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the creditor is bound to a strict negotiation, because the creditor is entitled to payment from his debtor directly, without subjecting his right to the contingency of insolvency. The present case was still stronger, because Grossett was not debtor to the Receiver-general, but to the King.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of in the said appeal be, and the same is hereby reversed; and it is further ordained, that the respondent is liable to the appellant, as representative of his father, deceased, for the sum of £205. 6s., lost by the insolvency of James Drummond, the acceptor of the bill of exchange in question, but is not liable to any interest on account thereof.

Note.—This decision alters the rule decided in Alexander *v.* Cumming, that a bill indorsed in security does not require due negotiation. Vide M. 1582.

LADY DOWAGER FORBES - - *Appellant;*
LORD JAMES FORBES - - *Respondent.*

House of Lords, 29*th January* 1765.

REDUCTION—ERROR IN ESSENTIALS OF AGREEMENT—LIFERENTER'S POWERS AND LIABILITIES—BONA FIDE CONSUMPTION.—Where the husband and wife, by marriage articles, conveyed the estate to themselves, and the survivor of them, for the wife's liferent use allenarly, reserving power to grant provision to daughters to the extent of £3000, and failing the husband exercising this power to the wife: Held, (1*st*,) That though the husband had granted provisions to his daughters in exercise of this faculty, to the extent only of £2000, that the wife was entitled, after his death, to execute an additional bond to the extent of £1000. (2*nd*), That where the liferentrix had entered into agreements restricting her liferent rights, through error in essentials, that she was still entitled to claim her rights as originally settled. (3*d*), That *bona fide percepti et consumpti* was not pleadable, and the respondent accountable, for the whole rents, feu-duties, and casualties since the date when her right accrued, reversing the judgment of the Court of Session: But, (4*th*), That she was liable for the interest of the heritable debts on Puttachie and Pittendriech.

FOR the first branch of this case, which was remitted back from the House of Lords to discuss the remaining points, *vide* ante, p. 36.

The questions involved were brought into Court, by Lord Forbes insituting an action of reduction against Lady Forbes, to set aside her new infeftment taken in the lands *quoad* the subjects not contained in her infeftment of 1730; and also for reduction of the heritable bonds, granted to her daughters by way of additional provision, and to have her compelled to pay the interest of the heritable debts, and to discharge him of the arrears of her liferent interest, in terms of the deeds of restriction, &c.; which reduction, being met by action of reduction at the instance of Lady Forbes, seeking, 1*st*, To reduce the deeds of restriction, and for payment of the arrears of her liferent from her husband's death; 2*d*, For declaring her right to the liferent of the superiorities and patronages, in virtue of the contract of marriage, and for payment of the bygone feu-duties; and, 3*d*, For payment of the rents of the lands of Puttachie and Pittendriech, which had been possessed by Lord James, both before and since his brother's death, up till his own death in 1761.

The marriage contract in question contained a clause of warrandice, by which Lord Forbes bound himself to warrant the liferent conveyance to his wife, "free of all former in- "feftments, liferents, annualrents, inhibitions, adjudications, "or incumbrances."

After it was entered into, Lord Forbes being indebted to his brother James (the respondent's father, afterwards Lord James Forbes), in 1500, he, by contract with James, disponed in wadset his lands of Puttachie and Pittendriech, and obliged himself to infeft James therein, subject to redemption. James was infeft, entered into possession of the lands, and enjoyed the rents during Lord Forbes' lifetime, and afterwards until his own death in 1761.

Lord Forbes also became indebted, during the marriage, to his brother in the sum of £2000, to Sir William Forbes in £1000, and to Mr. Ogilvy of Balbegno in £400. These were secured by heritable bonds, and infeftments were taken thereon, except on that of Mr. Ogilvy.

In 1730 Lord William Forbes died, and, as already explained, had executed, six days before his death, the bonds of provision in favour of his daughters for £2000.

Thereupon Lady Forbes was infeft in the estate of Forbes; but, besides that, there were other estates conveyed, and particularly described in the marriage contract,—namely, the lands of Puttachie and Pittendriech, in which no infeftment was taken, nor was any infeftment taken in the parishes

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where lay the rights of presentation, the superiorities, and feu-duties,

The deeds of restriction were then entered into, agreeing to restrict her liferent provisions to the free liferent of the estate, after the annualrents of all heritable debts were paid, by which she further agreed to discharge all arrears of her liferent. These deeds were entered into on the representation on the part of Lord Forbes, that the estate was nearly exhausted with debt; while, on the part of Lady Forbes, they were entered into in the belief that her daughters' bonds of provision were reducible on the head of deathbed; and it was made a condition in the deeds, as part of the consideration for granting them, that these bonds were not to be impugned or questioned on that head.

But upon Lady Forbes being afterwards made aware of her rights, she took new infeftments over the whole estate of Forbes, comprehending not only the whole property lands, including Puttachie and Pittendriech, but also the superiority lands and patronages.

After the cases had been remitted from the House of Lords, to discuss the reasons of reduction *quoad ultra*, Lord James Forbes died, who was succeeded by the respondent.

At this stage, the daughters of Lady Forbes brought their actions for their provisions; and Lady Forbes brought a new action for payment of the whole bygone feu-duties received by his father since 1730. And she having moved the Court, under the remit for application of the judgment of the House of Lords, this was done, the respondent only objecting in so far as it called on the Court to find that she, as liferentrix, was not liable in the interest of the heritable debts.

On resuming consideration of the whole cause, the Lord Ordinary, Bankton, to whom the case was remitted, found, in terms of the judgment of the House of Lords; and in re-
July 11, 1760. gard to the case otherwise, made "avizandum to the Lords, "with the other points of the cause; and ordains both "parties to give in memorials."

The new actions were then conjoined.

Lady Forbes maintained that the deeds of restriction of the marriage provisions ought to be reduced, as having proceeded on a gross and fundamental error, she having been induced to believe that the bonds of provision granted to her daughters were good for nothing, and liable to challenge on the head of deathbed, which was not the case, and she maintained, that the infeftment of Lord Forbes in the lands,

which followed this agreement, ought to be set aside, in so far as it may bar her right to the rents of these lands during her life, and also for decree against him for the back rents of these lands, as well as the feu-duties, since Martinmas 1730, being the date of the agreement, and for count and reckoning, and payment. In answer to this, it was contended, that the rents and the feu-duties were intromitted by the respondent's father *bona fide*, and upon the faith of the agreement entered into by the appellant, and that she was not now entitled to restitution; that the deeds of restriction were fair and reasonable, in the circumstances of her husband's estate. That the additional bond of provision, granted by her, after her husband's death, was null and void, as she had no power to grant it after her husband's death; and on his death this power ceased—and that a liferentrix was bound to keep down the interest of the heritable debts, during her possession. The Court remitted to the Lord Ordinary to allow a proof of the averments.

After proof of the respective averments of the parties, and minutes of debate,—The Lord Ordinary pronounced this interlocutor: "Having considered the debate, sustains the de- July 5, 1762.
"fence of *bona fide percepti et consumpti quoad* any feu-
"duties paid to the late Lord Forbes, prior to the interlocu-
"tor of this Court of the 2d August 1758, and *quoad* any
"entry money, or casualties of superiority, received by his
"Lordship, anterior to the judgment of the House of Lords,
"in February 1760, upon granting entries to the vassals pre-
"ceding that period; and finds the defendant, Lord Forbes,
"liable as heir, *cum beneficio inventarii*, in all such paid and
"received by his father, subsequent to the said times."
And upon advising a representation for the said Lady Forbes, and answers, the Lord Ordinary refused to alter, and ad- Dec. 15, ——
hered. Upon a petition to the Court, and answers thereto,
"the Lords having advised the state of the process, testi- Jan. 19, 1763.
"monies of witnesses, writs produced, and above debated,
"they repel the reasons of reduction of the deed 1730, and
"articles 1735; but sustain the reasons of reduction pleaded
"by Lord Forbes, of the additional provision of £1000 ster-
"ling, by Lady Forbes, to the younger children in 1752;
"and remit to Lord Ordinary who pronounced the act, to
"proceed accordingly." Of the same date, their Lordships pronounced this interlocutor,—"The Lords having advised
"the state of the process, testimonies of the witnesses, writs
"produced, and having heard parties procurators with re-
"spect to the wadset of Puttachie, and Ogilvie of Balbegno's

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" heritable bond; they, before answer, ordained parties to " give in memorials into the boxes on these points, on or be- " fore Saturday the 29th current." The memorials having been put in; the Court finally pronounced this interlocutor,—" The Lords having advised the memorials, *hinc inde*, " find that Lady Forbes is entitled, during her life, to the " possession of the lands of Puttachie and Pittendriech, as " comprehended in her contract of marriage; but that, dur- " ing her possession, she is liable to pay interest of the wad- " set sum of £1500 sterling, and that she is liable also dur- " ing the subsistence of her liferent, to pay the annual-rent " of Ogilvie's bond; and find that Lord Forbes is not ac- " countable for any part of the rents of the said lands, prior " to the date of this interlocutor, and decern. And having " advised the petition of Lady Forbes, with answers of James " Lord Forbes, now conjoined with this process, they find " that Lady Forbes is entitled to the feu-duties in " question, from the death of Francis Lord Forbes; and " find also, that she is entitled to the casualties in question, " from the date of her summons only, and remitted to Lord " Ordinary who pronounced the act, to proceed accord- " ingly."

Against these interlocutors, Lady Forbes brought an appeal to the House of Lords, in so far, 1*st*, As the defence of *bona fide percepti et consumpti quoad* the feu-duties was concerned; 2*d*, As they repel the reasons of reduction of the deeds of restriction 1730, and articles 1735; 3*d*, As also during her possession of the lands of Puttachie and Pittendriech, she was liable in the interest of the wadset debt of £1500; and the annualrent of Ogilvie's bond, &c.

Pleaded for the Appellant.—The effect of the deed of restriction of 1730, is to release the estate from the arrears of the jointure, to be incurred by reason of Lady Forbes keeping down the interest of the heritable debts; such release to be absolute, in case the bond of provision should stand; if not, then the arrears not exceeding £2000, were stipulated to be security in favour of the daughters, to that amount; and it is submitted that this deed ought to be set aside, the same having been obtained from Lady Forbes by surprize, and upon fundamental error; and by fraud and imposition, so far as the release of the arrears was extended to the collateral branches of the family. The deed was granted six days after the death of her husband, and before she was acquainted with, or advised on the circumstances of her husband's affairs, and her own

rights under the settlement; as also, it proceeded on the supposition, that the bonds of provision executed by her husband, in favour of her daughters, a few days before his death, were subject to the law of deathbed; which was not the case, and it was to save their interests, as thus challengable, that the deed was entered into. The deed of 1735, in like manner, ought to be reduced; because it was executed in entire ignorance of her rights, namely, that she was infeft in the superiorities, feu-duties, and casualties, as well as the liferent of the lands, which turned out *not* to be the case; and also, on the supposition that his daughter's bonds of provision were reducible on the head of deathbed; and having restricted her rights, and given up her claim to the arrears of surplus rents, on this mistake, she was not bound by these deeds; hence, therefore, she is entitled to the surplus rents, to the superiorities and casualties, and feu-duties, nor can the defence of *bona fide percepti et consumpti* avail, because, in point of fact, it was not *bona fide*, he being in the knowledge of these facts. 2*d*, The interest of the wadsett and heritable bond to Ogilvie, falls as a charge upon the inheritance, and not on the liferentrix. And, 3*d*, As to the additional bonds of provision, granted by her to her daughters, the same ought not to be reduced, because they were granted under express powers, conferred by the marriage articles, which bound her late husband to provide to the daughters provisions to the extent of £3000! He only provided before his death the sum of £2000, and as the marriage articles expressly provided, "that in case the said Lord Forbes should die, without making any provisions for such younger children, or should not charge the estate with the whole £3000 for that purpose, then, and in *either of these cases*, it should be lawful to the said Dorothea Dale (Appellant), if she survived him, to charge the said estate with the said £3000, or with such part thereof as should not be charged by the said Lord Forbes." She was, under this clause of the contract, entitled to grant the bond in question.

Pleaded for the Respondent.—The appellant had most unquestionably a power to restrict her liferent annuity over the estate of Forbes, and, consequently, if such restriction was deliberately made, it cannot be now retracted, and she must now be bound, unless she can show that it proceeded on force, fraud, or fear; but none of these grounds have been alleged or proved against the deeds, which have remained unchallenged and acquiesced in by her for a period of thirty years. That, besides, there were existing circum-

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stances in the deceased's affairs, which made such deeds of restriction necessary. He was owing of debt to real creditors £3400; £1500 to the respondent's father, and £2000 to the appellant's three daughters; and the interest of all these being a growing debt on the estate, must have carried off and exhausted the whole estate. If, therefore, the deeds of restriction are binding on the appellant, the only remaining point is, what do they cover? *2d*, She became bound, by the agreement 1735, to pay the interest of these heritable debts. It embraces Ogilvie's bond of £400, as well as the wadset; which bond, although not expressly mentioned in the agreement of 1735, yet being an heritable debt, fell under the general clause thereof, as to all debts secured on the estate by infeftment, and therefore that the interest of this, along with the other, fell, in terms of that agreement, on the liferentrix. *3d*, The deed of provision for £1000, granted by her to her daughters, in addition to the £2000 granted to them by the father in his lifetime, the Court had justly set aside, because Lady Forbes, after her husband's death, had no power to grant additional provisions; and also because it was clear, from the marriage articles, that the £2000 was the utmost extent to which the parents could go in making provisions to the daughters, which latter bore to be in full satisfaction of all they could claim or demand out of the father's estate, and barred from all other claim. It was, besides, inconsistent with the then state of his affairs; and the faculty in the marriage contract ought not to be construed unfairly, and to the disadvantage of the heir, and ought not to be held to subsist after the father's death; but, on the contrary, to have ceased on that event.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of the Lord Ordinary, of the 5th of July 1762, and the said interlocutor of the 15th December 1762 following, adhering thereto, be hereby reversed; and it is hereby declared, that the respondent is liable, as heir *cum beneficio inventarii*, for any feu-duties, entry money, or casualties of superiority paid to or received by his father, the late Lord Forbes; and it is further ordered, that so much of the interlocutors of the 19th January 1763, as sustains the reasons of reduction pleaded by Lord Forbes, of the additional provision of £1000 sterling, by Lady Forbes, to the younger children in 1752, be hereby reversed; without prejudice to the question concerning

the interest thereof, and the time from which the same should commence. And it is further ordered, that so much of the interlocutor of the 15th of February 1763, as finds that Lord Forbes is not accountable for any part of the rents of the lands prior to the date of the said interlocutor; and also so much as confines the account of the feu-duties and casualties, to be taken from the date of the summons only, be, and the same are hereby reversed; and it is hereby declared that the appellant, Lady Forbes, is entitled to an account of all the said rents, feu-duties, and casualties, paid to, and received by, the respondent's father, after her right accrued. And it is further ordered, that the said two last mentioned interlocutors, in all other respects, be hereby affirmed; and that the Court of Session do give all necessary directions for carrying this judgment into execution.

For Appellant, *C. Yorke, John Maddocks.*
For Respondent, *Al. Wedderburn, Alex. Lockhart.*

Note.—Unreported in the Court of Session. Lord Mansfield presided in giving judgment.

WILLIAM DALLAS, - - - - *Appellant;*
JAMES DALLAS - - - - - *Respondent.*

House of Lords, 4*th February* 1765.

RATIFICATION—REDUCTION—FACILITY—MARRIAGE CONTRACT—FATHER'S POWERS—PROVISIONS TO CHILDREN—SECOND MARRIAGE.—A father, in his son's contract of marriage, conveyed his estate to his son and his intended wife in liferent, and the heir male of that marriage in fee. The son thereafter executed an entail of the estate to George, his eldest son, and heir male of the marriage, and a series of other heirs substitutes, reserving power to burden and alter. After his wife's death, he married a second time, and provided in the marriage settlement for the issue of the second marriage out of separate estate. He thereafter executed additional provisions in favour of the children of the second marriage, and burdened also the estate conveyed to the heir male of the first marriage, as well as granted a lease of the same for 40 years. The heir male of the first marriage was facile, and had been prevailed on to ratify the entail, and these subsequent deeds of provision. Held, that his son was not barred by his father's deeds of ratification from challenging the entail and provisions