

No. 46.

JAMES WYLLIE, Appellant.

ELIZABETH ROSS and Others, Respondents.

Passive Title.—A testator having, by a deed of settlement, conveyed his property and effects to a party who was not the heir at law, under burden of payment of legacies, and the heir at law (who was the disponee's mother) having made up titles to the testator, and thereafter executed a gratuitous disposition in favour of the disponee, who, in the meantime, had intromitted with the funds of the testator: Held (affirming the judgment of the Court of Session) that he was liable in payment of the legacies, although he alleged that his right was derived from the heir at law, and not from the testator.

June 12, 1827.

2^D DIVISION.
Bill Chamber.
Lord Eldin.

JAMES RITCHIE, who was proprietor of heritable subjects in the county of Perth, tenant of the farm of Cargill, and possessed of large personal funds, executed, in 1793, a deed of settlement, by which he disposed to his mother in life-rent, and to James Wyllie in fee, the lands of Hole of Scone and others; also two tenements of houses, and vacant ground, in Bridgend of Tay, and all heritable property of any kind that he should die possessed of, in the parish of Kinnoul; and assigned to Wyllie the tack of Cargill. By this deed it was provided and declared, 'that the said James Wyllie shall, by acceptation hereof, be bound, and the subjects before disposed are hereby expressly burdened with payment of the sum of L.200 sterling, to each of the children of David Ross, to bear interest from year and day after the decease of the longest liver, of the said Ritchie's mother and himself, and to be payable at the first term of Whitsunday or Martinmas, after the legatees have attained the age of twenty years complete.' In like manner, James Ritchie disposed to his mother in life-rent, and George Ritchie in fee, certain houses and lands in the parish of Scone, declaring that, by acceptation hereof, George shall be bound, and the subjects conveyed are burdened with the payment of certain legacies.

This deed did not contain procuratory or precept; but Ritchie bound and obliged himself, his heirs and successors, to infest and seise his disponees in the fee of the respective subjects disposed to them, 'and for that purpose, to make and grant all deeds and writs necessary, containing procuratories of resignation, precepts of seisin, and all other clauses necessary.' And further, he nominated Wyllie 'to be his sole executor and intromitter, with his whole goods,' &c. all which he bequeathed to him, under burden always of payment of his debts.

After the execution of this deed, James Ritchie entered into an agreement with the Earl of Mansfield, for the purpose of exchanging the lands of Hole of Scone, for other lands called Airleywight. To determine what compensation should be paid by the one party to the other, a reference was made to an arbiter, who pronounced an award ordaining mutual conveyances, with a payment of L.2200, by his Lordship to Ritchie. The parties entered into possession, but no conveyance was executed during Ritchie's life. He also sold one of his houses at Bridgend of Tay, and all his other heritage, and he subset to one Duncan, at a surplus rent of L.80, the lease of the farm of Cargill. June 12, 1827.

Ritchie died in 1805, and his heir-at-law was his paternal aunt, Mrs Wyllie, the mother of the appellant, James Wyllie. The deed of settlement was immediately recorded; but Wyllie alleged, that as the subjects destined to him had been (with the exception of one of the houses at the Bridgend) conveyed to other parties, or sold; and the deeds and legacies of Ritchie amounted to more than the value of that house and his personal effects, he did not take up the succession under the deed. His mother, however, as the heir-at-law, expedite a general service, and completed her titles, by infestment under precepts of clare constat, to the properties which Ritchie had become bound to convey to Lord Mansfield. She then, in implement of the contract, disposed, with Wyllie's concurrence, these properties to his Lordship, and received from him a disposition to the lands of Airleywight. These lands she very shortly afterwards gratuitously disposed, under certain burdens, to Wyllie.

Wyllie's mother died in 1819, and thereafter the respondents, Elizabeth Ross and others, children of David Ross, raised an action before the Sheriff of Perthshire, against Wyllie, for payment of their respective legacies. Wyllie resisted the demand, on the ground, inter alia, that he had repudiated the deed, and held Airleywight not under Ritchie's settlement, but as disponee to the heir-at-law, who had made up titles as such. Elizabeth Ross and others replied, inter alia, that this was a mere device to defraud them of their legacies, and that Wyllie had taken under Ritchie's settlement, and been largely lucratus thereby. After a proof, from which it appeared that Wyllie had received payment of the surplus rents of the farm of Cargill from the sub-tenant, Duncan, and the value of certain meliorations from the landlord, the Sheriff found, ' that the defender did receive from James Duncan, to whom the deceased, in his own lifetime, assigned or subset the said tack, additional rents payable by him for the same; and that, finally, he received from the

June 12, 1827. ‘ proprietor L.200, being the amount of the last year’s rent, stipulated to be received for ameliorations, which last year’s rent became due in the lifetime of the deceased’s mother, though the settlement of the said claim did not take place till 25th June thereafter,—Finds, that the foresaid deed of settlement is the only title that has appeared under which the defender was entitled to act; and being in the knowledge of that deed, he must be held to have accepted and acted under it,’ and therefore repelled the defences, and decerned against him.

He then presented a bill of advocacy to the Court of Session, but the Lord Ordinary on the Bills refused it, and the Court, on the 12th November, 1825, adhered.*

Wyllie appealed.

Appellant.—The heir-at-law was not burdened with these legacies; and the appellant, as dispoinee in the lands, did not accept under the deed. There was nothing for the appellant to take up, the testator having, by the excambion with Lord Mansfield, conveyed away the lands intended for him. It matters not that feudal titles had not been interchanged. An effectual contract had been made, and parties were bound to implement it. No doubt, where a conveyance is made to the heir-at-law, burdened with legacies, he cannot shake off this burden by repudiating the settlement, and making up titles as heir-at-law. But here, the lands were not disposed to the heir-at-law, but to the appellant. He repudiated the settlement, and doing so, cannot be required to pay legacies, the payment of which were made to depend on his acceptance of the deed, and receiving the lands of Scone, but which lands had, previous to the testator’s death, been alienated. The appellant did not intromit with the testator’s succession, so as to incur a passive title.

Respondents.—The appellant has accepted of, and taken benefit from the deed of settlement, and intromitted with the testator’s estate and effects. The succession was valuable, and he could have no fair reason for repudiating it. It is a mere pretence to say that he did so, because he took the whole benefit which was to be derived from it, by receiving the rents and the value of the meliorations. It was necessary that his mother, the heir-at-law, should make up titles, because no procuratory of resignation, or precept of seisin, had been introduced into

* See 4 Shaw and Dunlop, No. 149.

the deed; and in order to give a feudal title to Lord Mansfield, June 12, 1827. she accordingly did so, and the appellant obtained possession of Airleywight, and the unpaid consideration money. It may be true, that this was accomplished through the intervention of his mother, but this was either with the view of carrying the deed into effect, or for the collusive purpose of attempting to defraud the respondents of their legacies. But even had the appellant rejected the succession, that would not have evacuated the legacies. For whoever took up the succession, did so under the burden of paying them; they being a burden on the succession. If the appellant's mother really took up the succession, she was liable; and he, as her gratuitous disponee, remains equally responsible.

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

Appellant's Authorities.—3 Ersk. Inst. 9. 10.—2. 2. 17.—3. 3. 48.—Lockhart, July 31, 1767 (6370).—3 Ersk. Inst. 8. 82.

Respondents' Authorities.—3 Ersk. Inst. 8. 51.

SPOTTISWOODE AND ROBERTSON, *Solicitors.*

ROBERT LOW, Cashier of the Dundee Banking Company, Ap- No. 47.

pellant.—*Keay—John Campbell.*

HENRY BELL, Trustee on the Sequestrated Estate of James Duncan, Respondent.—*Wetherell—Stuart.*

Bankrupt—Stat. 1696. c. 5.—A party having drawn two bills on another, and discounted them with a Bank, and the bills having been dishonoured by non-acceptance; and the drawer having, within sixty days of his bankruptcy, drawn a bill on his son for the amount of the dishonoured bills, which he accepted, on receiving an heritable security in relief; and this bill having been indorsed to the Bank by the drawer, and he having been sequestrated,—Held (affirming the judgment of the Court of Session,) That the indorsation to the Bank was reducible under the act 1696, c. 5, but reversing the judgment so far as it imported that the bill was to be delivered up by the Bank to the trustee for the creditors of the bankrupt.

In June 1820, James Duncan, merchant in Dundee, drew June 12, 1827. two bills for L.300 each, which he discounted with the Dundee 1ST DIVISION. Bank. The bills were forwarded to the drawers for accept- Lords Meadow-
ance, but were dishonoured, and returned under protest to the bank and Kin-
neder.

* The Lord Chief-Baron heard this appeal.