

THE LORDS found, "That Katharine Clarke had no preference over the other Creditors of James Jamieson for the debt in question."

No 51.

Lord Ordinary, *Justice-Clerk.* Act. *Wight.* Alt. *Ilay Campbell.* Clerk, *Tait.*
L. *Fol. Dic. v. 4. p. 66. Fac. Col. No 71. p. 119.*

1786. November 15.

RICHARD THOMSON *against* Messrs DOUGLAS, HERON, and COMPANY.

THOMSON, in consequence of a contract entered into between himself and his man of business, disposed his lands to the latter, "heritably and irredeemably, in order that he might sell the same, and apply the proceeds for the behoof of Thomson." The disponee executed the procuratory of resignation, and obtained a charter from the Crown, on which he was infeft; but as he omitted to insert in the procuratory the above qualification of his right, it did not appear on the record. Being debtor to Douglas, Heron, and Company, he conveyed those lands to them, in security of his debt. Afterwards, others of his creditors adjudged the lands, but without taking infeftment.

Thomson instituted an action of reduction on the head of fraud, of the right obtained by his disponee, alleging that the latter had fraudulently failed to apply properly the value of the estate; in which action appearance was made for Douglas, Heron, and Company, and for the adjudging creditors. The pursuer

Pleaded; The right of the disponee was in the nature of a trust; the property of the estate still remaining substantially in the disponent; and the only power given to the disponee being that of disposing of it for a price, for which he was to be accountable to the disponent; his assuming the character of unlimited proprietor, in order to which he omitted to engross the conditions of his right in the procuratory of resignation, was a gross fraud, and must import a *labes realis* in the conveyance in question; especially as this was granted for a prior debt, and not for money instantly paid on account of such security.

Answered; "A purchaser or a creditor contracting upon the faith of the records, cannot be affected by any personal challenge upon the head of fraud, that may lie against the person with whom he contracted;" (see above in this Section.) Nor are the adjudging creditors in a different situation.

Observed on the Bench; If a disponee omit to engross in his infeftment those clauses which were meant by the disponent to limit or qualify his right; if, for example, a clause of redemption be so left out of the infeftment, the disponent by this fraud can in no shape be hurt. The right will not be unlimited; because what was truly bestowed on the disponee was only a limited right. But in the present case, the disposition imported absolute and unlimited property; although, as the counter-part of this grant, there arose a personal obligation on the disponee to render account. And whether this has been justly fulfilled, or

No 52.

A disposition was granted for the behoof of the disponent, but in the terms of an absolute conveyance. The disponee granted heritable security over the property to creditors of his own. Found effectual. But adjudgers, take *tantum et tale*.

No 52. fraudulently violated, the right of property remains equally unaffected. A *bona fide* purchaser, therefore, might have effectually acquired such property from the disponent; and an heritable creditor by infestment is held to be in the same situation. The adjudging creditors stand, however, in a different predicament; for, as it has been found by decisions, which, for the stability of the law, ought not to be departed from, they must take the right of their debtor *tantum et tale* as it was in his person.

THE LORDS found, "That the allegation of fraud was not relevant against the heritable securities and infestments; but that it was relevant as to the creditors-adjudgers*."

Lord Ordinary, *Sawinton*. Act. *Solicitor-General*. Alt. *Abercromby*. Clerk, *Home*.
S. *Fol. Dic. v. 4. p. 67. Fac. Col. No 294. p. 453.*

1789. December 4.

AMELIA LAMONT, against The CREDITORS of LAUHLAN and ARCHIBALD LAMONT.

No 53.
Sums with which a conveyance of lands was burdened, found to be preferably secured, in a question with the Creditors of the disponent, tho' no infestment had followed.

LAUHLAN LAMONT, in case of his dying without male-issue, conveyed his lands of Auchagoyle to Archibald Lamont, burdened with the payment of his debts, and a legacy of L. 100 to each of his three sisters.

The precept of sasine accompanying this conveyance, was declared to be granted under the following among other conditions; "That in the event of Archibald Lamont or his heirs attaining possession of the lands, he or they should pay the disponent's lawful debts, and the sum of L. 100 Sterling to each of Isabel, Grizel, and Amelia Lamonts, the disponent's sisters; which sums to the said three sisters should be paid within twelve months after the disponent's decease, with a fifth part more of penalty in case of failure, and annualrent of the principal sums from and after the time of the disponent's death, during the not payment; and which sums were, in the event of their becoming due, declared to be real burdens upon the lands till paid off."

After the decease of Lauchlan Lamont, and of Archibald Lamont the disponent, who never executed the precept of sasine in his favour, the creditors of both proceeded to attach the lands of Auchagoyle. Among others, Mrs Amelia Lamont obtained a decret of constitution against the heirs of Archibald Lamont for the L. 100 due to her; and after using general and special charges, she instituted a summons of adjudication, which was conjoined with a previous one brought by another creditor.

* It may be remarked, that the disponent, who had become bankrupt, also appeared in the action, for the vindication of his character; and denied that he had been guilty of any impropriety. It was, however, merely a question of relevancy; and the facts were regarded as hypothetical.