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to know the true state of the fact: Yet had he known it, what could he have done more than to have called Methven in such a process, that he might support his title if it was truly sufficient? This he accordingly did. And it might as well be required of every pursuer of an improbation, to enumerate every title the defenders are possessed of, (though he should need the aid of inspiration to know them,) as the defender's predecessor to have called Methven under the special character of heir of Rothesholm. Methven had then undoubtedly the same right of heir in his person that his son now has; and considering that he was the nephew of Rothesholm, as well as of Smith of Huip, it is almost incredible, that he was ignorant of these brothers having been born of different marriages. *In dubio* the contrary must be presumed; and taking the matter in that view, it was certainly incumbent upon him to have put in his claim at a time when he saw another assume that title.

It must give great weight to the defender's arguments in support of the former decreet as a *res judicata*, that after the pursuer was allowed by the Lord Ordinary to open his objections to the defender's rights, before answer as to the preliminary point, it appeared, that the whole of them were identically the same that had been argued and over-ruled in the former tedious litigation. The pursuer then means nothing less at present, than to make the Lords overturn all that they formerly did upon the most mature deliberation, without having one word to say, that can throw any new light upon the matter.

"THE LORDS sustained the defence of *res judicata*."

Act. *G. Cockburne.* Alt. *Rae.*

D. R. *Fol. Dic. v.* 4. *p.* 236. *Fac. Col. No* 265. *p.* 491.

1761. *February* 17.

JOHN GORDON of Achanachie, and Mr ALEXANDER GORDON of Whiteley, Advocate, his Trustee, *against* GRIZEL OGILVIE, Eldest Daughter and Heiress of Mr John Ogilvie, Advocate.

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An apparent heiress having made up titles in the person of a trustee by an adjudication upon a trust-bond, in order to challenge her predecessor's deed; and decree-absolvitor having passed against her,

ANDREW MIDDLETON of Balbegno was twice married. By his first wife he had a daughter Elizabeth, married to Charles Gordon of Achanachie, and mother of the pursuer. By his second he had three sons, of whom Robert the eldest succeeded him in his estate of Balbegno.

Robert married a sister of Mr John Ogilvie advocate; and his two brothers having predeceased him without issue, and he himself having no children, he, in 1709, settled his lands and estate of Balbegno upon his brother-in-law Mr John Ogilvie, declaring the same to be redeemable for a rose noble, by himself, or any heir-male or female of his body, upon such heir attaining the age of 21 years.

Upon Robert's death in 1710, Mr Ogilvie entered into possession of the estate; and took out a charter under the Great Seal, upon which he was infeft.

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Elisabeth the sister threatened a reduction of the above deed; and having likewise some claims on her brother's executry, an agreement was at last entered into between Mr Ogilvie on the one part, and Charles Gordon, Elisabeth's husband, on the other; whereby Charles Gordon, *inter alia*, became bound "to procure and deliver to the said Mr John Ogilvie an obligation by Elisabeth Middleton, with his consent, binding her, her heirs and successors, that neither she, nor any of her children, nor their descendants, should quarrel the right of Mr Ogilvie, or his heirs, to the lands of Balbegno, or should seek any reversion of the same:" And Mr Ogilvie, on the other hand, gave Charles Gordon a bill for a certain sum of money.

In implement of this agreement, Elisabeth granted an obligation in 1713, whereby "she, with the special advice and consent of her said husband, and he the said Charles Gordon as taking burden on and upon him for his said spouse, and they both, with one consent and assent, bind and oblige them, and their heirs, &c. that neither she, the said Elisabeth, nor any of her children or descendants, shall in any sort disturb or quarrel Mr Ogilvie, or his heirs, their right or title to the estate of Balbegno," &c.

Elisabeth, after the death of her husband in 1749, executed a revocation of this agreement, and granted a trust-bond to Mr Alexander Gordon of Whiteley, who thereupon adjudged the estate of Balbegno; and upon that adjudication as a title, Mr Gordon brought a reduction and improbation against the daughters of Mr Ogilvie, challenging their right to the estate of Balbegno. This action having come before Lord Elchies, the defender *pleaded*, That Elisabeth's obligation above-mentioned, was a sufficient bar to her from insisting in the action; and the LORD ORDINAY, by his interlocutor 11th July 1750, "found, That the pursuer was barred by her said obligation from quarrelling the defender's right, without prejudice to her to reduce that obligation as extorted *vi aut metu*, or on any other ground in law." To which interlocutor the LORDS, upon a reclaiming petition, adhered.

Elisabeth having died in the year 1753, her son, the pursuer, granted a new trust-bond to Mr Alexander Gordon, who thereupon charged the pursuer to enter heir to Andrew his grandfather, and Robert his uncle, in the estate of Balbegno, and thereafter brought a process of adjudication; in which the defender having appeared, opposed the decree of adjudication, but consented that the pursuer should insist and plead as if the adjudication had been led and a reduction and improbation were depending.

The cause having been thus brought into Court, the defender opposed production of her titles; and *objected*, 1*mo*, That she was safe from any challenge from Elisabeth, or her descendants, by the aforesaid obligation and decree of the Court of Session, which were conclusive against the pursuer, as he could not pass by Elisabeth, who had made up titles to the estate by an adjudication

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on a trust-bond; *2do*, That she was safe by the positive prescription in virtue of infeftments and undisturbed possession from the 1714 downwards; and, *3tio*, That John Gordon, the pursuer, represented his father Charles, by passive titles known in the law, and particularly by having taken a precept of *clare constat* as heir to him, besides intromission with his effects; and as Charles had bound himself, along with his wife, not to quarrel Mr Ogilvie's rights to the estate of Balbegno, so the pursuer was barred from quarrelling these rights by representing his father.

The pursuer *answered*, That he did not claim under the adjudication led by his mother Elisabeth, and therefore could not be barred by the *res judicata* against her. He likewise endeavoured to shew, in point of fact, that he did not represent his father upon any passive title; and, with regard to the defence of prescription, he *pleaded*, That the action of reduction brought by his mother, within the forty years, was a sufficient interruption. Upon these several points, the Court, upon the 26th November 1760, pronounced the following interlocutor.

"Upon report of Lord Edgefield, the Lords find it proved, That the defenders and their father, Mr John Ogilvie, have been in possession of the lands and estate of Balbegno, by virtue of charter and sasine, upwards of forty years; but repel the defence of prescription, in respect of the interruption by the process of reduction and improbation raised at the instance of Gordon of Whiteley, on the trust-bond granted to him by Elisabeth Middleton, the pursuer's mother, in the year 1750. The Lords sustain the defence of *res judicata*, proponed for the defenders, in respect of the decreet-absolvitor pronounced in the said process of reduction and improbation in their favour;—also sustain the defence, That the pursuer John Gordon represents his father Charles Gordon of Achanachie, and is thereby barred from challenging the deed of renunciation of the estate of Balbegno, dated the 26th May 1713, granted by the said Elisabeth Middleton and the said Charles Gordon; and therefore find the defenders have produced sufficient to exclude the pursuer's title; and assoilzie, and decern."

The pursuer preferred a reclaiming petition, complaining of the interlocutor in two respects; *1mo*, In so far as it sustained the defence of the *res judicata*; *2do*, In so far as the other defence was sustained, that he represented his father. The *last* of these points was a good deal involved in fact, and is not material to be stated. The other was what was chiefly under consideration of the Court, and was the subject of a hearing in presence.

Pleaded for the pursuer, There was no proper title, either real or personal, in Elisabeth, which affected the estate of Balbegno: Her only title was an adjudication led by her trustee for the purpose of trying her right to the estate, and it fell to the ground, when her process founded on it was dismissed upon the personal objection moved against her. The pursuer does not represent Elisabeth under that title, or in any shape whatever; and therefore, though the

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judgment pronounced against her might bar her heirs, it cannot affect him. This will appear from considering the origin of adjudications upon trust-bonds, and the motives which introduced them. The utmost care and anxiety was anciently used to prevent the intermeddling of apparent heirs with their predecessors' estates, without being liable to the whole debts. If they made up titles by service, they became unquestionably liable; if they took possession without service, they became also liable upon the passive title of *gestio pro hærede;* and if they purchased any right to the estate, otherwise than at a public sale, it was likewise declared a passive title by 1695, cap. 24. By this severity of the law, if there was any doubt of the circumstances of the estate, it became extremely hazardous for the heir to have any thing to do with it; and if a stranger had unjustly taken possession, it was dangerous to establish a title for quarrelling such wrongful possession. To remedy this hard situation of apparent heirs, adjudications upon trust-bonds were devised; whereby the heir, by a fiction of law, became a creditor, and consequently entitled to carry on any process for investigating the situation of the estate, without running risques. This is the sole use and intention of adjudications upon trust-bonds. They create no connection between the apparent heir and the estate, unless further steps are taken. If the trustee succeed in his action, and convey the estate to the apparent heir, the adjudication with infeftment thereon will be a complete title; but if he do not succeed, the apparent heir remains unconnected with the estate, and the adjudication is no title to it. Hence it is, that such adjudication is no passive title, nor is the apparent heir thereby subjected to his predecessor's debt: It is exactly similar to a licence to pursue granted by the Commissary to an executor, in moveables.

As Elisabeth, therefore, never was in the feudal right of the lands, that right may be taken up without the burden of her adjudication, which was only led to afford a title to bring a tentative process *ad tentandas vires hæreditatis.* The adjudication never was conveyed to her by the trustee. She was cast in her action upon an objection merely personal to herself; and therefore the adjudication fell to the ground, and can affect no person who does not represent her. The pursuer is no representative of Elisabeth. He has taken up the estate out of the *hæreditas jacens* of his grandfather and uncle, passing by Elisabeth. Her deeds therefore cannot affect him, though he be her son; because the representation cannot be by bare existence, but must be established by a service, or some other form known in law. The decree against Elisabeth was not pronounced on the merits of the cause, but upon the obligation she had granted, which was an objection personal to herself, and with which the pursuer has no concern. It must therefore be still competent to him to insist in this reduction, the merits of which are as yet untouched and undetermined.

Answered for the defender; The pursuer's mother, with her husband's consent and advice, having, for a valuable consideration, discharged her claim or

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right of succession as heir apparent to her brother's estate, and having afterwards made up a proper legal title to her brother's succession by the established legal form of an adjudication upon her own bond, her discharge, though previous in point of date to the adjudication, is sufficient and effectual to bar the pursuer, a subsequent heir apparent, from insisting upon the precise same claim which was given up and abandoned by his mother's deed. And the defender, by the solemn decree absolvitor pronounced against the pursuer's mother, which rendered the matter a *res judicata*, having been for ever absolved and acquitted from that claim, the pursuer stands justly barred under that *res judicata*; otherwise every succeeding apparent heir *in infinitum* might renew the suit, which is too absurd to be admitted in any court of justice. The pursuer mistakes the nature of an adjudication upon a trust-bond; for, if it is a sufficient title to carry on a reduction of the predecessor's deed, it must necessarily follow, upon the plainest principles, that the pursuer, who has a title to insist in the action, can effectually transact and discharge that action, and that such discharge will for ever extinguish the right; or, which is the same thing, a decree-absolvitor in that action will for ever secure the defender from being disquieted upon account of the claim. The surest test of a pursuer's title is this, if an absolvitor will secure the defender; for, unless that is the case, the title is insufficient, and ought not in justice to be sustained. An apparent heir who has made up no title, cannot pursue a count and reckoning, because he cannot discharge the defender. On the other hand, an apparent heir can defend his predecessor's rights in any action brought to challenge them, and any decision in such action will undoubtedly be binding against every future heir. Besides, there is the clearest authority from the statute-law itself to hold this title by an adjudication on a trust-bond as equivalent to a service, and as a method known and practised for taking up and vesting the right of succession; act 106. Parl. 7. James V.—act Parl. 1695.

"THE LORDS sustained the defence founded upon the transaction with Elisabeth Middleton in the year 1713, and decree-absolvitor pronounced thereon in favour of the defender in the year 1753; and adhered to the points in the former interlocutor reclaimed against."

The cause having been appealed, the decree of the Court of Session was affirmed upon the 22d March 1762.

Act. *Walter Stewart*, Advocatus, *Ferguson*. Alt. *Garden*, *Montgomery*, *Scrimzeour*, *Lockhart*. Clerk, *Pringle*.

J. C. *Fol. Dic. v.* 4. *p.* 236. *Fac. Col. No* 22. *p.* 41.

*** Lord Kames reports this case:

ANDREW MIDDLETON made a gratuitous settlement of his estate upon Ogilvie of Balbegno, and the property was established in the disponee by infeftment.

After Andrew's death, Elisabeth his heir-apparent objecting to the settlement as not fairly obtained, there ensued a transaction betwixt her and Ogilvie, in which, for a valuable consideration, she ratified the settlement. After her death, her son the next heir of line brought a formal reduction of the settlement, upon the head of fraud and circumvention. This process was spun out to a great length, by a multitude of points and circumstances, which deserve not to be recorded. The cause purified of its dross resolved at last into the following point, What should be the effect of Elisabeth's ratification? It is effectual to exclude Elisabeth herself; but is it also effectual to exclude Andrew's other heirs insisting in a reduction of the settlement after Elisabeth's death, though they do not represent her?

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It occurred at advising, that if the reduction had been brought before Ogilvie was infeft, the pursuer could have no title without being served heir in special to the land, remaining still *in hæreditate jacente* of Andrew. But that Ogilvie's infeftment, which *funditus* denuded Andrew of the property, made the case very different. In this case, Elisabeth was entitled in her own right to challenge the settlement, which will thus appear. A naked disponee, who has obtained his right by fraud and circumvention, is bound to repair the hurt he has done; and to that end, a simple renunciation will not avail where the disponee stands infeft. And therefore he must, in order for reparation, re-convey the estate to the disponer; and if the disponer be dead, he must convey it to his heir. This entitles the heir to demand restitution of the estate. It entitles him also, if the fraud and circumvention be controverted, to bring a process, or to make a transaction as *de re dubia*. If the estate be restored to him, he may dispose of it at his pleasure; and for the same reason, if he agree for a valuable consideration to ratify the purchaser's right, this ratification must stand good against all the world.

"The ratification was accordingly sustained to bar the action."

Sel. Dec. No 175. *p.* 238.

1768. *March* 10. DOUGLAS *against* ELPHINSTON.

No 56.

A PETITION and complaint being given in to the Court of Session, stating various objections to the qualification of one who had been enrolled as a freeholder, the Court sustained one of the objections which regarded the division of the valuation of the lands; and found, That the freeholders had done wrong in admitting the person to the roll; and found it unnecessary to determine the other objection. This judgment being reversed on appeal, and the freeholder restored to his place on the roll, a petition was given in to the Court of Session, praying the Court to resume the consideration of the other objections which had been formerly stated, but had received no judgment. It was *answered*,