it was therefore 'agreed between the said trustees and me, in order to avoid all farther expense and trouble, that I should become purchaser of the whole heritable subjects which belonged to the said George Mackenzie, at the rate of twenty-five years' purchase of the free rental thereof; and should further get right to the whole other effects which belonged to him, and take upon myself the burden of paying all his lawful debts, and grant to them the discharge and bond of corroboration under-written. And seeing that the trustees, in conformity to said agreement, did, upon the 23th day of February last, execute and deliver a disposition and assignation in favour of myself and Mrs Sarah Aglianby, my spouse, and her heirs, according to my desire, of all and whole my lands and estate of Netherwood and Castle-Dykes, &c.; and have further, on the date hereof, made and granted in favour of me and my said spouse, dispositions and assignations

Mar. 3, 1826. ‘ of the whole remaining estates and effects, both real and personal, which belonged to the said George Mackenzie, with immediate tradition and delivery of the same;—therefore I, the said Richard Lowthian, with advice and consent of my said spouse, have not only exonerated and discharged them, the said trustees, of their whole intromissions with the defunct’s affairs, but also am bound and obliged, and do, by these presents, in implement of my part of the said agreement, bind and oblige myself, my heirs and executors, and successors, whomsoever, to warrant and relieve, harmless and skaithless keep, the said trustees and each of them, and their heirs and successors, of all cost, skaith, damage, interest, and expenses which they may sustain, by and through their acceptance of and acting under the said trust-deed, or granting the foresaid conveyance to me and my said spouse any manner of way; and for that effect, that I shall with all convenient speed make payment of all the just and lawful debts resting due by the said George Mackenzie, and procure valid discharges of the same to all concerned; such debts being always constituted, in the first place, as accords to law; but against which, all legal and competent objections are hereby reserved to myself, and all others having interest therein, and in particular, without prejudice to the generality foresaid, the several debts and sums of money owing to the said defunct, which are to be specified in a list or inventory, to be given up to me by the said Simon Mackenzie, if that shall be judged necessary.’—A list containing Glover’s debt was accordingly given in to Mr Lowthian.

On the 3d of June of the same year, Mr Lowthian granted to Mr Glover a personal bond of corroboration, in which, after narrating the bond and disposition in security for £10,000, and infestment thereon over the estate, he states:—‘ And seeing that I did some time ago purchase the said lands and others, and that the said Richard Glover has agreed to supersede payment of the principal sum of £10,000, to the term of payment after mentioned, upon condition of my granting the obligation underwritten: Therefore, and in corroboration of the said bond and disposition, and infestment following thereon, and without hurt or prejudice thereto, or to any other obligation granted to the said Richard Glover, for payment of the interest of the said principal sum, *sed accumulando jura juribus*,’ he declared himself to be bound, ‘ as I hereby bind and oblige me, my heirs, executors, and successors, whomsoever, to content and pay to the said Richard Glover, his heirs, executors, or assignees, the foresaid

‘ principal sum of £10,000 sterling, and that at and against the Mar. 3, 1826.
‘ term of Martinmas next ; with the said sum of £2000 sterling
‘ of liquidate penalty in case of failure; and the due and ordi-
‘ nary interest of the said principal sum of £10,000 sterling,
‘ from the term of to which term the said inte-
‘ rest is paid up, and yearly and termly thereafter, during the
‘ not-payment of the said principal sum.’

Mr Lowthian entered into possession, and although he regularly paid the interest on the heritable bond, yet he did not pay any part of the principal.

On his death, Mrs Aglianby, his widow, took possession of the estates; but some years thereafter, she was compelled by Mr Lowthian’s heirs-portioners to remove. She then claimed terce and jus relictæ, and the question among others occurred, whether Glover’s debt of £10,000 affected the jus relictæ? It was ultimately found, that it did not.*

Mutual actions of declarator were then instituted, by the heirs-portioners and the executors of Mr Lowthian, to have it ascertained on which of them the burden of paying the £10,000 lay. In their summons, the heirs-portioners alleged that it fell on the executors, seeing that by the bond of corroboration, and the other deeds narrated, ‘ the said Richard Lowthian incurred a personal
‘ obligation merely, to pay the said debt of £10,000 to the said
‘ Richard Glover, and the said debt is in every view a personal
‘ debt only in so far as regards the succession of the said Rich-
‘ ard Lowthian; and although the heirs as well as the executors,
‘ by the Law of Scotland, are liable to the creditors of the de-
‘ funct for payment of the just and lawful debts due by him,
‘ yet the executors are obliged to relieve the heirs of the person-
‘ al debts, in so far as the executry and moveable estate extend.’
And they concluded for relief accordingly.

On the other hand, the executors stated in their summons,
‘ that as the aforesaid debt was secured over the said defunct’s
‘ heritable estate; as the disposition in his favour to the said
‘ estate, was declared to be burdened with the said heritable
‘ debt; as the said defunct stood duly infeft and seized in the
‘ subjects affected by the said heritable debt; and as the said
‘ heritable debt was formally corroborated by the said defunct,
‘ and the term of payment superseded in manner aforesaid; his
‘ heirs-portioners are, for these and other reasons, bound to sa-
‘ tisfy and pay the foresaid heritable debt and interest.’—And

* See Ross against Aglianby, January 20, 1797. (4631, and No. 5. Ap. Foreign.)
May 25, 1814.—(House of Lords)—14th Nov. 1816. F. C.

Mar. 3, 1826. concluded, that the heirs should therefore pay the said heritable debt, and relieve them of the same.

The Lord Ordinary conjoined the actions, assoilzied the executors, and decerned against the heirs-portioners; and on advising a representation, refused it on the following grounds, as expressed in a note:—‘ There can be no sort of doubt of the principles of law, by which this case must be determined; the only difficulty is that of applying them to the established facts of it. All authors agree in, and all decisions confirm the doctrine, that it is the animus, or intention, of a deceased, either expressed, or to be collected by his acts and deeds, that regulates his succession, and its partition between his heirs and his executors, as well as the payment of his debts; in particular, it is established, that when a man purchases a landed estate, and dies before paying the price, the land belongs to his heir; while the burden of paying the price is incumbent on the executor, if the personal estate be sufficient for the purpose. Thus, if Mr Lowthian, after purchasing Netherwood, had died without paying the price, the estate would have fallen to his heirs, and the burden of the price would have been imposed on his executry, nor would it have made the least difference, that the estate was burdened with heritable bonds and sasines, granted by the former proprietor. If the executor was bound to pay the price of the estate, which he was, he had to discharge these debts as part of that price. On the other hand, there can be as little difficulty in determining, that, if Mr Lowthian, after purchasing the estate, had granted an heritable bond over it for the price, the land would have descended to his heir, cum suo onere, that of paying the price. The simple question here, then, is this,—Mr Lowthian bought Netherwood, over which there was a real burden of £10,000 due to Mr Glover, by virtue of an heritable bond and infestment. Mr Glover was willing that his money should remain so secured; and Mr Lowthian had no desire to counteract these wishes, by paying up the money, and granted a bond of corroboration, narrating specially the heritable bond and infestment, that the creditor was willing that the debt should remain unpaid, on Mr Lowthian granting a corroboration thereof; and therefore, without weakening that security, but in confirmation thereof, and accumulando jura juribus, Mr Lowthian bound himself, his heirs, &c., to pay the debts, &c. Is not this equivalent to Mr Lowthian having granted an heritable bond for the money? That is the sole and simple question in this case; for, if such bond had been granted, there could not be a doubt, that the

‘ burden of paying the debt would be incumbent on his heirs. Mar. 3, 1826.
 ‘ The Lord Ordinary was of opinion, when the case was ably
 ‘ pleaded to him, and on perusing this able representation, con-
 ‘ tinues to be of the same mind, that the bond granted by Mr
 ‘ Lowthian was to the same effect as if he had granted an herit-
 ‘ able bond in its proper technical form. It is of the nature of
 ‘ real burdens on heritable property, that they subsist, and can
 ‘ be made effectual against it, into whosoever hands they may
 ‘ pass. No doubt, the creditor in these real burdens cannot di-
 ‘ rectly attach the person of the new proprietor, in virtue of his
 ‘ security alone; but still the security subsists, and can be adopt-
 ‘ ed by the new proprietor, so as to make it as complete against
 ‘ his person and his property, as it was against the original
 ‘ granter. Had this not been competent, the Lord Ordinary is
 ‘ satisfied, that Mr Lowthian would have granted an heritable
 ‘ bond, in technical form, to Mr Glover, but it was competent to
 ‘ adopt the original bond granted by Mackenzie; and therefore
 ‘ the expense of a new bond and sasine was avoided, by Mr Low-
 ‘ thian adding his own personal obligation to that of Mr Mac-
 ‘ kenzie, in corroboration not only thereof, but of the real bur-
 ‘ den already existing on the estate.’

The heirs-portioners having reclaimed, the Court, on 6th July 1824, on advising petition and answers, adhered; and thereafter refused a reclaiming petition, without answers, on the 12th of November thereafter.*

Lord Pitmilley.—I am of opinion that the interlocutor is well founded. The decisive circumstance is, that Lowthian got a disposition from the trustees, acknowledging payment of the price, under the declaration that he should take upon himself the payment of the heritable debts affecting the estate; and this he followed up by granting a bond of corroboration of the debt in favour of Glover. This constitutes the difference between this case and those where there was merely an obligation on the purchaser to pay the price. Here it was discharged, and the heritable debt was adopted by Lowthian, as payment of much of the price, so that it is clear that it must be a burden on the heir.

Lord Glenlee.—I am of the same opinion, and think the interlocutor right.

Lord Justice-Clerk.—I agree with the opinion which has been delivered. The bond of corroboration was granted in reference to the heritable debt. It would have been absurd and superfluous

* See 3 Shaw and Dunlop, No. 198.

Mar. 3, 1826. to have granted a new heritable bond. The case of Arbutnot is different from this. No discharge of the price was there granted, and the payment of it remained as an obligation on the purchaser; whereas here no such obligation exists, and the purchaser has adopted this heritable debt as his own.

Lord Robertson.—I concur in the opinions which have been delivered.

Clayton and others, the heirs-portioners, appealed.

Appellants.—The principle upon which all questions of this kind have hitherto been regulated, is the legal intention of the party who grants the obligation, in so far as can be collected from the nature of the obligation. If he grant an heritable security, and leave it undischarged at his death, he is presumed to have intended that his heirs should bear the burthen. ; If he grant a personal security, he is held to have burdened his executors. But in the present case, although the debt was real, it had not been made so by Mr Lowthian. He had merely granted a personal bond of corroboration, to come in place of that which Mr Glover had lost by the death of M'Kenzie; but not the original heritable bond, nor any additional real security. Mr Lowthian's obligation to relieve the trustees was for their safety, and did not better the situation of the creditors. The question, therefore, still comes to be, whether a person, who agrees to become personally bound for a debt, already heritably secured over an estate which he purchases, that heritable security not having been created by him, is to be held, by legal inference, to have intended to burden his heirs or his executors? But it has been decided, that the mere purchase of an estate burdened with heritable securities does not make the heir liable to pay, without relief, the debt so secured; and even if the party have granted a personal obligation to the creditors so secured for their debts, this is an obligation not upon the heir, but on the executors. In like manner, if a person purchase lands burdened with heritable debts, and retain a part of the price to discharge these encumbrances, but does not grant an heritable bond to the creditor, and if he die before the price is fully paid, the part so retained is a burthen on the executors, and not on the heir succeeding to the lands purchased. The case is different if the price be expressly declared a real burden; but that is not the case here. The security was personal, and was expressed in the form usually adopted when persons mean to give a security not intended to interfere with or impair a previous security; and it is the nature of the obligation granted for the price, not the

nature of the securities already existing, which is the true criterion of the intention of the granter, and the guide to direct on whom the burden ought to be placed. Mar. 3, 1826.

The judgment besides is inconsistent with the principles which rule accessory securities in general,—namely, that where they are merely accessory, they are not held to alter the nature of the original debt, so as to affect the question of succession. The only exception is, where an heritable security is given by the debtor to corroborate a personal debt. That makes the debt heritable, and burdens the heir; but a party corroborating by a personal security a real debt, renders his executors liable. Mr Lowthian did not constitute the real debt which he corroborated. The security he granted was merely accessory. It is not correct to say, that Mr Lowthian did in substance the same thing as if he had granted a new heritable bond with a personal obligation; for, although quoad Mr Glover the effect, as far as security went, was the same, there is this distinction, that he merely granted the personal corroboration; and the question is not to be regulated by the effect of the deed taken in conjunction with other deeds granted by strangers, but by the nature of the deed itself, and the legal intention of the party inferred from having granted it.

Respondents.—To ascertain whether debt falls on the heir, or on the executor, the proper inquiry is, whether it is a proper heritable debt affecting the estate, and a debt for which the deceased was directly responsible. If so, it affects the heir, whatever may have been the way in which the debt has been constituted. Allegation of intention in this question is irrelevant. The decision must depend on the condition in which the estate was left by the deceased, without any inquiry as to the motives that induced him to place the estate in that condition. Nothing short of a probative and positive declaration will defeat the rules of law. The only question, therefore, is, whether Mr Lowthian made the debt his, and whether it was an heritable debt. If the answer be affirmative, the burden falls on the heir. But the deeds prove that he did adopt it as his debt. It is incorrect to say, that, where a party buys an estate burdened with debt, and dies without paying the price, the executor is liable to clear off that burden. He is liable to pay the price to the seller, but the creditors in the real burden have no claim on the executor. They have against the estate. If a purchaser find it inconvenient to pay the whole price, in a case where there are already existing heritable debts, he may raise money by an heritable bond; or he may declare in the disposition such a sum to

Mar. 3, 1826. be a debt on the estate; or he may adopt the debts already existing (thus making them his own), and grant personal security in addition to security over the land. In that case, the debt is clearly heritable, and, as such, attaches to the heir. But that is precisely the present case. As far as intention can bear upon this question, the legal presumption is, that if the purchaser meant, instead of immediately paying up all the price, to burden his real estate with part of it, he also meant that the heir should bear the burden. Accordingly, if he stipulate with the seller that part of the price is to remain upon the property, then he indicates his intention that the heir is to be bound; because the obligation no longer stands on the mere contract to pay the price, but is fortified by thereal security.

Mr Lowthian put the debt precisely in the same situation as if he had granted an heritable bond. He preferred a bond of corroboration, because a real security was already effectually constituted, and did not require to be repeated. By that bond he made the debt his own; but he thereby no more intimated that he intended to burden the executors, than if he had executed an heritable bond containing the usual personal obligation.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

LORD GIFFORD.—My Lords, I beg to call your Lordships' attention to a case heard before your Lordships, in which Nathaniel Clayton is the appellant, and Richard Lowthian Ross and George Hinde are the respondents. My Lords, this appeal rose out of the following circumstances: In the year 1777, a gentleman of the name of Mackenzie purchased an estate in Scotland called Netherwood, for £20,000; he afterwards borrowed the sum of £10,000 from a Mr Richard Glover, and upon that granted an heritable bond, dated 27th December 1777. My Lords, Mr Mackenzie afterwards fell into considerable embarrassment, and his affairs were placed in the hands of trustees, with power to them to sell and convey his estates. Mr Mackenzie in the year 1781 died, leaving this heritable security upon the estate of Netherwood. The trustees sold the estate to a Mr Lowthian—that purchase was completed, and Mr Lowthian paid the price, and the trustees thereupon made a disposition of the estate in 1781, Mr Lowthian undertaking to indemnify the trustees against this gentleman. At the same time that this disposition was made, or very shortly afterwards, a deed of exoneration was executed by Mr Lowthian in favour of the trustees, against any demands that might be made upon them, and by which he took upon himself the payment of these debts; so that at that time he stood in a situation subject to this heritable debt existing of £10,000.

My Lords, things remaining in this situation, at that time Mr Glover Mar. 3, 1826. required from Mr Lowthian in addition to the heritable security which he then held, that this estate should become chargeable for this debt. In consequence of that, Mr Lowthian, on the 3d of June 1782, executed a bond to Mr Glover. The bond recites the heritable security given by Mr Mackenzie to Mr Glover, and it then goes on to state the sale of the estate; that Mr Lowthian did some time ago purchase the said lands and others, and that the said Richard Glover has agreed to supersede payment of the said principal sum of £10,000, to the term of payment after mentioned, upon condition of my granting the obligation under written; ‘therefore, wit ye me the said Richard Lowthian, in corroboration of the ‘said bond and disposition, and infestment following thereon, and without hurt or prejudice thereto, or to any other obligation granted to the ‘said Richard Glover for payment of the said principal sum, sed accumulando jura juribus, to be bound, as I hereby bind and oblige me, my ‘heirs, executors, and successors whomsoever, to content and pay to the ‘said Richard Glover, his heirs, executors, or assignees, the aforesaid ‘principal sum of £10,000 Sterling, and that at and against the term of ‘Martinmas next.’ My Lords, in this way the transaction as to Netherwood goes on; and the sale was completed—Mr Glover trusting to the proprietor of the lands, who had given this personal security in addition to the security that existed upon the estate. A long detail follows afterwards, on which it is not necessary for me to enter. It is sufficient to state, that Mr Lowthian being dead, a question arose between the heirs succeeding to the estate of Netherwood, and his personal representatives, as to by whom this charge of £10,000 upon the estate of Netherwood ought to be borne. The question, therefore, was, whether the heirs who obtained the estate of Netherwood, were to be considered liable, or whether it was to be paid by the executors out of the personal estate?

In consequence of this dispute, mutual actions of declarator were brought,—the one being at the instance of James Marshall, and the appellant Nathaniel Clayton, as trustees for the four heirs-portioners of Richard Lowthian, who alleged that by this bond of corroboration, and the other deeds before narrated, Richard Lowthian incurred a personal obligation merely to pay this debt of £10,000 to Mr Glover; and that the debt was therefore a personal debt only, in so far as regarded the succession of Richard Lowthian; and although the heirs as well as the executors, by the law of Scotland, were liable to the creditors of the defunct for the payment of the just and lawful debts due by him, yet the executors were obliged to relieve the heirs of the personal debts, in so far as the executry and moveable estate extend. The trustees for the heirs therefore concluded that the respondents, the executors of Mr Lowthian, should relieve the heirs from the payment of that sum. On the other hand, the executors contended in their action, that as this sum was a debt secured upon an heritable estate, and as the disposition in favour of Mr Lowthian was declared to be burdened with the said heritable debt, and as the heritable debt was formally corroborated by the defunct, and the

Mar. 3, 1826. term of payment superseded in manner foresaid, the heirs were bound to satisfy and pay this debt, with the whole annual rent thereof, and termly failures appertaining thereto; and to free and relieve the said Richard Lowthian's executor, or next of kin, of the same, and of all the consequences thereof. These actions were conjoined, and came before Lord Cringletie, who, upon the 4th of June 1823, pronounced an interlocutor, by which he assoilzied the executors from the conclusions of this libel, and farther decerned against the heirs-portioners, conform to the conclusions of the libel, at the instance of the executors. The effect of this decision was, that the heir was to take this estate cum suo onere, that is, with this debt of £10,000. To this interlocutor his Lordship adhered, for the reasons which he assigned in a note (here his Lordship read the note of the Lord Ordinary); the heirs then presented a petition to the Court of Session, and the Court of Session adhered to the interlocutor of the Lord Ordinary, and afterwards refused a petition without answers.

Under these circumstances the case has been brought to your Lordships' House upon appeal. There can be no question as to the general law of Scotland, but the difficulty is in applying it to this case. The main case relied upon by the appellant is the case of Arbuthnot, in the year 1770. Your Lordships will recollect that the law stands thus:—If a man contracts to purchase an estate for a sum of money, and dies before that purchase is completed, his personal estate is liable to make good that purchase in favour of the heir; that is to say, the party's death does not put his executors in a different situation than he himself would have stood in; that upon paying the purchase money out of the personal estate, and acquiring the real estate, the real estate would have gone to his heirs, and he dying before it was completed, the heir could call upon the executor to pay that price. Upon that principle the case of Arbuthnot was clearly decided. The purchase had been made in that case at the judicial sale of an estate, burdened with a variety of heritable debts. The party had bound himself to pay a certain price, but died before that purchase was completed, and the heir at law said the executor was liable to pay that sum out of the debts recovered. It was contended on the part of the personal representatives, that inasmuch as the money would have been paid in discharge of real securities, therefore it ought to be considered as applicable to that purpose, and that the heir ought to take it cum suo onere; but the answer to that was, that the application of the purchase money makes no difference; as between the purchaser and seller he was bound personally to pay the price, and though the price would have been applied in payment of debts that existed as real charges upon the estate, yet that made no difference in considering the question between the heir-at-law and the executors. The only question was, out of what fund that price was to be paid. The Court held that the price not having been paid, although a personal bond had been given, it was a personal debt, as it affected the purchaser, and must therefore be paid out of the personal estate. I cannot see, therefore, how the facts of that case, or the principle upon which that decision rests, can be applied to the present.

I will shortly call your Lordships' attention to the state of this trans-
action. Mr Lowthian purchased the estate, then subject to a real charge of L.10,000; the purchase was completed by the trustees, and a disposition was made of the estate to Mr Lowthian, but subject to this heritable charge. My Lords, it seems to have been almost conceded at your Lordships' bar, that if the question had remained in that situation, without any bond of corroboration having been given in addition to the heritable security—that is, if Mr Lowthian had taken this disposition to himself, subject to this heritable bond which he had suffered to remain upon the estate, the heir would have taken the estate, subject to the payment of this debt. If that be so, it seems to me extremely difficult to say, that, because Mr Lowthian, in addition to that, had given this bond—a bond that expressly recognized the existence of this debt—it would be extremely difficult to say, that that would make any difference; because I apprehend the law of Scotland to be, that if there is a real charge, and in addition to that a personal security, the personal security cannot alter it so far as it regards the real charge, or the succession to the estate; and when your Lordships look at the bond as an addition to that real charge, it seems extremely difficult to maintain that this bond would make any difference. But without staying to inquire whether the law of Scotland goes to that extent, the question here is, whether, under the law of Scotland, Mr Lowthian, purchasing subject to this charge, and taking it as an encumbrance upon the estate, and giving a bond of corroboration and confirmation of that, adding to it no doubt his personal security, and supposing that Mr Lowthian had paid the whole price, and afterwards borrowed money upon an heritable bond granted by himself, that would have charged himself merely personally? If it would have done so, *cadet questio*. But if, having purchased and paid the price, the purchaser grants an heritable bond, it is admitted that the heir must take it *cum suo onere*, and cannot call upon the executor to indemnify him against that debt. Now, therefore, supposing this question was to be determined, as Lord Cringletie has determined it, upon the intention to be collected from this transaction, one might feel a difficulty in going to the full extent of the learned Lord's note, because in one part of it he states, that one ground of his judgment is, that Mr Lowthian would no doubt have granted an heritable bond if Mr Glover had required it. My Lords, whether the Lord Ordinary is right in his supposition, that Mr Lowthian would so have done, it is not necessary for your Lordships to determine. The only question is, whether, according to the principles of decided cases, and applying those principles to this state of facts, your Lordships can say, that in this case the debt must be considered a personal debt merely of Mr Lowthian, (in which case the executor would be liable to indemnify the heir;) or whether, looking at all the circumstances, in purchasing it with this charge, and confirming that charge by this bond, whether, under those circumstances, your Lordships are not of opinion that the Court of Session have come to a right conclusion in saying it was to be considered a charge upon the real estate, which the heir-at-law is bound to discharge? My Lords, other

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Mar. 3. 1826. cases were referred to, which it is not necessary for me to state to your Lordships—the principle of that case of Arbuthnot I have already noticed. It is said, that the bond in that case was an heritable bond to be granted by the purchaser. Whether it was so or not, that case was under very different circumstances, and the principles applied to that decision cannot be applied to a case under very different circumstances. I have stated to your Lordships, that that case appeared to me the leading one, and for the reasons I have given, I think it does not militate against the decision of the Court of Session. The principle is perfectly clear, and the facts of that case bring it within the principle. The price had not been paid. The only thing done was to grant a personal security, and the price was to be applied in payment of the personal liabilities. Although, therefore, my Lords, it is not usual in moving to affirm a judgment, to state the reasons upon which that affirmance is moved, yet, considering this as a very important question, I have detailed to your Lordships the reasons for my opinion, that the judgment that has been pronounced by the Court below is right, and therefore I move your Lordships that this judgment be affirmed.

Respondents' Authorities.—2 Erskine's Institutes, 2, 5—14, 16, 17. 3 Ersk. 8, 52.—*Fraser v. Fraser*, 13 Nov. 1804, affirmed on appeal.

Appellants' Authorities.—*Arbuthnot v. Arbuthnot*, 23d June 1773.—(5225)—*McNicol*, 16th June 1814, and 31st Jan. 1816. (F. C.) 2. Bell's Com. 8.—*Ord v. Edmonstone*, 22d Nov. 1671.—(5551)—*Wishart v. Northesk*, Jan. 7, 1638.—(5552)—*Kames's Select Decisions*, No. 223, p. 288.—1661, c. 32.

CLAYTON, SCOTT, & CLAYTON—A. MUNDELL, Solicitors.

No. 7.

JAMES MILLER, Appellant.—*Keay—Abercrombie*.

Lord and Lady GWYDIR, Respondents.—*Adam. D. Dundas*.

Landlord and Tenant—Penal Rent.—A tenant having entered to possession of a farm, on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, and another during the last three years, under the penalty of paying an additional rent for these last years, and not having complied with the rules so prescribed,—Held (affirming the judgment of the Court of Session) that he was liable in the penal rent, and that it was not a valid defence, that he had adopted the same course as the other tenants on the estate, and as was prescribed by their leases, or that he had done so with the knowledge of the landlord.

March 8, 1826.

2D DIVISION.
Lord Cringle-
tie.

MILLER received from the factor on the Perth estate an offer of lease of the farm of Leystone for nineteen years. The offer contained this, among other clauses :—‘ With regard to the general mode of managing the farm, you shall always have one third part of the arable land under green crops and summer fallow, (the fallow uniformly getting four ploughings, and not