that, when this question was first stirred, the President, and he only, spoke of it as a doubtful point. But when the matter came to be more maturely considered, the Court came unanimously into the above decision, as great inconveniencies must have arisen from a contrary judgment, and occasion been given to many questions not dreamed of, concerning estates possessed upon apprisings.

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So, upon examining the nature of an apprising, it was judged to be a proper sale under redemption, whereby the land which descends to the heir comes in place of the debt, which no more exists as to either principal or annualrents: whereas, were it a *pignus prætorium* or legal disposition in security during the legal (which had been the common notion) then the debt still subsisting till expiry of the legal, the appriser dying within the legal, the bygone annualrents of it would fall to his executors.

Fol. Dic. v. 3. p. 269. Kilkerran, (ADJUDICATION AND APPRISING.) No 3. p. 3.

1769. *December* 14.

ROBERT WILLOCH and Others, Trustees of the deceased George Auchterlony, Merchant in London, *against* JOHN AUCHTERLONY, Merchant in Montrose, Grand-nephew and Heir of Line of the said George Auchterlony.

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Arrears of interest upon a debt secured by adjudication, found heritable and not transmissible by testament. Altered upon appeal.

THE funds and estate of George Auchterlony in the year 1762, his brother Alexander and nephew George being then both dead, consisted, besides others, of the following particulars:

1*mo*, In virtue of his own original right he was possessed of the sum of L. 4517 : 15s. part of the principal sum of an heritable bond over the estate of Stanhope, of date the 12th November 1737, and upon which an adjudication had been led 28th July 1738.

2*do*, He had right to certain annuity bonds granted by the York Buildings Company, issued in 1730, and which had been secured by infeftment and adjudication obtained upon the Company's estates in Scotland.

3*tio*, The residue of the above heritable bond on Stanhope, amounting to L. 5500, was, by a proper deed in the Scottish form, dated 17th October 1753, vested, the *fee* thereof, in John the defender's uncle; and had accordingly, upon his death in 1762, devolved upon the defender himself as his heir. The liferent and annual interest of this sum had been settled upon George by his brother Alexander's settlement, of the above date; but as, owing to the involved situation of the estate of Stanhope, little of the interest had been paid, there was due to George, at the time of his death in 1764, an arrear of interest amounting to L. 4296.

George Auchterlony, on the 27th February 1762, executed, in the Scottish form, a disposition and assignation; whereby he disponed and conveyed his own proper share of the debt affecting the estate of Stanhope, being L.4517 : 15s.

No 100. of principal sum, with a proportion of the penalty and interest that should be due at the time of his death; as also his share and interest in the York Buildings Company's debts above mentioned, affecting their estates in Scotland, to and in favour of Messrs Willoch, &c. together with John Auchterlony the defender, and their heirs, &c. 'to the end that they might apply the proceeds 'thereof towards payment of his debts and legacies, obligations and donations, 'in such way and manner as he had already or should thereafter think proper 'to give and bequeath, by his last will and testament, codicil or codicils there-'to duly execute.'

This disposition made no mention of the adjudication of the estate of Stanhope, which had been led for the whole heritable debt; it mentioned only the heritable bond and infeftment; and conveyed the share thereof, which had all along remained with George, and his interest in the York Buildings Company's debt; but it took no notice of the bygone interest due on the L. 5500, amounting afterwards to L. 4296, the third and last portion of George's estate, as above noticed.

On the 5th March 1762, George executed his last will and testament; whereby he appointed the pursuers his executors; and after leaving several legacies to the amount of some thousand pounds, he gave to the defender L. 50 for mournings. The will concludes with a clause, whereby he 'gives, devises, and 'bequeaths, all the residue of his estate, consisting of money, bonds, bills, 'government and other securities, and all interest, rents, and profits that shall 'be due thereon, and all his other estate and effects, of what kind soever, to 'and amongst his nephew and nieces, grand-nephews and grand-nieces, equally 'betwixt them.'

George Auchterlony died in May 1764; and some time thereafter, John, the defender, challenged the above settlement, and maintained, *1mo*, His right to the L. 4296 of bygone interest fallen due on the L. 5500 of the Stanhope debt, as having been rendered heritable by the adjudication led on the original bond in 1738; and as neither transmitted nor transmissible by George's trust-disposition and last will, and so falling to him as his heir at law. *2do*, He set up his claim to the L. 4517 : 15s. of principal and interest thereon, part of the debt on Stanhope; as also to the sum due on the York Buildings Company's bonds, which by transactions and agreement had been settled to amount to L. 1709 : 5 : 8; upon the ground that, as these debts were heritable subjects, they had not been effectually conveyed by George to his trustees by the disposition of 27th February 1762, and last will of 5th March thereafter; and that they of course fell to him in the same capacity as his heir at law.

These were the points contested; and though, in consequence of some arrangements that had taken place, opposite actions were raised, by which means George Auchterlony was stated as the defender; yet as he was radically *in petitorio*, the argument maintained by him shall take the lead.

Pleaded for John Auchterlony the defender,

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On the *first* point; It was an established principle in the law of Scotland, that an adjudication, both as to the accumulated sum and the annualrents due thereon, made part of the heritable estate. An adjudication was not merely a *pignus prætorium* or security, but a judicial sale of lands under a limited reversion, upon payment of the accumulated sum and annualrents. This payment could only be made to the person *in titulo* of the bonds, viz. the *heir*, who in that event only was to convey or renounce his right; and the executor, as he was not the person who could re-convey, had clearly no right to demand the fulfilment of the condition. As there could be no doubt upon this point as to the principal sum and annualrents accumulated, the law admitted of no distinction betwixt these and subsequent annualrents arising thereon; an adjudication in short was a *jus individuum*, and must *cum omni causa* descend to the heir. The only instance in which that principle had been called in question, was in the case of Ramsay *contra* Creditors of Clapperton, in 1738, No 99. p. 5538., when the judgment of the Court, deliberately pronounced after a hearing in presence, was in favour of the heir of the adjudger; and as that judgment had been approved of and acquiesced in for a long series of years, it would be of very dangerous example to overthrow fixed and established rules, originally founded on obvious principles.

The presumed will and intention in this case could not alter the question. However strong the presumption might be in favour of a testament, as the express will of the testator, it never would from thence follow that landed estates were, contrary to the particular rules of law, to be transmitted in that way; and as every one was presumed to know the law, it was a fair inference that, by not disposing of the right otherwise in a habile mode, it had been the testator's intention it should go as the law would direct.

Upon the *second* point; It was a clear proposition that the deed in favour of the trustees, upon which they rested as the foundation of their right to the heritable subjects thereby conveyed, could not of itself have been carried into any effect, independent of the testament. A trust was thereby nominally created; but the uses and purposes of that trust were reserved for the last will to be afterwards executed. Without the subsequent deed, therefore, the trustees would have been obliged to denude of these subjects in favour of the heir, as the only person having right thereto: It was the testament only which could give the trust-disposition any force or effect as to the destination or disposal of the testator's estate; and as the law did not allow heritable estates to be conveyed by testament, neither would it suffer that salutary rule to be eluded by devices of this nature.

The trustees had no *jus quæsitum* by this deed; it remained undelivered and under the maker's power as effectually as if it had never been executed; and if a contrivance of this nature was allowed to defeat the heir's right of succession, the law of death-bed would be at an end. Every person meaning to disappoint the heir, had nothing more to do but to execute a deed of this kind; and keep-

No 100. ing it in his possession, and under his power, thereafter, by some other deed executed upon death-bed or by testament, appoint the uses to which the estate thereby conveyed should be applied.

Pleaded for the Trustees,

Upon the *first* point; In questions of this nature, whether subjects were to be held as heritable or moveable, so as to descend to the heir or executor, the *intention* of the deceased party, whose succession was disputed, was chiefly to be considered. This principle was solemnly established as a general rule in the case, Waugh *contra* Jameson, No 86. p. 5526. The intendment of parties in the present instance was unquestionable, both from examination of the previous conveyances of that debt, which were all silent as to the adjudication, so that it was considered as resting merely upon the heritable bond; and still more so when George's settlements were considered, which unequivocally shewed he regarded these arrears as a moveable subject, and that as such they were disposable by testament in the way he wished.

The plea maintained, that an adjudication had the effect of rendering the posterior as well as prior annualrents properly heritable, was founded on a subtility of law, to which effect ought not to be given, in order to defeat the meaning and intendment of parties. No reason *ex facie* occurred why an adjudication should have stronger effects, as to the interest of the debt, than in many other cases pointedly analogous and similar. Take the case of an heritable bond upon which there was an arrear of interest; the debtor could not redeem or compel the creditor to renounce without paying both principal and interest; and yet if the creditor was dead, both heir and executor must concur in discharging the debt; the one for the principal, the other for the interest. The contrary argument rested in a great measure upon the rigorous principles of the feudal law; but these had been greatly relaxed in favour of the right of executors; strong instances of which occurred in the cases, Fac. Col. Hamilton of Dalzel *contra* Mrs Euphame Hamilton, No 19. p. 5253; and of 24th July 1765, Lord Banff *contra* Tod *; by which, in direct contradiction to some decisions, it was now an established point, that the rents of an estate falling due in apparency, though not uplifted by the heir in his lifetime, were no longer heritable so as to pass to the next heir of the investiture, but were *in bonis* of the apparent heir deceasing, and went to his executors.

These strong instances of recent departure from strict feudal principles, were sufficient to shew that the decision in the case of Ramsay and Clapperton was now out of the question; and, as it was by mere accident that the heir, in the first instance, came to have a claim, viz. by George Auchterlony's not having uplifted and discharged the whole arrears in question, it was extremely hard that those who were intended to have this fund should be deprived of it.

Upon the *second* point; It was an agreed fact that George Auchterlony was in *liege poustie*, both when he executed the trust-disposition in February 1762, and his last will and testament in March following, and that he lived and en-

* Not Reported. *See* Appendix.

joyed his faculties for two years thereafter. This being the case, and as he held the unlimited fee and property of his whole estate, he was clearly entitled, by a deed in proper form, to convey this debt on Stanhope, or any other heritable estate, to any person he pleased, and under such conditions and reserved powers as he should think proper. The deed in question was such a deed; it was a deed *inter vivos* sufficient to exclude the heir at law; and the subsequent testament was only an exercise of the power and faculty thereby reserved.

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The trust right being therefore, by the law of Scotland, a habile conveyance in favour of the trustees, the property fully vested in them, and the granter as much denuded of the subjects conveyed as any one could be, by a deed reserving his liferent, and a power to alter or burden at any time of his life, it was of little or no consequence what was the form of the writing in which, by the reserved power, the after purposes of the trust were declared. The first deed being a sufficient deed, was all that was required; and as the right of the heir was thereby cut off and excluded, he had neither title nor interest to challenge the subsequent declaration, whether it was a testament, or conceived in even a less formal manner. The trustees, upon this point, founded on the case, Pringles *contra* Pringle, No 73. p. 3287.; but which was reversed upon appeal; and certain deeds, viz. a bond on death-bed, and a codicil executed in virtue of a reserved faculty in a deed which was unchallengeable, sustained.

There were several specialties argued in this case; but in giving judgment, their Lordships rested entirely upon the general abstract point. Upon the *first*, they were nearly all agreed that the bygone arrears were heritable; and as they had not been conveyed in the trust-disposition, that they fell to the heir. Upon the *second* point, they were a good deal divided; some were of opinion that the settlement executed was an indirect way of evading the law of death-bed. The majority, however, thought that the trust-deed was an effectual conveyance of the heritable subjects mentioned therein, and that the after declaration was legally executed in virtue of the reserved power in the trust.

The following judgment was pronounced: "Sustain the defence for John Auchterlony against payment of the sum of L. 4296, as the balance of the interest of the principal sum of L. 5500, which was resting at the time of George Auchterlony's death; and assoilzie the said John Auchterlony from that branch of the libel at the instance of the trustee against him. Repel the defence proponed for the said John Auchterlony against payment of the sum of L. 1709 : 5 : 8d. uplifted by the said John Auchterlony out of the estate of Marishall: Find the said sum does fall under the trust-right libelled on, &c. Sustain the defence proponed by the said Robert Willoch and the other trustees of the said George Auchterlony, against payment of the sum of L. 4517 : 15s. and annualrents thereof, claimed by the libel at John Auchterlony's instance against the said trustees: Find that the said sum was carried by, and vested in, the trustees, by the trust-disposition executed by George Auchterlony in their

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favour, and the said George Auchterlony's latter-will and testament relative to the said trust-right; and assoilzie the said Robert Willoch and the other trustees from the process brought at John Auchterlony's instance against them for payment of this sum, and decern."

Both parties reclaimed; but the LORDS adhered, and refused both petitions.

Lord Ordinary, *Justice-Clerk*. For the Trustees, *Sol. Dundas*, *Rae*.
For John Auchterlony, *A. Lockhart*, *Wight*.

Robert Willoch, &c. appealed against the interlocutor of the 14th December 1769 and 21st of February 1770, in so far as the Court had sustained the defence proponed by John Auchterlony against payment of the sum of L. 4296, as the balance of the interest of the principal sum of L. 5500, which was resting owing at the time of George Auchterlony's death.

John Auchterlony appealed from the said interlocutor, which repelled the defence proponed by him against payment of the L. 1709 : 5 : 8d.; and sustained the defence proponed by the said Robert Willoch, &c. against payment of the sum of L. 4517 : 15s. and interest thereof claimed by him.

The judgment was as follows:

"It is declared, That the money received by George Auchterlony, on account of interest upon Charles Murray's bond to him on the lands of Stanhope, ought to be imputed in discharge of the interest, according to the order of time when the same balance became due; and after satisfaction of all the interest which was incurred before Martinmas 1742, the said George ought to be considered as debtor to Alexander, assignee of John Arbuthnot, for a proportional part of the money so received by George, corresponding to the interest of L. 5500. And it is further declared, That whatever money has been paid to the respondent, as and for the interest of the said sum of L. 5500, from Martinmas 1742 to the death of Alexander, ought to be considered as part of the personal estate of Alexander; and what has been paid to and received by the respondent, for interest accrued due upon the said L. 5500, from the death of Alexander to the death of George, ought to be considered as part of the personal estate of the said George. And it is ORDERED and ADJUDGED, That the interlocutors, so far as they are complained of by the original appeal, be reversed. And it is further ORDERED, That the cause be remitted back to the Court of Session, to proceed therein according to the declaration herein before made. And it is further ORDERED, That the interlocutors, so far as they are complained of by the cross appeal, be, and the same are hereby affirmed."

This judgment reversed the first finding of the interlocutor of the Court of Session, of 14th December 1769. And hence it struck only against the first branch of the title of the decision, viz. 'Arrears of interest upon a debt secured by adjudication, heritable and not transmissible by testament.' The other points, which support the proposition maintained in the second branch of the title, were affirmed.

R. H. *Fac. Col. No 8. p. 18.*