1776. *July* 9. FRASER *against* SMITH.

No 59.

AGNES FRASER bequeathed, at her death, to Janet Smith, "her moveable 'goods and gear, whole body-cloaths and wearing apparel, all her linens, and 'all other moveables, goods and gear, which shall belong to her at 'her death, of whatever kind or denomination; and particularly,' &c. Then follows an enumeration of her houshold furniture and apparel. The principal part of the testatrix's effects consisted of a promissory note of a banker's for L. 40, which being claimed as falling under the above bequest, the executor *urged*, That it did not come under the general description of moveable goods and gear, and being left out of the enumeration of particulars, it was thence presumable, that so considerable a part of the defunct's succession was not intended to be bequeathed away from her executor. THE LORDS preferred the executor to the sum in question. *See* APPENDIX.

Fol. Dic. v. 3. *p.* 126.

1780. *July* 21. JOHN and URSULA SMITH *against* JAMES MARSHALL.

No 60.

A father disponed to his son his whole estate, under burden of his debts, declaring that, by accepting the disposition, his son should be *personally* liable for them. Found he was, notwithstanding, liable only *in valorem*.

JOHN MARSHALL, the father of James Marshall, was debtor in a bond granted to John and Ursula Smiths.

Several years prior to the date of the bond, John Marshall had granted and delivered to James, who was his eldest son, a general disposition of his whole estate and effects, real and personal, with the reservation of his own liferent right; 'and with and under the express burden of his just and lawful debts 'which should happen to be addebted and owing and resting by him at the 'time of his decease; with which,' it is added, 'not only the hail subjects 'above disponed, with this present right and disposition thereof, and all infeft-'ments and diligence, or execution following, or competent to follow thereupon, 'are and shall be expressly burdened; but also the said James Marshall and his 'foresaids, 'by their acceptation hereof, shall become personally liable thereto,' 'and be 'personally bound' in payment of.'

James Marshall, however, did not take infeftment on this disposition till several years after his father had granted the bond. In the mean time, the latter uplifted debts due to him by heritable bonds, sold one of two tenements which he had in property, and conveyed most of his remaining effects to his other children. Upon his father's death, James was decerned executor, but not *confirmed*; uplifted the debts; and paid the creditors without decree, though not without public intimation in the newspapers.

John and Ursula Smiths then insisted in an action against him on these three grounds; *First*, As being liable for his father's debt to them *præceptione hæreditatis*, the infeftment on the disposition being posterior to the bond, though the

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disposition itself was prior; a plea which seemed more agreeable to the object of the law, that of securing creditors, than supported by authorities; 2*dly*, as vicious intromitter, from not confirming, and paying without decree; and 3*dly*, in virtue of the burdening clause in the disposition, especially the words, 'personally liable.'

THE COURT were unanimous in refusing action on the first ground above mentioned. With respect to the second, they found the defender liable in the sums which the pursuers would have drawn, had they, together with those who received dividends from the defender, been confirmed executors-creditors. But the third was considered as of more difficulty, since the effect of such a clause had not been ascertained by decisions; and therefore, the LORDS appointed the arguments upon it to be heard in presence.

Pleaded for the pursuers: By the later judgments of the COURT, it has indeed been found, that dispositions granted 'with the burden of the disponer's 'debts' do not subject the disponee *ultra valorem* of the subjects conveyed. That condition is calculated to prevent creditors from being laid under the necessity of bringing reductions of such deeds.

A clause, however, declaring the disponees personally liable, is not necessary, nor in fact was it ever designed, for that purpose. On the contrary, it can have no other meaning than to render disponees liable to creditors to the full amount of the disponer's debts, whether the extent of his effects shall happen to exceed, or to fall short of that amount. This distinction is ascertained, and clearly expressed, in the judgment of the COURT in the case of Thomson *contra* Creditors of Phin; Stair, December 8. 1675, *voce* PASSIVE TITLE; by which they found, 'that the clause with the burden of the disponer's debts, did not 'oblige Phin *personally*, but as intromitter with the whole moveables *quoad* the 'value of the whole moveables.'

Such a condition does not subject the disponee to a passive title, seeing it is *ex pacto* that he thus becomes bound; in the same manner as if he were to put on record a bond to that effect. Nor can any words be more clearly expressive of this obligation than those which occur in the present case. If the defender was not to have been bound *ultra valorem*, why was it not so expressed? At least, why are words used of a signification and tendency directly the reverse?

Nor is this contract rendered ineffectual by the defender's supine negligence, in so long delaying to take infeftment on the disposition, which left his father at liberty to make the alleged alienations: for a *jus quæsitum* had already arisen to the creditors from his personal obligation; and this he will not now be allowed to defeat.

Answered for the defender: The pursuers are obliged to suppose, that the terms, 'personally liable,' are of the same import with those of 'universally liable,' signifying an unlimited obligation to pay the whole debts, however inadequate to them the effects of the disponer might be. Yet these phrases are

No 60. not more synonimous in law than in common language. To become 'personally liable,' admits of a very different and an obvious meaning. For in this manner, personal diligence is expressly permitted against the disponee; which is more easy and expeditious, and sometimes more efficacious than the real. Such is the sense put on the words in the judgment of the COURT, in the case of Clerk *contra* Clerk, Stair, December 2. 1662.; in which, from the want of these words, it had been questioned whether personal diligence could proceed against a disponee; whence the purpose of using them appears, contrarily to the idea of the pursuers, to be merely that of obviating doubts of this nature. Of a similar tendency is Kilk. Mercer against Scotland, June 6. 1745. *See* these cases, *voce* PASSIVE TITLE.

To deny the pursuers construction altogether were therefore more reasonable, than to admit it as the only just one; and surely it is a very moderate conclusion, that the words have not necessarily such a signification. According to this idea, the matter resolves into a *quæstio voluntatis*; but it is one of no doubtful kind. For to inquire, whether it was the meaning and will of the parties, that the defender should become in all events universally liable for his father's debts, is to ask if the father purposed to sacrifice the interest of his son; and if the son coveted his own ruin,

Besides, as it is admitted, that the burden of the debts was laid on the subjects conveyed, this of itself implies a limitation of that obligation; and consequently its personal effect must be in like manner circumscribed; for both are necessarily commensurate.

But were the opposite construction to be admitted, it would not avail the pursuers. The transaction in question was a bilateral contract; but of which John Marshall, by dilapidating the succession of his son, the defender, failed to perform his part. It being evident then that the former could not himself, in this situation, have compelled implement on the part of the latter, neither can the creditors of the former acquire from him a right which he himself could never claim. If they have any *jus quæsitum*, it must have proceeded from themselves, not their debtor. But what valuable consideration have they given the defender? Or what loss have they suffered through his interference? Besides, as it is not to be doubted, that the father and son were at full liberty to have at any time destroyed the deed without challenge from the creditors, so of course these last could have had no *jus quæsitum*.

THE LORDS found 'the defender liable for his father's debts only *in valorem* of the heritage and moveables intromitted with by him.'

Reporter, *Lord Braxfield.* Act. *Rae, Maclaurin, W. Millar.* Alt. *Lord Advocate.*
Rolland, Honyman. Clerk, *Tait.*

S. *Fol. Dic. v. 3. p. 126. Fac. Col. No 121. p. 222.*