

No 52. fraudulently violated, the right of property remains equally unaffected. A *bona fide* purchaser, therefore, might have effectually acquired such property from the disponent; and an heritable creditor by infestment is held to be in the same situation. The adjudging creditors stand, however, in a different predicament; for, as it has been found by decisions, which, for the stability of the law, ought not to be departed from, they must take the right of their debtor *tantum et tale* as it was in his person.

THE LORDS found, "That the allegation of fraud was not relevant against the heritable securities and infestments; but that it was relevant as to the creditors-adjudgers*."

Lord Ordinary, *Sawinton*. Act. *Solicitor-General*. Alt. *Abercromby*. Clerk, *Home*.
S. *Fol. Dic. v. 4. p. 67. Fac. Col. No 294. p. 453.*

1789. December 4.

AMELIA LAMONT, against The CREDITORS of LAUHLAN and ARCHIBALD LAMONT.

No 53.
Sums with which a conveyance of lands was burdened, found to be preferably secured, in a question with the Creditors of the disponent, tho' no infestment had followed.

LAUHLAN LAMONT, in case of his dying without male-issue, conveyed his lands of Auchagoyle to Archibald Lamont, burdened with the payment of his debts, and a legacy of L. 100 to each of his three sisters.

The precept of sasine accompanying this conveyance, was declared to be granted under the following among other conditions; "That in the event of Archibald Lamont or his heirs attaining possession of the lands, he or they should pay the disponent's lawful debts, and the sum of L. 100 Sterling to each of Isabel, Grizel, and Amelia Lamonts, the disponent's sisters; which sums to the said three sisters should be paid within twelve months after the disponent's decease, with a fifth part more of penalty in case of failure, and annualrent of the principal sums from and after the time of the disponent's death, during the not payment; and which sums were, in the event of their becoming due, declared to be real burdens upon the lands till paid off."

After the decease of Lauchlan Lamont, and of Archibald Lamont the disponent, who never executed the precept of sasine in his favour, the creditors of both proceeded to attach the lands of Auchagoyle. Among others, Mrs Amelia Lamont obtained a decret of constitution against the heirs of Archibald Lamont for the L. 100 due to her; and after using general and special charges, she instituted a summons of adjudication, which was conjoined with a previous one brought by another creditor.

* It may be remarked, that the disponent, who had become bankrupt, also appeared in the action, for the vindication of his character; and denied that he had been guilty of any impropriety. It was, however, merely a question of relevancy; and the facts were regarded as hypothetical.

In the ranking which followed, Mrs Lamont having claimed a preference over those creditors who were not really secured, the common agent objected, and

Pleaded ; There can be no permanent burden on landed property without infeftment ; and therefore the legacies in question, though intended to be made real, must be considered as obligatory on the grantee only. By taking infeftment without any notice of the legacies, it was in the power of the grantee to defeat the testator's purpose ; and his creditors, who attach the rights that belonged to him, without any obligation to fulfil those engagements he may have come under, cannot be affected by them. The situation of the legatees, even if they had been authorised to take infeftment, must have been the same, until they were actually infeft, as if they had obtained an heritable bond on which no sasine had ever followed. But as it was not put in their power to complete their right in this way, it would be equally inconsistent with the established law, and with the design of the public registers, if any preference were now to be given to them, see Section 8th *h. t.*

Answered ; It is true, that no incumbrance can be laid on landed property which does not enter one or other of those records which have been prepared for the purpose. It may also be admitted, that in this case Archibald Lamont in whose favour the conveyance was granted, by executing the precept of sasine, without any notice of those burdens which were meant to accompany his right, might have placed the legatees in the situation of personal creditors only. But as no infeftment has followed, and as his creditors coming in his place cannot warrantably proceed to take infeftment, without engrossing in the sasine those conditions which were annexed to the grant, the question must here be determined in the same manner as if the right had been completed by the disponee himself, as it ought to have been. In such a case, it will not be disputed, that the sums due to the legatees would have been a real burden on the lands.

The question having been reported on informations, the Judges were unanimously of opinion, That Mrs Lamont had a preferable right.

The cause having been remitted to the Lord Ordinary, his Lordship pronounced an interlocutor in favour of Mrs Amelia Lamont.

Reporter, *Lord Justice-Clerk.*
W. M. Bannatyne.

For the Creditors, *A. Macdonald.*
Clerk, *Menzies.*

For Mrs Lamont,

C.

Fol. Dic. v. 4. p. 66. Fac. Col. No 95. p. 172.

* * See a case between the same parties, No 61. p. 5494, *voce* HERITABLE and MOVEABLE.