estate, may be conceived in such manner as to create a personal obligation upon the disponee to make payment of a debt mentioned to a creditor named, but not to create any real burden upon the lands disponed in favour of that creditor; and that is precisely the situation which, by the conception of the trust-deed in question, these creditors, mentioned in the list, are placed. No more is imported than a simple declaration that the receiver shall be bound to make the payment, or that the deed is granted for the purpose of such payment. And it adds nothing to the force of the right though this clause be inserted in the sasine, and appear upon the record. No real burden has therefore been created, and nothing but a personal obligation on the trustees to execute the purposes therein set forth appears.

After hearing counsel for five days, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Wm. Adam, Thos. Macdonald.*
For Respondents, *Sir J. Scott, Wm. Tait.*

THOMAS MARTIN and Attorney, . . *Appellants.*
JAMES MARTIN, RICHARD STONE, and J. FOOTE, *Respondents.*

House of Lords, 17th June 1795.

ADJUDICATION—HERITABLE or MOVEABLE—APPROBATE AND REPROBATE—FOREIGN WILL—HOMOLOGATION.—A party domiciled in England, executed a will in the English form, leaving only a liferent of part of his estate to his heir at law, his eldest son, remainder to other heirs. The residue of his real estate, "*not by him otherwise disposed of*," he bequeathed to his three younger sons, equally between them. No special mention was made of three several bonds due by the York Buildings Co., upon which adjudications had been led against their estates in Scotland. After enjoying his liferent under this will for sixteen years, the eldest son raised a declarator, and claimed the bonds as heritable estate, which an English will could not carry. Held, that as he had taken benefit so long under his father's will, he could not now reprobate the same.

The appellant's father, Joseph Martin, died worth £100,000, consisting of real and personal estate in England, where he was domiciled. He had four sons, of whom the appellant was the eldest, but having incurred his father's displeasure, he, by his father's will, was only provided with a liferent of the surplus rents, payable out of his father's estate of Cheshunt, remainder in tail male to the use of his son or sons of his

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body, if any, whom failing, to the use of the testator's second son, Joseph Martin, and his assigns, during his life, remainder to the use of the first and other sons of his body, and so on to the testator's other sons. "The rest and residue of his real "and personal estate, not by him otherwise disposed of," he bequeathed to his three younger sons, Joseph, Charles, and George, equally between them, share and share alike.

Part of the deceased Joseph Martin's property consisted of three bonds by the York Buildings Co. for £500 each, due to his own father, Thomas Martin, upon which decree of adjudication had been obtained against the Company's estates in Scotland, in Joseph Martin and John Parker's names, *qua* executors of Thomas Martin's will. The adjudication debt not having been specially mentioned in the will of Joseph Martin, the question was, Whether it was carried by the will? The debt had accumulated to

July 24, 1766. £4059, as at this date, and fell to be paid, but a title through the appellant as heir at law being demanded, he refused, but afterwards granted a deed of release, upon the understanding that he had no right to the debt contained in the adjudica-

In 1790. tion. Sometime thereafter he raised the present reduction and declarator, to have the deed of release set aside, and to have it found and declared, that he had best right, as heir at law of his father, to the debt in the adjudication, the same being heritable in its nature, and descending to the heir at law. On the following grounds, 1st, Assuming the will was broad enough to carry the adjudications as real estate, yet, by the law of Scotland, a will in the English form is ineffectual to carry heritable estate in Scotland, and the adjudications being heritable property, could not be so carried. 2d, That the adjudication was not included in the will, and therefore, in the situation of real estate, of which the testator had made no disposition.

In answer, the respondents pleaded the assignment and release as a bar to the reduction, and further, contended that the adjudication in question, supposing it real estate, came within the intendment of the will of Joseph Martin, and the appellant having received his annuity under the will of his father for sixteen years, had barred the claim by

Dec. 13, 1792. homologation. Further, that the debt was not heritable in Joseph.

The Lord Ordinary found, "That the words of the will are "sufficiently broad to comprehend the adjudication in ques- "tion, and although that will does not contain words suffi- "cient to convey feudal property by the law of Scotland,

" and that it is not authenticated in terms of the statute " 1681, yet, in respect Thomas Martin, the pursuer, has " taken benefit under the said will, finds that he is not en- " titled to approbate and reprobate the same deed, but that " he is bound to implement the same in favour of the trus- " tees; and of consequence finds, that the deed of assign- " ment and indentures of release, now under challenge, " were not deeds done to his prejudice, nothing more being " there done than what the trustees could have done inde- " pendent of him by an adjudication in implement." On representation against this interlocutor, *to the effect of obtaining leave to reprobate the will*, the Lord Ordinary, of this date, pronounced this interlocutor,—" In respect the Jan. 24, 1793. " pursuer has taken benefit under his father's will for the " space of sixteen years, finds he is not entitled to repro- " bate the said will."

On two several reclaiming petitions, the Court adhered.* Dec. 18, 1793. Against these interlocutors the present appeal was Mar. 4, 1794. brought.

Pleaded for the Appellants.—Consent in every transaction is of the essence of the contract, and whenever any of the parties act under a mistake in regard to the subject matter of the contract, there can be no consent, and the contract is not binding; such mistakes being errors *in substantialibus*, void the contract. The error here was on both sides, for the respondents, who were executors under his father's will, had no interest in the adjudication in question; but, conceiving that it was carried by the will, applied to the appellant to execute the deed of release sought to be reduced. Under the same belief that the will carried the adjudications, the appellant

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* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—" This is a question of homologation." (See former notes).

LORD ESKGROVE.—" I am for altering."

LORD SWINTON.—" Of the same opinion."

LORD PRESIDENT.—" I am for altering upon the point decided. But I doubt whether it was heritable in Joseph Martin's person."

LORD JUSTICE CLERK.—" It was clearly heritable. The trutees held it for him; and it would have been against their duty to turn it into money, if there was money sufficient to pay the debts and legacies. They fell to convey the subject itself."

The Court adhered to former judgment.—Vide President Campbell's Session Papers, vol. 73.

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signed that deed, so that there is error here in the very subject matter of the transaction, and therefore that deed ought to be set aside. 2d, Real or heritable property in Scotland, not passing by a will, it makes no difference whether it is the will of a Scotsman residing abroad, or of an Englishman domiciled in England, having real property in Scotland, and there being no conveyance of the adjudication, the property thereof belongs to the appellant, as heir at law, which he is entitled to take, over and above the annuity bequeathed to him by his father; or, at least, he is entitled to his election, and to take either the one or other.

Pleaded for the Respondents.—The adjudication in question was led by Joseph Martin and John Parker, *qua* executors of Thomas Martin of Clapham, and not by Joseph Martin in his individual capacity. It could not, therefore, be heritable property in him. He had merely a personal claim to have the benefit of the trust, and that personal claim was transmitted to his executors by his will. 2d, But supposing the adjudication to have been heritable, the words of Joseph Martin's will were sufficient to carry that and every species of estate belonging to him; and therefore, as the adjudication debt, if situated in England, would undoubtedly have been carried by the will as real property, the appellant cannot take benefit from and under that will, and at sametime claim the Scottish heritage, because that would be to approbate and reprobate the same deed. He has already made his election, by accepting the annuity under the will, and now it was impossible for him to plead ignorance of his rights, or the nature of the deed of release, the deed itself informed him. The case laid before English counsel informed him of this right, and that he could not claim both under and against the will. In these circumstances he executes the deed of release. After this, and after an election so deliberately made, confirmed by so many unequivocal acts, and adhered to for sixteen years, the appellant cannot now open up the whole transaction.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Wm. Adam, Wm. Tait.*
For Respondents, *Sir John Scott, W. Grant.*

NOTE.—Unreported in Court of Session.