

as not entitled to draw any composition from a stranger. It was therefore moved, that a reservation to this purpose should be inserted in the interlocutor. And the judgment of the Court was accordingly (4th July 1777,) pronounced in the following terms: ‘ Find that Mr. M’Kenzie, the superior, is ‘ obliged to enter the defender, who in this case is the heir of the former investiture, in terms of the tailzie, upon receiving a duplicando of the free duty, and ‘ is not entitled to demand from him a year’s rent, or other composition for ‘ said entry; reserving to the superior and his successors in the superiority any ‘ claim which he or they may have to a year’s rent, or other composition, on ‘ the entry of any future heir of tailzie, not an heir of the investiture prior to the ‘ tailzie; and reserving to the said heirs all defences against the same, as accords.’

No. 2.

Lord Reporter, *Justice-Clerk.*Act. *Elphinstone*Alt. *Ilay Campbell,**Kirkpatrick,* Clerk.*J. W.*1801. *June 16.*

JOHN SYME, the Trustee for the CREDITORS of JOHN RANALDSON, *against*
SIR WILLIAM ERSKINE, and Others.

ANDREW RANALDSON executed a strict entail of the lands of Blairhall, Langleys, and Wester-broom. He had purchased the two latter from Dr. Erskine, to be held of the disponent for 2s. 6d. feu-duty.

His son John Ranaldson, the institute, on his father’s death, recorded the entail, and made up titles to Blairhall in terms of it. He possessed the other lands for some time in apparency, but having got into embarrassed circumstances, he executed a trust for behoof of his creditors, and wished to convey the lands held in apparency to them.

With this view, his agent John Syme, Writer to the Signet, who was likewise his trustee and chief creditor, applied to the agent of Dr. Erskine for a precept of *clare constat* in favour of John Ranaldson, as heir of line of his father, but was informed that the Doctor had sold the superiority to Sir William Erskine. Mr. Syme then wrote to David Forbes, Sir William Erskine’s agent, requesting that a precept of *clare constat* might immediately be prepared.

Mr. Forbes made out the draught of the precept with his own hand, (28th September 1789;) it was duly executed by Sir William Erskine (22d October 1789;) and after some correspondence between Messrs. Forbes and Syme,

No. 3.

The institute under an entail, who was likewise heir of line, wishing to make up titles in the latter character, obtained from the person he believed to be superior, a precept of *clare constat*, upon which he was infeft, and conveyed the lands to his creditors. After the death of the granter of the precept, it

No. 6. about arrears of feu-duty, &c. it was (October 1789) delivered to Mr. Syme, who made the following payment :

was discovered, that he had previously sold the superiority, which had been overlooked at granting the precept.

On that ground, the substitutes reduced the titles of the institute ; but his creditors were found to have no claim for reparation against the heirs of the granter.

The heir of the agent who had been employed by the granter of the precept, was likewise sued for damages, but assolizied.

Mr. Forbes,	-	-	-	£2	2	0
Clerk and vellum,	-	-	-	0	15	0
Feu-duty from Martinmas 1787 to Martinmas 1789,	-	-	-	0	5	0
Dues of entry,	-	-	-	0	2	6
				<hr/>		
				£3	4	6

John Ranaldson took infeftment (13th October 1790,) and conveyed the lands in trust for his creditors. He died in 1796 ; and after his death, and that of Sir William Erskine and of Mr. Forbes ; the trustee proposed selling the lands, and had been offered £1650 for them, when it was discovered, that Sir William Erskine had sold the superiority the year before granting the precept, and that the purchaser had taken infeftment on the disposition, which had been revised by Mr. Forbes.

Upon this, the substitutes of entail brought a reduction of John Ranaldson's titles, upon the ground that the precept had been granted *a non habente* ; (APPENDIX, PART I. *voce* TAILZIE,) and Mr. Syme brought an action of relief and damages against the present Sir William Erskine, as heir of his father, and against the representatives of Mr. Forbes, in which he

Pleaded : If the precept had been granted by the true superior, the titles made up by John Ranaldson, as in fee-simple, would have enabled his creditors to sell the lands and divide the price, notwithstanding the entail ; 28th July 1725, Viscount of Garnock against Master of Garnock and others, No. 127. p. 15596 ; 5th July 1744, Murray Kyninmond against Murray, No. 132. p. 15601 ; 29th June 1784, Bromfield against Paterson, No. 145. p. 15618.

Of this advantage they were deprived by the strange blunder of Sir William Erskine and his agent, in granting the precept after Sir William had sold the superiority ; and for this loss their representatives are bound to indemnify the pursuer.

In defence, much was rested on the particular circumstances of the case. At the date of the transaction, (it was said) Mr. Forbes was eighty-two years of age, and though not absolutely incapable of doing business, his faculties were considerably impaired. This accounts for his forgetting the previous sale of the superiority. And the pursuer contributed to mislead him, by his assuming Sir William Erskine to be the superior, and his urgency to have the precept executed. The present action resolves into a complaint that the pursuer's own statement was believed, and the inaccuracy of which he had it in his power to ascertain from the record.

Even if the action had been raised in the lifetime of the late Sir William Erskine and Mr. Forbes, it would have been extremely hard to have subjected

them in so large a claim, where the act complained of was done in obedience to the demand of the pursuer, and the advantage they derived from it was so insignificant.

Precepts of *clare constat*, too, in no case, imply warrandice of the superior's right, and they had no business with the use to be made of it by the pursuer.

If the purchaser had not been infest, there would have been no blunder in granting the precept, and it was the pursuer's business to ascertain the fact.

Besides, the pursuer was acting *in fraudem* of the entail, and he is not entitled, in a court of justice, to complain of his disappointment. John Ranaldson himself could not have complained, nor can the creditors in his right.

Farther, the death of the late Sir William Erskine and Mr. Forbes, makes the action wholly incompetent. For with us, as in the Roman law, penal actions do not go against heirs, and all actions are so considered, whether they arise *ex contractu* or *ex delicto*; and although they be *rei persecutoria* on the part of the pursuer, provided they arise from a transaction from which no benefit results to the heir; Vinnius, B. 4. Tit. 12; Stair, B. 4. Tit. 3. § 38, 39, 40; 18th February 1773, Gray against Paxton and others, No. 35. p. 10361.

Replied: The pursuer's conduct showed his firm impression, that Sir William Erskine was the superior of the lands. It was the duty of Sir William and his agent to undeceive him. If they had intentionally concealed the previous sale of the superiority, there could not have been a doubt of their being liable to indemnify the superior, and the blunder was so gross, as in a civil question to be equivalent to bad intention.

There is no evidence of Mr. Forbes' infirmities, and, at any rate, as he was transacting business, they would have afforded no relevant defence to himself, and still less to Sir William Erskine who employed him.

Sir William and his agent received the legal gratuity, which they accepted of as sufficient for the voluntary work undertaken by them, and if this did not imply absolute warrandice, it surely implied *bona fides*, and warrandice from fact and deed.

Creditors are entitled to avail themselves of every legal form to defeat entails, and to complain when their object is illegally frustrated; Bruce against Bruce, 15th January 1799, No. 100. p. 15539.

The object of the present action being, not to punish the defenders, but merely to recover reparation of a loss sustained, it cannot be considered as a penal one. When an artist dies after undertaking and receiving payment for a piece of work, his heirs are bound to complete it, and are liable in reparation if he has spoilt the materials; and upon the same principles, the defenders are liable for the validity of the precept, so far as their predecessors were bound to warrant it; Vinnius, lib. 4. Tit. 12.; Voet, lib. 9. Tit. 2.; Stair, B. 4. Tit.

No. 3. 3. § 38; Bankt. B. 4. Tit. 24. § 7.; Erskine, B. 4. Tit. 1. § 14.; 22d February 1793, Tod against Thomson*.

The Lord Ordinary assolizied the defenders.

The Court were divided in opinion. Some Judges were favourable to the claim, on the ground that the granting of the precept implied warrandice from fact and deed, and that the object of the action being merely pecuniary reparation, it was competent against the present defenders.

But a great majority of the Judges were of an opposite opinion. This was founded partly on the action being considered as penal against the defenders, and partly on a complex view of the whole circumstances.

The Lords, on advising petitions, with answers, by two consecutive interlocutors, "adhered."

Lord Ordinary, *Balmuto.* Act. *Craigie, D. Douglas.* Alt. *Hope.* Clerk, *Pringle.*

D. D.

Fac. Coll. No. 237. p. 534.

* * This cause was appealed. The House of Lords ORDERED and ADJUDGED, that the interlocutors complained of should be affirmed.

1808. June 17.

MAGISTRATES of ABERDEEN, against JOHN BURNET of Countesswells.

No. 4.

A singular successor of the vassal, in a feu, on payment of one year's rent to the superior, (a royal burgh,) has a right to demand a charter to himself and heirs whatsoever, though the charter of his author was to heirs male, burgesses of that burgh, with a clause in the reddendo, that they should perform burgh services, and

In the year 1764, the town of Aberdeen granted a charter of the lands of Countesswells to George Chalmers. This charter was in an ancient form. Accordingly it conveyed the lands 'to George Chalmers merchant in Edinburgh, burgh, burgess of Aberdeen, his heirs male and assignees, burgesses, brethren of guild, and actual indwellers within the burgh of Aberdeen, using and frequenting the trade and interchange of merchandise within the same,' &c. And in the *reddendo* it declared, 'That the said George Chalmers, his fore-saids, shall be subject, and subject themselves, to the courts, suits, and jurisdictions of the Magistrates of this burgh; and that they shall perform and give due obedience to the officers and governors of the same, conform to the customs of the citizens and inhabitants thereof; and that it shall not be in the power of the said George Chalmers, or his foresaids, for the future, to enjoy two lands, or two fishings, cruive, or whole nets salmon fishing, holden of us at one and the same time; and that the said lands and others above

* Not reported. In that case, the heir of a notary was sued for damages on account of a blunder in a notarial instrument, executed by his father thirty nine years before. The Court gave judgment against him. But a petition against this interlocutor was appointed to be answered, and the case, it is believed, was compromised.