

1752. *July 24.* JANET LUNDIE, of that ilk, *against* MRS WILSON.

IN 1696, James Lundie of Lundie got a gift of his estate as forfeited, by the attainder of E. Melfont, his father, and was infeft, and after his death, his brother Robert served heir to him, and was infeft and possessed 17 years till 1716. But after his death, his son John was advised that E. Melfont had only a liferent, and that the fee was in Sophia his grandmother, and therefore liable for Robert's debt on the act 1695. Alleged, that he possessed as donatar to his father E. Melfont's forfeiture, who had only a liferent, and during whose life he had no right to possess as apparent-heir of his mother. Answered, The act does not distinguish *quo titulo* the apparent-heir possesses, if he possesses as proprietor, and thereby induces creditors *bona fide* to trust him, insomuch, that the purchasing that gift was by another clause of the same act a passive title in Robert, subjecting him to Sophia's debts, as if he had served heir to her; and the case would have been the same if he had purchased an adjudication or any other right of property. I repelled the defence and sustained the passive title. But on reclaiming bill and answers, the Lords altered the interlocutor, and in respect of E. Melfont's right of liferent, found that Robert's possession during the Earl's life, did not subject the next heir passing by Robert to his debts; but remitted to me to enquire whether Robert had possessed three years after the Earl's death. (See DICT. No. 91. p. 9749.)

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1753. *January 23.* TRAILL *against* FEA.

FEA of Clestron being married to the apparent-heiress of Buchanan of Sound, who had two old apprizings of the lands of Woodwick and North Ronaldsay, in Orkney, but which had been reduced in 1679 by Nisbet of Carphin, whereupon he attained the possession, but a reduction reductive had been raised and insisted in 1690;—and James Traill being desirous to purchase the lands from Carphin, but afraid of being brought to trouble by these two old apprizings, Clestron, to encourage him to make the purchase, in 1724 granted an obligation that he and his wife should grant a trust-bond in order to adjudge the lands from her, and to convey under certain conditions the adjudication to James Traill, “*Proviso*, that their granting “ the trust-bond and conveying the adjudication, should not involve them “ in any passive title as representing Buchanan of Sound.” James Traill made the purchase in 1727, and is succeeded in it by Traill of Westness; but Clestron, to avoid his obligation, confirmed his wife executrix to

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No 12. another of her predecessors in a debt due by Buchanan of Sound, and thereupon, in name of a trustee, adjudged the lands from her. Westness therefore sued Clestron on his obligation, both to convey that adjudication, and to cause his wife grant a trust-bond, in order to lead a new adjudication, and to convey it. Clestron, by way of defence, repeated reduction of the obligation on fraud and circumvention; *2dly*, Alleged that he was only bound to convey what right his wife succeeded in to the Buchanans of Sound, but not debts due by them to herself or other predecessors to them; *3d*, That such a trust-adjudication would involve them in passive titles, and therefore not bound in respect of the *proviso*. Upon a proof led, the Court found that there was no ground for the reduction, and repelled that defence. To the second, it was answered, that that *proviso* was qualified thus, "I being always obliged, so far as lies in my power to implement the substance and import of this paper, after whatever manner men of law shall direct, without incurring a passive title;" and that the conveying the adjudication already led, could incur no passive title; and in respect of this answer, they repelled the second defence. To the third;—that the new trust-bond and adjudication would infer no passive title, unless the apparent-heir possessed upon it; and therefore the Lords at first repelled also that defence; but upon a reclaiming bill and answers, though they adhered to the interlocutor on the two first points, yet it being observed to them, that if Westness could possess on a trust-adjudication on the apparent-heir's bond, or exclude any other creditor of the Buchanans of Sound, the apparent-heir, at the suit of Sound's other creditors, would be obliged either to purge that incumbrance, or pay their debt, Dirleton, No. 380, and the same decision in Stair, 8th November 1676, Jeffray against Murray,\* and 3d November 1682, Blyth against Lawson;† the Lords found that there was danger of her incurring a passive title by her granting a trust-bond, and therefore sustained that defence against that branch of the libel. The first interlocutor was 16th December 1752, and the last was 23d January 1753. I was not present (being in the Outer-House) at the last interlocutor, but thought the danger might have been avoided by a quality in the trust-bond, that Westness's possession should not be ascribed to the new adjudication in competition with any creditor of Sound's, nor be any title to compete with such creditor, notwithstanding of which it would have excluded any subsequent heir of Sound's, which was the only design of the obligation.

See No. 12. *voce* MUTUAL CONTRACT.

See HEIR-APPARENT.

See NOTES.

\* Dict. No. 86. p. 9741.

† Dict. No. 87. p. 9742.