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certain debts, the creditors were found to have no real right, but only a personal action.

ing discharges from the creditors to whom he was engaged, and whereupon the said Mr John was infeft by a base infeftmen;

The said Mr Cornelius, in respect his son Mr Patrick had undertaken to pay his debts, did dispone to him his lands, whereupon the said Mr Patrick was infeft by a public infeftment.

The said lands being thereafter comprised from the said Mr Patrick, and there being a competition betwixt the said Mr John Inglis, and diverse other creditors of the said Mr Cornelius and his son Mr Patrick, who had comprised the said lands from the said Mr Patrick, the LORDS found, that Mr John Inglis was preferable to the said other creditors, in respect, though their infeftments upon their comprisings were public and the said Mr John his infeftment was holden of the granter, yet the said Mr John's right was public as to Mr Patrick, in so far as the said Mr Patrick had corroborated the same, and before the said comprisings, had made payment to the said Mr John, of certain bygone annualrents in contemplation of his said right, and had taken a discharge from him relating to the same; so that his right, being public as to Mr Patrick, was public as to those who had right from him; and infeftments holden of the granter, being valid rights by the common law, and by act of Parliament and statute invalid only as to others, who had gotten public infeftments, in respect of the presumption of fraud and simulation; the said presumption *cedit veritati*, and in this case is taken away in manner foresaid.

THE LORDS found, that notwithstanding that the right was granted to Mr Patrick, upon the consideration foresaid, and for payment of the debt therein mentioned, that the creditors mentioned in the same, had not a real interest in the said lands, but only a personal action against the said Mr Patrick, in respect the said right was not granted to him for their use and behoof, neither was it expressly burdened with their debts; and therefore the LORDS did find, that all the creditors, both of the said Mr Cornelius and Mr Patrick, who had comprised within year and day, should come in *pari passu*.

Dirleton, No 399. *p.* 195.

*** Gosford's report of this case is No 50. p. 2119.; *voce* CAUTIONER.

No 60.
A disposition bearing, both in the procuratory of resignation and precept of sasine, this clause, that the receiver should be obliged to pay all the

1685. *November.* 19. LORD BALLANTYNE *against* ROBERT DUNDAS.

THE Lord Ballantyne being creditor to the deceast Lord Preston in the sum of L. 10,000, he intented action of reduction against Robert Dundas of Arniston, of a disposition granted by ——— Preston, son and heir to the said deceast Lord Preston, wherein he did insist upon the reasons following, viz. That the disposition was granted by the said Preston, within year and day after the defunct's decease, to the prejudice of the pursuer, who was a creditor of the de-

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disponer's debts, contracted or to be contracted, was found to import only a personal obligation on the receiver to pay these debts, and not to affect the lands disponed.

funct's contrary, to the 24th act, Parl. 1. Cha. II. It was *answered*, That the foresaid act of Parliament did only discharge voluntary dispositions by the apparent heir, whereby he satisfied his own debt, and prejudged his predecessor's creditors, but that this disposition was for an onerous cause, viz. for payment of certain of the defunct's creditors, mentioned in a back-bond granted by the defender's father; and it was clear, both by the rubric and statutory part of the act, that it was only a remedy against the creditors of the apparent heir, but that it did not stop the apparent heir from disponing of the defunct's estate, for payment of his creditors, such as he thought fit. *2do*, That the defender's author, viz. the said ——— Preston, was not apparent heir in these lands disponed, he being infeft by virtue of a disposition from his father before his death; which infeftment, albeit it did bear, that the son should be obliged and liable to pay all his father's debts, contracted and to be contracted, sicklike as if he were served heir to the father; yet the son had thereby a qualified fee of the said lands, and neither needed, nor could be served heir to the father therein; and that it was so, was evident, seeing the foresaid fee did preclude all the King's casualties; so that neither ward nor marriage could fall by the death of the father. THE LORDS did not determine the first point, whether the apparent heir might dispone, for the satisfaction of any of his father's creditors within the year; but they found, that the defender, being infeft before his father's death upon the foresaid disposition, was in fee of the saids land, and so was not apparent heir therein.

Difference of these Expressions, "Obliged to pay the Father's Debts," and "With the Burden of the Father's Debts."

The pursuer's *second* reason of reduction was, That the qualification contained in the foresaid disposition, viz. That the son should be liable, and obliged to make payment of all the father's debts, contracted or to be contracted, being inserted, both in the procuratory of resignation and precept of sasine, was real, and did affect the lands disponed, although transmitted to the defender, who was a singular successor. It was *answered*, That the conception of the clause was but personal upon the son, being conceived in these terms, that the son should be obliged, and found liable for the father's debts, sicklike as if he had been served heir. THE LORDS found, that the disposition not bearing to be with the burden of the father's debts, although the clause was repeated both in the procuratory of resignation and precept of sasine, yet it did import no more than a personal obligement upon the son to pay his father's debts, but did not affect the lands in the defender's person, who was a singular successor.

Fol. Dic. v. 2. p. 66. P. Falconer, No. 101. p. 70.

No 60.

*** Fountainhall reports this case.

1684. *December* 18.—THE question betwixt Lord Ballenden and Dundass of Arniston, about Sir Robert Preston's estate, was decided on Pitmedden's report. THE LORDS found Ballenden's inhibition null, served on a general charge to enter heir, because the debt was not specially condescended on in the general charge; though there was a summons after for payment on the said charge, wherein the said debt was liquidate and specific.

1685. *November* 19.—THE debate between Lord Ballenden and Dundass of Arniston, mentioned 18th December 1684, being reported by Pitmedden, the LORDS found, that John Preston was not in the case of an apparent heir, but a qualified fiar, under the provisions and obligations contained in the disposition made to him by his father, and so (notwithstanding the 24 act of Parliament 1661) he might sell and dispose on his lands within year and day of his predecessor's death, and that the disposition was not qnarrellable on that head, the son being always infeft on the said disposition before his father's death; and found the provisions and obligations to pay his father's debts, albeit repeated in procuratories and infeftments, are but personal against John Preston the fiar, and not real against the fee.

1686. *February* 16.—THE Lord Ballenden's reduction against Preston and Arniston being debated in the Inner-house; the LORDS adhered to their former interlocutor, (*vid* 18th December 1684) finding the inhibition null, *quoad* the L. 300 Sterling bond, not expressed therein, because the leiges by such a general inhibition could never be certiorate what their debtors are owing, nor know how to contract with them. But as to that point, whether John Preston could dispone within year and day of his father's death in favours of some creditors, and not of others, though by a former interlocutor (19th November 1685) the LORDS had found he might, being a qualified fiar, yet they demurred on it now, and ordained informations to be given in thereanent; because the fee given him by his father bore with the burden of all debts contracted, or to be contracted, and that he should be liable in the same way as if he were to enter heir.

The third point represented against Arniston's disposition was, that it was from a nephew to an uncle without adequate causes; that by his posterior back-bond he had gratified some of the creditors to the prejudice of others who had done diligence; which was found unlawful, as Stair observes, 8th January 1669, Newman, No 2. p 880.; 24th July 1669, Crawford, No 234. p. 1196.; and B. 1. T. 10. This point was referred to the Auditor.

The fourth reason of reduction was, that the lands were *distincta tenementa* lying discontigue, and yet Arniston's sasine was only taken at the manour-

place of Courton, and so could extend to no other, unless they proved an union, dispensation, or erection, into a barony; and which was found relevant. No 60.

1687. *November* 23.—THE Lord Ballenden's reduction against Dundass of Arniston, Stobs, and John Preston's other creditors, mentioned 16th February 1686, was reported by Edmonston; and the LORDS thought the reason relevant on the act of Parliament 1621, that Arniston could not assume personal creditors before Ballenden, nor prefer any debts paid by himself since the disposition, but only those to which he had right at that time; and therefore preferred Ballenden, who had inhibited, the rest, though his inhibition was found null *quoad* one of his debts. There was cited for Ballenden, this decision from Stair, Newman, No 2. p. 880.; and Crawford, No 234. p. 1196. The words of the interlocutor were: The Lords found that Arniston by his back-bond could not prefer one creditor of Preston's to another but conform to their diligence; but that as he might have received payment of all his own sums, so he might prefer himself as to all debts due to himself at the time of the disposition of the lands of Preston, or at the time of the disposition of the lands of Auchindinnie, which were both anterior to his back-bond; and therefore sustain the reason of reduction at my Lord Ballenden's instance against Stobs, and the other creditors therein called, founded upon Ballenden's prior diligence; and in respect thereof prefer him to them, notwithstanding of the preference given to them by the foresaid back-bond; and ordain the Lord Ballenden to be ranked accordingly.

Fountainhall, v. 1. *p.* 322. 376. 403. & 481.

1687. *June* 14. BAILIE MARJORIBANKS CREDITORS, Competing. No 61.

IN the case of Alexander Chaplain writer, and Bailie Charles Charters, and other creditors of Bailie Marjoribanks, it was debated, that a clause in a disposition of a tenement of land, bearing in the procuratory of resignation, that it was with the burden of his other children's provisions, was only personal, and not real; to which opinion the President inclined: Yet many of the Lords thought what was in any of these three clauses, viz. the dispositive clause, the procuratory of resignation, or in the precept of sasine, became a part of the real right: And accordingly the LORDS found it to be real, from the conjecture of a posterior clause, making it with the burden of any farther augmentation or provision to his bairns.

Fol. Dic. v. 2. *p.* 65. *Fountainhall, v.* 1 *p.* 456.

*** Sir P. Home reports this case.

1687. *July.*—JOHN MARJORIBANKS having disponed his estate to Joseph Marjoribanks his eldest son, with this provision, that his son should make payment