On the 7th December, 1769, "The Lords sustained the objection to the poinding;" altering Lord Gardenston's interlocutor.

Act. D. Armstrong. *Alt.* R. M'Queen.

Diss. Auchinleck, Monboddo. No vote put.

1769. *December* 7. ROBERT WILLOCK and OTHERS *against* JOHN AUCHTERLONY.

HERITABLE AND MOVEABLE—FACULTY.

Arrears of interest upon a debt secured by adjudication, heritable, not transmissible by testament. A disposition in trust, the purposes of which were only thereafter declared in a testament, but for which there was a reservation in the trust, held to be a sufficient conveyance of heritable subjects.

[*Faculty Collection, V.* 18; *Dictionary,* 5539.]

MONBODDO. The subjects in question were properly vested in George Auchterlony. The question is, Whether he could dispose of them by latter will and testament? And here is a question, Whether the annualrents of an heritable bond, upon which adjudication followed, would pass by will? My opinion is, that they could not. An adjudication has been a sale under reversion ever since 1469. By the statute then enacted, the sheriff was authorised to sell the land for the proprietor's debt: if a purchaser appeared, they were adjudged to the purchaser, under a reversion, during seven years, for the behoof of the debtor. If no purchaser appeared, they were adjudged simply to the creditor, without any reversion. This was held to be law down to 1738; and was laid down as law in the decision *Ramsay* against *The Creditors of Clapperton.* This decision was not a subtlety, as it has been called: it was only distinguishing between things which are different, a *pignus* and a sale. As to the disposition in favour of the trustees, here was an indirect method of devising heritable subjects by latter will and testament. The deed of trust was never delivered; but, although it had been delivered, it would not *de presenti* have given any right to the trustees, unless George Auchterlony had made a will. It seems to follow that Auchterlony gave away no part of his heritable estate by a disposition or deed *inter vivos.*

PITFOUR. It is too late to dispute the decision of Clapperton, unless it could be alleged that Auchterlony did not know of the adjudication having been deduced, and that the adjudication itself was null. The decision of Clapperton has been sanctioned by practice. Every ranking of creditors, for these 30 years past, has proceeded upon that decision being law: To vary it would create confusion and distrust. I am sorry to see any of the cardinal decisions of our law called in question. As to the second question; the decisions of *Forbes* and *Pringle of Crighton,* in the House of Lords, have so far explained or mitigated

the law of deathbed, that I think the trustees ought, from analogy, to be preferred.

COALSTON. Accumulated sums in an adjudication, and whole annualrents thereof, are heritable, and descend to heirs. This rule, established in the case of *Clapperton*, has been followed out in every ranking. As to the effect of the trust-right, George Auchterlony executed a disposition to trustees for purposes to be declared: this was done only by testament. Hence I consider the trust-right as if the trust had been for behoof of himself; which, in the English law, is called a resulting trust. In the late case of *Howie*, there were trustees named, and legacies granted. It happened that a surplus unprovided for remained over. This surplus was found to be a resulting trust to the disponer and his heirs. The annualrent, which fell due before the death of Alexander, and after the death of George, must be regulated by the decision of Clapperton; which, in so far, applies. Yet there may be a distinction as to the annualrent which fell due between the death of Alexander and the death of George. This was a liferent in George. It was separated, in his person, from the stock. Now, the profits of a liferent are moveable; and, in this view, they may be conveyed by the testament, and will fall under the right of the trustees.

GARDENSTON. When our countrymen go abroad, and make settlements, I would give effect to their settlements as far as possible, although they may have erred in form. I do not know the history of the case of Clapperton; for every decision has its history, whether it passed upon a division or unanimously. I think it is founded on a mere subtlety. As the practice stands, an adjudication is no more than a real security. I am, however, willing to hold the decision in Clapperton's case to be law; but I am moved by the specialties mentioned by Lord Coalston.

HAILES. I consider the decision of Clapperton's creditors to be a decision in the law of Scotland, and to be the law of Scotland. The favour which is due to Scotsmen who go abroad, make money, and dispose of it informally, does not move me. [When people in foreign parts, at Fort-George or Buenos-Ayres, make erroneous settlements from the impossibility of being properly directed, there may be difficulty; but here there is none.] George Auchterlony, residing at London, might have been advised as to the proper form of executing his settlements. Instead of taking advice from this country, he employed the pen of some uninformed practitioner at London, and the person he employed has committed a blunder: so much the worse for the persons whom George Auchterlony meant to favour; but there is no help for it. As to the trust-right, my only difficulty is, that, if it be sustained, a man *in lecto*, or, at least, in the form of a testament, may elude the excellent law of deathbed.

PITFOUR. As to the interest payable to George during his life; it is true, that, in all cases, bygones are moveable; but, in an adjudication, there are no bygones; there is no more than an eik to the reversion. If I dispone the tenth part of an adjudication, and retain nine parts, the tenth part will not be varied in its nature from the nine parts which I retain.

PRESIDENT. As to Lord Gardenston's observation: In every testament and transmission of moveables, I would go as far as possible in supporting the will of the testator; but I will never agree to the same latitude as to the transmis-

sion of heritable subjects,—the most beautiful part of our constitution. If parties do not take proper advice, I am sorry for it; but I will show no respect for their errors. The case of Clapperton is no subtlety, but solid law. It distinguishes between heritable and moveable, personal and real. It is not the intention of parties, but the form of their deeds, which distinguishes between them. A man may mean to give heritage by testament, but the form of the deed must make his meaning ineffectual. The case of Clapperton was ably argued, was approved of by all the judges, and by many great lawyers, who are now no more. It gives me pleasure to see the Court adhere to that decision. I tremble at the consequences of an alteration. I do not like the levelling principle of the information for the pursuers. As to the specialty mentioned by Lord Coalston, all that was given to George Auchterlony was a share in the corpus of the lands, corresponding to the annualrent during his life. With respect to the other point, it does not come up to the case of Pringle of Crichton; but there may be a strong hold in equity. The case of *Forbes* comes nearer; for, there, there was the exercise of a personal faculty. The damage to the heir did not arise from the exercise, but from the reservation.

KAIMES. It is now too late to object to the decision of Clapperton after an acquiescence of thirty years' practice according to it, and a thousand payments made in consequence of its being law. My difficulty is from John's homologation. George took his legatees bound not to quarrel his settlements. John has accepted the legacy: How can he quarrel to the prejudice of the settlements?

JUSTICE-CLERK. The argument of homologation does not affect me. There are sufficient sums to satisfy all the special provisions, and consequently the heir cannot be hurt by taking the £50 for mournings. As to the first point, the case of Clapperton ought not to be called in question. It has been objected, that, if the annualrent had been paid, the money would have been in Auchterlony's pocket, and consequently moveable, and gone to executors; and that it is hard that the nature of the creditor's estate should depend upon the conduct of the debtor in delaying payment. The same thing was pleaded and disregarded in the case of Clapperton, "that the inability of the debtor ought not to alter the succession of the creditor." If John, the uncle, had granted his personal bond to pay over the annualrents, he might have been bound, and his nephew in his place,—but John, the uncle, is not bound, and consequently John, the nephew, is not bound. My great difficulty is as to the feudal disposition in favour of the trustees executed *in liege poustie*. The purposes of this trust are declared by a testament in the English form, but executed *in liege poustie*. The disposition, it is true, was not delivered; but, if the purposes of the trust had been contained in it, it would have carried the estate from the heir, although not delivered; so that the question will not turn upon the non-delivery. Observe that George feudally disinherits his heir, and that the trust, at any rate, subsists as to the payment of George's debt. The disponer might have contracted onerous debts to the last day of his life, and so have exhausted the trust-estate. Such being the circumstances of the case, I think that the disponer might, *in liege poustie*, declare the trust.

KENNET. I think that the trust-right was effectual, and that it would have

been so although George Auchterlony had declared the trust upon death-bed. The case of *Forbes* is strong—that of *Pringle of Crichton* does not apply; for there was homologation by the heir, and, in consequence of it, a renunciation, by the father, of certain reserved rights.

On the 12th December 1769, "the Lords unanimously found that the annualrents, before Alexander's death, and after George's death, belonged to the heir: also found, that the annualrents from the death of Alexander to the death of George. Found that the trustees are preferable as to the other subjects in controversy." [This is the substance of the interlocutor, though not its words.]

Act. H. Dundas. *Alt.* A. Lockhart. *Rep.* Justice-Clerk.

Diss. as to second point,—Kaimes, Coalston. *Diss.* as to third point,—Coalston, Hailes, Monboddo. *Non liquet*,—Strichen, Kaimes.

Remitted on appeal.

1769. *December* 13. MARGARET, HELEN, ELIZABETH, MARY, and AGNES SCOTTS *against* GEORGE CARFRAE.

LEGACY.

A Legacy, left to be divided at the legatee's death among her children, falls by the legatee's predecease.

[*Fac. Coll., IV.* 365; *Dictionary*, 8090.]

AUCHINLECK. The 1500 merks, provided by William Scott to his wife, Isobel Swanston, is made payable at the first term after his death, with interest from that term; "which sum, it is said, the said Isobel Swanston shall leave and distribute amongst her daughters at her death, as she shall think fit." Isobel Swanston died before William Scott, and consequently the 1500 merks were never due to her; and, if not to her, neither to the daughters.

MONBODDO. I think there is ground in law for supporting the claim of the daughters to the 1500 merks. It is the same thing as if William Scott had left a legacy to his wife; whom failing, to his daughters, as she should divide it. "She shall leave." This shows the meaning of the testator. By the Roman law, this might not have been good; but, by our law, a legacy, to a person and his heirs, has been found effectual, though the trustee died before the testator.

JUSTICE-CLERK. The 1500 merks is neither more nor less than a legacy to Isobel Swanston, in case she survived her husband. The intention was, that the daughters should continue in some measure dependant on her; but she predeceased her husband, and consequently the legacy fell. When there is a