

said infeftments were valid and effectual rights to the creditors; and also found, That an enquiry into the situation of the circumstances of Sir Archibald Cockburn the elder of Langton, at the date of the disposition made by him to his son in 1688, was not competent *post tantum temporis*."

No 49.

For the Creditors of Sir Archibald elder and Sir Archibald younger, *Ferguson*.
For the Creditors of Sir Archibald elder, *Garden, M^cQueen*.

A. W.

Fol. Dic. v. 4. p. 65. Fac. Col. No 84. p. 184.

1765. February 15.

M^cKINNON against Sir JAMES M^cDONALD.

THE estate of Mackinnon stood disposed to John Mackinnon younger, and the heirs-male of his body; whom failing, to any other son of the body of John Mackinnon elder; whom failing, to John Mackinnon tacksman of Mishinish. Upon the death of John Mackinnon younger without issue-male, Mishinish served as nearest and lawful heir-male of provision, and was infeft. Some years after, a son, Charles, was born to old Mackinnon. Charles having insisted against Mishinish to denude, the Lords found, That the pursuer had right to the estate of Mackinnon from the time of his birth, and that the defender was obliged to denude in his favour. Afterwards, Charles having obtained himself served heir of provision in special to his brother deceased; brought a reduction for setting aside the sale of the lands of Strath, a part of the estate of Mackinnon, which Mishinish, during his possession; had sold to Sir James Macdonald, who was already infeft. *Pleaded in defence, 1mo*, That as Mishinish was rightly served, so all his onerous acts and deeds must be effectual against the estate; *2do*, That the obligation to denude was merely personal, and could not affect the right of a third party, who purchased *bona fide* upon the faith of the records; while the right of Mishinish subsisted. *Answered to the first*; That Mishinish's right was merely conditional, and defeasible in a certain event, in the same manner as rights to lands given in a donation *inter virum et uxorem*, which, though indefeasible, *ex facie*, are affected by an implied condition, upon the existence of which they become void, as if they had never existed. A putative heir possesses under a similar condition; and the consequence is, that as soon as the true heir appears, his infeftment becomes void, and every burden flies off, which he has imposed upon the estate. *Answered to the second defence*, That the obligation of Mishinish to denude was not personal, but was an inherent condition in his right. Nor has this doctrine any tendency to weaken the security of the records; for unless in the case of an entail, the law promises no security to a purchaser from looking into the last infeftment, whether it proceeded on a charter or a retour. If it proceeded on a retour, as in this case, it is incumbent on him to look into the destination in the charter; and he cannot be secure, if the service be not agreeable to that destination, or

No 50.

The deeds of the actual heir affect the estate, altho' he be afterwards obliged to denude.

No 50.

if any of the heirs preferably called either do or may exist. THE LORDS repelled the reasons of reduction, and sustained the sale of the lands made by Mishinish during his possession.

Mishinish, while in possession of the estate of Mackinnon, of which he was afterwards obliged to denude upon the supervention of a nearer heir, as explained above, had provided his wife in the locality of certain lands, part of the estate of Mackinnon. After the death of Mishinish, his widow having brought an action for the mails and duties of her locality lands, the LORDS, upon the same *ratio* on which they had given the former judgment, decerned for payment against the heir in possession.

Fol. Dic. v. 4. p. 67. Fac. Col.

* * * This case is No 34. p. 5279, and No 35. p. 5290, *voce* HEIR APPARENT.

1781. July 4. KATHARINE CLARK *against* JOHN ROBERTSON and Others.

No 51.

A party conveyed his estate, to trustees, directing them to pay his debts, and account for the residue to his son. The trustees, without entering on the management, denuded in favour of the son, who became insolvent. A person to whom the father had been personally liable for an annuity, found to have no preference.

ALEXANDER HARVEY left a considerable estate to his three daughters, burdened with an annuity of L. 65 Sterling to Janet Clark, his relict. One of the daughters was married to Joshua Johnston; who, wanting money to throw into trade, prevailed upon his mother-in-law to make way for a sale of the subjects, by giving up her security, and accepting of a personal bond for her jointure, from him and the other partners of a company in which he was engaged.

Among these were John and James Jamieson, father and son; who, in this way, came to be personally liable for Mrs Harvey's jointure. John, some time before his death, executed a settlement in the form of a trust-disposition, whereby the trustees were directed to convert his estate and effects into money, for payment of "all his just and lawful debts," particularly certain family provisions therein mentioned, and to account to his son, James, for the residue.

Upon John's death, his trustees, without entering upon the management, executed a disposition, proceeding upon the narrative, that James had paid or given security for the provisions and debts specified in his father's settlement, and had become bound "to satisfy and pay other debts, and perform any other deeds that might be owing or prestable by his late father;" and, therefore, disposing to him, his heirs, and assignees, the subjects and rights vested in them by the trust-disposition above mentioned.

James accordingly took possession of every thing, and continued in good credit for several years. But, being engaged, as a partner, with Buchanan, Hastie, and Co. who failed, he found it necessary to convey his whole subjects, heritable and move, to trustees, for behoof of his creditors.

Against these trustees, Mrs Harvey brought an action for having it found, John Jamieson's heritable estate was really burdened with her annuity, for which he, along with Joshua Johnston and others, had given bond; that, in