

1803. December 8.

WYLIE against DUNCAN.

IN March 1800, Robert Archibald, baker in Glasgow, obtained from James Wylie, manufacturer there, a disposition of certain tenements in Glasgow, for payment of L. 450. Infeftment was taken upon this conveyance, which was absolute and irredeemable, but at the same time a missive was granted by Archibald, narrating the sale of the subject, and engaging to re-sell it at the same price at any time, upon six months previous notice, and upon being allowed the expense of repairs and meliorations. This missive was of the same date with the disposition, but was not holograph of Archibald, and was attested only by one witness.

Notwithstanding this transaction, Wylie continued to possess the subjects as formerly.

Archibald's affairs having, in the course of the year following, fallen into disorder, his estate was sequestrated, and the trustee being infeft, sold the subject as Archibald's property. Upon this, Wylie produced the missive-letter, and insisted that the transaction which had taken place between him and Archibald was not intended as a sale of the subjects, but merely as security for a loan, and that he was entitled to redeem the property upon payment of the sum. But the trustee disregarded this claim, and Wylie raised an action against him before the Magistrates of Glasgow, concluding that he should be obliged to re-dispose these subjects, upon payment of the original price, with interest, in terms of the missive. The Magistrates assoilzied, and the trustee completed the transaction with the purchaser, by executing a disposition in his favour.

Wylie then brought an action of reduction before the Court of Session of the decree of absolvitor pronounced by the Magistrates, and "the LORD ORDINARY having considered the mutual memorials for the parties, finds, That under all the circumstances of the case, and particularly as it is not denied that the pursuer, subsequent to his conveyance of the subject to Robert Archibald, continued his possession of the same as formerly, and that the term of redemption, as appearing from the missive, is unlimited, the presumption is, that the disposition was not intended as an absolute conveyance, but merely as a security for money lent, which was considerably short of the real value of the subjects: Finds, That whatever might have been the plea of onerous creditors of the disponee, contracting with him on the faith of a right apparently absolute to the subject in question, the trustee on Archibald's sequestrated estate is not entitled to urge that plea, but must take the subject disposed to him *tantum et tale* as it stood in the debtor's own person, and therefore subject to the same right of redemption; therefore, and before farther answer as to the merits, ordains Robert Archibald to depone on the verity of his subscription to the missive." The trustee reclaimed to the Court, and

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*Pactum de re-trohendendo*  
being personal, not good against a trustee for creditors infeft.

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*Pleaded* ; The right acquired by Archibald over the subjects was completed by a disposition and infestment *ex facie* irredeemable, and is now vested in his creditors, who have contracted on the faith of the records. Although the creditors must take this subject *tantum et tale* as it stood in the person of their debtor, with respect to any real burden affecting it, they are not bound by any of his personal obligations. Even if the missive letter, upon which the pursuer rests his claim, were in every respect formal and regular, it cannot be binding on the creditors ; because, to constitute a real burden on lands in the person of singular successors, it is necessary, *1st*, That it be inserted in the investiture ; and ; *2dly*, That it be expressed as a real burden on the lands, and not as a personal burden undertaken by the disponee ; Bankton, b. 2. t. 5. § 25. ; Erskine, b. 2. t. 3. § 49 ; Lord Ballenden against Dundas, Nov. 19. 1685, No 60. p. 10238 ; Allan against Creditors of Cameron, July 19. 1780, No 78. p. 10265 ; Stewart against Home, May 18. 1792, No 54. p. 10232. In such circumstances, a voluntary purchaser might have acquired a sufficient right from Archibald to the subjects in question, and the case of creditors is at least equally-favourable with that of purchasers ; Stair, b. 1. t. 14. § 5. ; Erskine, b. 2. t. 6. § 32.

But even if a missive could be effectual in a question with creditors, it is in this case destitute of the statutory solemnities. It is neither holograph of the granter, nor does it mention the name of the writer ; it is not tested by two witnesses ; and it is neither addressed to, nor accepted by, any person whatever. Although such a missive might be binding *in re mercatoria*, the solemnities of the act 1681 are indispensable in writings regarding heritage ; Park against Mackenzie and Lawson, November 29. 1764. No 47. p. 8449 ; Sheddan against Crawford, July 6. 1768, No 48. p. 8456 ; Macfarlane against Grieve, May 22. 1790, No 51. p. 8459.

*Answered* ; The object of the parties in this transaction, was merely to create an heritable security to a certain extent over the subjects. It is evident there was no intention in the proprietor to sell, both as the sum paid was not equivalent to the value of the property, and as the original owner retained the possession. The disposition in favour of Archibald, and the missive granted by him to the pursuer, are component parts of the same transaction, and amount to nothing more than an heritable security in favour of Archibald, with the ordinary power of redemption contained in heritable bonds and dispositions in security.

But, even although the transaction were held not strictly to fall under the notion of an heritable security, it must be considered as a species of trust vested by the pursuer in Archibald ; and, consequently, in terms of the act 1696, he is entitled to prove the trust, either by Archibald's written declaration, or by his oath.

The trustee for a bankrupt's creditors can only hold that right or interest in the estate which belonged to the bankrupt himself. The act of bankruptcy

cannot create a new right, or make a conditional right absolute. The trustee must take the property *tantum et tale* as it stood in the person of the bankrupt; and if the property was subject to redemption, or was fiduciary in the person of the bankrupt, it must remain so in the person of his trustee; Mackintosh against Heriot, June 14. 1745, No 218. p. 1166.

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With regard to the objections to the regularity of the missive, it is not denied that the subscription is genuine, and, at all events, the pursuer is entitled to prove the verity of the subscription by the oath of the writer, so as to make the missive probative; Crawford against Wight, Jan. 16. 1739, *voce* WRIT; Neil against Andrew, June 8. 1748, *voce* PERSONAL and TRANSMISSIBLE; Edmonstone against Lang, June 23. 1786, *voce* WRIT. It was no objection to this mode of proof, that the granter of the missive is now bankrupt, Halkerston against Lindsay, February 26. 1783, *voce* PROOF. And although the letter is not formally addressed to the pursuer, there is extrinsic evidence that he was the person in whose favour it was granted.

THE LORDS, upon advising the petition, with answers, considered the burden as personal, and not good against the creditors. They therefore pronounced the following interlocutor: "THE LORDS having advised this petition, with answers, they alter the interlocutors complained of, and assoilzie the petitioner from the action of reduction, and decern; and remit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Woodhouselee*.Act. *Monypenny*.Agent, *James Smyth*, W. S.Alt. *Greenshields*.Agent, *R. Boyd*, W. S.Clerk, *Menzies*.

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*Fac. Col. No 127. v. 281.*


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 S E C T. VI.

## Discharge of the Superior's Casualties.

1610. February 1. Sir GEORGE ERSKINE *against* LD CRAIGIEHALL.

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IN the action of declarator pursued by Sir George Erskine, donatar constituted by Barnbougall to Craighiehall's liferent of the Lowchald, the LORDS found that the vassal's liferent fell to his superior, if the vassal were year and day at the horn before he were entered, and unrelaxed when he entered; that infestment given by the vassal-rebel, albeit before he were year and day at the horn, to him that bought his land, would not prejudice the superior of his liferent, if