

Scotland, Court of Session.
DECISIONS

OF THE

COURT OF SESSION,

¹⁷⁹¹ M.DCC.LXXXI.—¹⁸²² M.DCCC.XXII.,

IN THE FORM OF

A DICTIONARY.

COLLECTED BY

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M.DCCC.XXXIX.

TRUSTEES OF MASSIE v. JAMES MASSIE.

No. 150.

June 6, 1816.

1st Division

HERITABLE OR MOVEABLE.—*Bill-debt, whether rendered heritable by a trust-deed and infestment in the debtor's entailed estate, but to the effect only of assigning the rents for payment of debts.*

THE deceased James Massie was a creditor to General Hay of Rannes, by bill for £516. Massie's heritable succession devolved to his nephew and heir-at-law. His moveable funds were conveyed, by settlement, to trustees, for the behoof of his two nieces. The question

No. 150. occurred, in consequence, in an accounting between these parties, whether the said bill debt
 June 6, 1816. had been rendered heritable as to Mr Massie's succession, by a trust-deed and security of an
 anomalous sort, executed by General Hay in Mr Massie's lifetime.

General Hay was in the possession of a Scotch land estate, which yielded a neat rental of £1800, or thereby, but was held, under the fetters of a strict entail; and he owed debts to the amount of £21,487. He was also nearest heir to an old lady, a lunatic, who was owner of certain plantations in the island of Tobago.

In August and October, 1808, General Hay, with the consent of his eldest son, Andrew Leith Hay, and the son, also, for himself, executed a trust conveyance in favour of certain persons for the behoof of the General's creditors. This deed enumerates, in the outset, the several creditors, and the sums due to them,—James Massie, among others, as creditor by bill for £516. It proceeds on the narrative, that General Hay could not command sufficient funds for payment of his debts, having no present property but the estate of Rannes, which he held under a strict entail; but that he was desirous to establish a fund "for the regular payment of the interest of these debts, and for the extinction of the debts themselves, as well as for the payment of any other lawful debts at present due by me, although the same may be here omitted, and to do every thing in my power for the security of my lawful creditors, in so far as is consistent with the nature of my property, and titles under which I hold and enjoy the same."

The deed then proceeds thus:—"I have resolved to convey in trust to the persons after mentioned, my lands and estate, herein after specified, during the term of my natural life, to the effect of vesting the rents thereof in them during that period, for the purposes, and under the reservations, conditions, provisions, and declarations herein after mentioned."

Then follows the dispositive clause:—"Therefore I, with consent of my said son, hereby dispoise, convey, and assign to and in favour of Alexander Leith of Freefield," &c. (here the trustees are named), "the lands and others after mentioned themselves, to the effect of vesting the said trustees, or any other trustee or trustees who may be afterwards assumed, in a full and real right to the rents, mails, duties, customs, and casualties thereof, from the term of Whitsunday in this present year, 1808, and thereafter during the whole period of my natural life."

A full description of the subjects is subjoined, "Together with all right, title, interest, claim of right, property, or possession, which I have to the said lands and others, so far as regards the rents, mails, and duties thereof."

The rents are afterwards more fully and formally assigned to the trustees, by a separate clause, in the like style as in an ordinary disposition of lands: "Further, I hereby assign and convey to the said Alexander Leith, &c., the rents, mails, and duties, customs and casualties of the lands and others above dispoised, payable for crop and year 1808, and thereafter during the whole period of my natural life," &c.

The deed bears an anxious declaration as follows:—"But declaring that the foresaid disposition is granted for the purpose of securing my lawful creditors in the rents, profits, and duties of my estate, and for the purpose of enabling my said trustees to uplift the same, and to apply the free produce thereof in payment of the debts at present due by me, and that this deed shall not in any respect affect or encroach upon the conditions, limitations, prohibitions, clauses irritant and resolute, contained in a deed of entail of the said lands of Leith-hall and others, executed by the deceased Andrew Hay of Rannes, bearing date, 17th August, 1789, and recorded, &c., and which deed of entail shall remain firm, stable, and entire, nothing being hereby conveyed, or meant to be conveyed, but the right and title which I have to the rents of said estate, during my own life, in virtue of the said deeds of entail: And I hereby declare that all acts and deeds which the said trustees shall do, or attempt to do, contrary to the conditions, limitations, prohibitions, clauses irritant and resolute, imposed by said deeds of entail upon me and the other substitutes therein mentioned, shall be void and null."

The deed empowers the trustees to remove tenants, and to grant and renew tacks, to appoint factors "for managing the said lands of Rannes and others, and levying and uplifting the rents and duties thereof." It also conveys to them manor places, fortalices, mills, miltures, servitudes, and, *inter alia*, "the free burgh of barony of Old Leslie, with power to

create baillies, clerks, and other necessary officers and members of court." A special reservation is made of the "patronage of the parish churches belonging to me, and contained in the title-deeds of the lands and others above conveyed," as also "reserving the plantations and growing trees on the lands and others above disposed, with full power and liberty to me to thin, cut down, and manage the same at my pleasure."

Moreover, in the event of Mrs Elizabeth Leith's death, the General binds himself to make up his titles as heir to her, and to convey her estates to the trustees, with power to them to sell the same, and apply the proceeds in payment of his debts.

Towards the same end, of a more speedy payment of the General's debts, the deed empowers the trustees, if they choose, "to sell and dispose of a redeemable annuity to the extent of £1500 sterling annually, payable out of the rents of the said entailed estates, at such price as they can obtain from the same, and that during the joint lives of us, the said Lieutenant-General Alexander Hay, and Andrew Leith Hay, and the life of the survivor of us;" and to convey the rents to the requisite extent, to the purchaser of such annuity.

In terms of this deed, the trust was to subsist during the life of the General's son, as well as his own; and the son bound himself, in a special clause, to renew the trust for the period of his natural life, or till the debts should be paid, in the event of his succeeding to his father.

It was also declared, "that, in the event of the non-acceptance or death of the said trustees above named, this trust-right shall not cease or become void, but the same, with the infertment to follow hereupon, shall stand and subsist as a security to my creditors above named," and be carried into effect by other trustees, to be named by the creditors themselves, in whose favour the General and his son were to renew these presents.

In the event of the objects of the trust being accomplished, "by the payment of my debts out of the rents and proceeds of the said entailed estates, the sale of the said estates and plantations in Tobago, or from any other source, then the said trustees shall be bound to renounce and discharge this trust right, and to reconvey to me, the said Lieutenant-General Alexander Hay (or my son, Andrew Leith Hay, as the case may be), the rents and proceeds of the said entailed estates in all time thereafter, and the whole other subjects belonging to me, which may be then in their hands, in virtue of this trust."

In conclusion, General Hay, "for his right of liferent above-mentioned, and in security to that extent to his said creditors, obliges himself to infert and seise the said trustees, and the survivors or survivor, in the said lands and others."

A precept is accordingly appended to the deed, in which the General grants warrant "to give and deliver heritable state and seisin, real, actual, and corporal possession, of all and whole the foresaid lands and others, described and lying in manner above mentioned, and here held as repeated *brevitatis causa*, to the said Alexander Leith," &c.; "but to the effect only of the said trustees possessing the same during my life, as a security to the said creditors, but without contravention of the said tailzies, and in trust always for the uses and purposes, and under the conditions, declarations, and reservations above mentioned."

In December 1808, the General's creditors, Mr Massie among others, signed a regular deed of accession to the said trust, in which they authorized the trustees to pay to the General an annuity of £300, and allow him the possession of the mansion-house, offices, and gardens of Leithhall for his lifetime, without payment of rent.

On the 9th of May, 1809, infertment followed in favour of the trustees. These are the principal circumstances of this anomalous and equivocal deed, which naturally gave rise to a controversy among Mr Massie's representatives, with respect to the quality of his claim of debt.

The Lord Ordinary (———), in the accounting between his trustees and his heir, "Found, as to debt of £516, due to the deceased James Massie by General Hay of Rannes, that the same is heritable *quoad* Mr Massie's succession."

At advising a petition and answers, the Court adhered; but the voices were three to two. On advising a second petition and answers, one of the Lords departed from his former opinion; and they now, by a vote of three to two, altered their former interlocutor, and found that the claim of debt remained moveable.

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The reasoning on the bench, on occasion of the two advisings, was to this effect, in support of that opinion which in the end prevailed: That where a creditor adjudges or takes an heritable bond, he does a precise thing, relative to his own claim of debt, and of which the effect, in altering the quality of that claim, is known. His object, indeed, is to get payment of his debt; but he alters its form and shape; and he knows that a change of its character in point of succession must ensue. But when a change in the nature of a debt is to be inferred, without any alteration of its form, from things done by the debtor, and from circumstances not particularly relative to that claim, the proceeding must be very plain and clear to be attended with any such effect. In particular, the intention of both parties must be looked into. In the case, accordingly, of a trust-deed for an immediate sale of land, and payment of the debts out of the price, certainly such a conveyance leaves the quality of the disposer's debts just as it was before.

In like manner, in the present instance, a strange and an anomalous right is granted, from which no inference of a change in the quality of the debts can be made. General Hay's creditors had become urgent; but he and they both knew that real security was unattainable: their object, therefore, was, not to lay permanent incumbrances on the lands, but to secure the punctual application of the rents to their payment. The deed accordingly does not establish a right of annualrent on the lands; nor does it bear that the debts shall be a real burden on them, which, if he chose to risk an irritancy, he might have declared them to be. It is true, in point of form, he conveys the lands, but he does so to the effect only of assigning the rents. While he gives these, he guards, by the most cautious provisions, against touching the property: in particular, the precept of seisin, and the clause for denuding the trustees, are carefully limited to the rents only. In short, he pares the surface as thin and near as possible, so as to save the *solum*, and limit the interest of his creditors to the yearly issues and revenues, without touching the property, or any thing deeper.

It is true, there is a precept of seisin and an infeftment; but this was for the sake of more effectual management, and to vest the trustees with the fuller powers. As to the creditors themselves, there is truly no infeftment, but an assignation only to the rents; and as an intimated assignation only, and nothing more, the infeftment can operate in their favour. Such an infeftment is a strange and an anomalous investiture, and not agreeable to feudal principles, which warrant tradition of heritable tenements only, and not of rents or profits as distinct from the lands. Indeed, a liferenter cannot grant any warrant for infeftment; he can only assign his own interest; and he does so by a mere personal deed.

The case of Sir William Nairne, 15th February, 1810, was well decided, but was quite different from this; being the case of a thorough and proper heritable bond granted to the lender of the money, who expressly covenanted for heritable security, and this bond followed with an infeftment in the lands, out and out, and of all that the debtor could give, and guarded only with a provision that the security should not be used so as to infer an irritancy of his right to the estate. Besides, the question there was with an arrester, who could not possibly compete with the holder of an infeftment, which was not objected to by the heirs of tailzie. But on the face of General Hay's deed, there is nothing but a conveyance of rents, that the creditors may be paid out of them as speedily as may be. To accomplish this was the granter's sole object; and the trust accordingly bears certain provisions, those especially for turning the two liferents into money, by which, in certain events, the debts might soon have been extinguished.

The case of Thomson, 18th June, 1793, is much in point; and there the point was maturely considered. The principle in the case of Grierson and Ramsay, 25th February, 1780, is on the same side, as is that also of Smart and Wilson, 31st May, 1809. Erskine delivers the law on the other side too broadly. In Dunbar's case, 14th July, 1738, the question turned very much on the adjudication. The judgment in Kyninmont's case, 6th November, 1739, has been thought doubtful, and has been disregarded in latter instances.

These were the observations of the *Lord President*, and *Lords Balgray* and *Succoth*.

Lords Hermand and *Balmuto*, who were for adhering, were chiefly influenced by the judgment in Sir William Nairne's case. The words of the deed (they said) in that instance

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might be somewhat different; but the substance of what was done, and the intention of the parties, were much the same. No. 150.

For the Trustees, HUGH LUMSDEN.

For the Heir, HENRY M'KENZIE.

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