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Answered for Mr Goldie, The cause was ripe for judgment before the death of the original defender, and its merits fully known to the Court. After his death, that there might be a person to sustain the character of the defender, the forms required that the heir should be called by a transference. He was called, but refused to enter. Now the decreet must be deemed valid and *in foro*, for that the case was fully debated by the father, the original defender, and afterwards his eldest son was regularly called, in order that he might receive judgment on the debate. The pursuer could not oblige him to represent or defend; and therefore justice will not permit him, by his refusal, to undo the whole proceedings against his father. As to the right in the trustees, it is founded on a latent, personal, revocable, and testamentary deed, granted by Cherrytrees in their favour; of which deed the pursuer had no knowledge; and as the trustees have no interest in it distinct from the interest of Cherrytrees' own family, it will follow, that the decreet obtained by Mr Goldie, after debate with Cherrytrees himself, and after transference of the action against his eldest son, must be held as conclusive against the trustees.

"The Lords found that it was still competent to the trustees to be heard notwithstanding of the decreet."

Act. *A. Pringle, J. Ferguson*, et *Advocatus*. Alt. *T. Hay*, et *A. Lockhart*. Reporter, *Tinwald*, *D.* *Fol. Dic. v.* 4. *p.* 236. *Fac. Col. No* 38. *p.* 60.

1760. *July.*

Hugh Crawford, Trustee for David Smith of Methven, *against* Mrs Anne Randal of Breck.

No 53.

In a challenge of a creditor's right affecting an estate, for behoof of the apparent heir to the original debtor, a decree pronounced in a former challenge and competition, to which the pursuer's father, who then held the right of apparency, had been made a party, was held as a

Crawford, upon a trust-bond granted by Methven, apparent heir of Andrew Smith of Rothesholm, his granduncle, obtained an adjudication against him, as charged to enter heir in special in the lands of Rothesholm and Hurtesso; and then pursued an action of mails and duties against the tenants, and also against Mrs Anne Randal, as intromitter with the whole rents.

Randal produced her titles; *1mo*, A bond granted to Michael Randal of Breck, 26th June 1667, by Mr Patrick Smith, Advocate, and Andrew Smith of Rothesholm, conjunctly and severally, for L. 1057 Scots; *2do*, Decreet of adjudication obtained by Breck, 12th July 1688, of the lands of Rothesholm and Hurtesso, for payment of the accumulated sum of L. 2139, 14s. Scots; *3tio*, A decreet of reduction and improbation obtained by Thomas Randal, her brother, in 1740, against the present Methven's father, and Trail of Sabay, Hugh Smith and others.——On this last-mentioned decreet she pleaded *res judicata*, and set forth,

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res judicata, although it was contended, that he was not a party to the former proceedings upon the footing of the right of apparency, which was not then known to him.

That in the year 1728, a process of reduction, improbation, and declarator, was brought in name of Robertson of Tilliebelton, adjudger upon a trust-bond from Hugh Smith, who then assumed the character, and was considered as heir of line of the said Andrew Smith of Rothesholm, his granduncle, as well as of John Smith of Huip, his grandfather, against David Trail of Sabay, who, before the 1700, had got into possession of the lands of Rothesholm, Hurtesso, and Huip, in virtue of sundry grounds of debt owing by the said Andrew and John Smiths, which he had purchased in from David Smith of Methven, father to Methven the present pursuer, and others; and also against the said David Smith of Methven, and William Randal, father to the present defender; on the other hand, Thomas Randal, son to William, and disponee to his debt on Rothesholm, brought a counter-action of reduction, improbation, and declarator, against the said Hugh, and Trail of Sabay, Smith of Methven, and others.—— And these two processes having been conjoined, Mr Randal's adjudication and grounds of debt had repeatedly stood the test, after a most obstinate litigation, first against the objections of Hugh Smith, as apparent heir of the debtor; and next, Trail of Sabay having taken the field against him, upon the footing of these adjudications, under which he had obtained, and was then in possession both of the lands of Rothesholm and Hurtesso, and also of the lands of Huip; the Lords "found Sabay's adjudications paid and extinguished; and therefore preferred Mr Randal to the rents of the said lands of Rothesholm and Hurtesso for crop 1739, and in time coming." And thereupon Mr Randal extracted his decreet; and, in virtue thereof, entered to the possession of the lands of Rothesholm and Hurtesso, as his absolute property; and continued in peaceable possession till his death in 1755, when he was succeeded therein by the present defender, his sister and sole heir.——And for her it was now *contended*, in bar of this fresh attempt to wrest the subject from her, by the present Methven, as having lately discovered and proved himself to be the true heir of line of Andrew Smith of Rothesholm, (being grandson to his elder brother of the full blood, whereas Hugh Smith was descended of his younger brother of the half blood), That the present Methven's father having been called, and compearing, in the above-mentioned process concluded in 1740, Methven or his trustee cannot now be heard to make any further objection, or repeat the objections formerly urged, as these must be considered as either proponed and repelled, or competent and omitted; and that the decreet obtained by Thomas Randal must be held as a *res judicata* against Methven.

Answered, Although it is admitted, that the late Methven was cited as a defender in the reduction and improbation raised at the instance of Thomas Randal, this decreet pronounced in favour of Randal could not strike against or hurt the right of apparency, which was at that time in the person of Methven, although he was then ignorant of that right.—Reduction and improbation are terms, which, when applied to deeds or writings, are well understood, and can have a proper legal effect; but to reduce and improve a right of apparency, to

No 54. declare it false and forged, &c. is a contradiction and absurdity in the use of words.——No such inept purpose was, or could be, in view, by citing Methven in that reduction. Nor could it be thereby intended to exclude him from claiming that estate, at any time thereafter, in the character of apparent heir thereto; because his right of apparency was not at that time known; on the contrary, another person was then competing with Mr Randal under that character, and was believed to have the right in his person.

The only reason that can possibly be assigned why Methven was called in that process, appears to have been, because he was thought to have an interest to defend the diligences led against the estate by Sabay, to whom he had conveyed certain grounds of debt affecting it, that were brought under challenge in that reduction, for which he was liable in warrandice to a certain extent. This interest, however, appears in itself to have been very distant and trifling; and Methven does not seem to have given any attention to the proceedings in this process, in which he imagined at that time he had so little concern. It is true, indeed, upon the diligence at Sabay's instance being at last set aside, Sabay having brought a process of recourse, Methven appeared to defend himself; and the process was dropped, for this good reason, That as Sabay's diligence had been set aside, because his debt had been satisfied and paid by intromissions, and not from any objection to his grounds of debt, no warrandice could possibly be incurred. And the pursuer does not now insist, that Methven is not bound by the decision which was given as to Sabay's rights, and precluded from making any new objection, or renewing any further claim against the estate in virtue thereof. But his plea rests upon a very different and more solid foundation; and now that it is discovered, and clearly proved, that he is the undoubted heir of line in the lands, the pursuer, in his right, claims under that title the privilege which the law has given to every apparent heir, of challenging the incumbrances affecting the estate formerly belonging to his predecessor. This is a right, in its own nature, totally distinct from, and indeed inconsistent with that on account of which the late Methven is said to have been called in the former process, and which could, in no respect, be prejudged by any proceedings in that cause, seeing it is derived through a very different channel, and was not, nor could possibly be, taken notice of in the questions then stirred.

Replied, That the protecting the subject against the vexation of frivolous suits, has been ever an object of particular attention. Hence it is an established rule, that *res judicata* affords a total and absolute defence; and also, that competent and omitted is relevant to debar a renewal of the same action, upon arguments that might have been formerly proponed. A case can scarcely be figured, where there is more reason for applying these salutary rules than the present. The defender's predecessor called the father and predecessor of this pursuer, personally, in the most solemn process known in our law, at a time when he held in his person the very same right under which his son now

claims: And amongst the warrants of the former process, there has been found a representation of Mr Smith of Methven to the Lord Ordinary, setting forth, "That a process had been raised against him upon the warrandice in his conveyance to Sabay, and that process having been remitted to Tillibelton's reduction and improbation, (which was conjoined with Mr Randal's,) decreet was obtained against Methven, against which he prays to be reponed;" by which it is sufficiently proved, that Methven was a party to those processes; and consequently that nothing that passed therein can be supposed to have escaped his knowledge or observation. If he did not in his own name propone the objections which were repeatedly urged by other competitors, and are now again offered by his son and heir, it must be presumed, that he wilfully staid behind the curtain, with a view to an after-game, by attacking the winner, after he was fatigued and wearied out with defending against the same weapons in the hands of others. No 54.

Again, as most of Sabay's rights had been derived from Methven himself, and he stood bound in absolute warrandice of them, the litigation maintained by Sabay must be understood as the compearance and defence of Methven; and consequently Methven, or his heir, cannot now be heard against the decreet then obtained by Mr Randal.

Further, Methven was called by the defender's predecessor to exhibit and declare any title whatever he then had in his person, whether it was that of heir of line to his debtor, or adjudger of his estate. The pursuer of that action could not know how many titles he might have in his person, till he appeared, and declared them. It is sufficient that Methven was properly called in, and perfectly knew of that process; and as he at that very period held the same title of heir that his son now takes up, (as well as that of creditor,) the interest of the then pursuer could not be hurt by his chusing to defend under the one title rather than the other. The pursuer had no compulsitor to oblige him to defend under both titles; and the consequences would be very inconvenient, were a defender, possessed of sundry titles, allowed to defend under one, and, when defeated, make a discovery of others, which he then stood vested in, and commence a fresh litigation upon the very points already over-ruled. Besides, it is evident, that the character of heir could never have added weight to the objections offered for Methven, or his assignee, to the defender's right. Such objections were rather strengthened, when proponed under the character of a co-creditor; and if over-ruled in that case, there could certainly be no hope of their being sustained in favour of the objector, as heir of the common debtor.

Neither can the assertion of the present pursuer, "That his father did not, during the former processes, know that he was truly the heir of line of Rothesholm," alter the case.——It is true, that Hugh Smith, when he raised the first process of reduction and improbation, assumed that character, which it now appears belonged to Methven. But the defender's predecessor had no occasion

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to know the true state of the fact: Yet had he known it, what could he have done more than to have called Methven in such a process, that he might support his title if it was truly sufficient? This he accordingly did. And it might as well be required of every pursuer of an improbation, to enumerate every title the defenders are possessed of, (though he should need the aid of inspiration to know them,) as the defender's predecessor to have called Methven under the special character of heir of Rothesholm. Methven had then undoubtedly the same right of heir in his person that his son now has; and considering that he was the nephew of Rothesholm, as well as of Smith of Huip, it is almost incredible, that he was ignorant of these brothers having been born of different marriages. *In dubio* the contrary must be presumed; and taking the matter in that view, it was certainly incumbent upon him to have put in his claim at a time when he saw another assume that title.

It must give great weight to the defender's arguments in support of the former decreet as a *res judicata*, that after the pursuer was allowed by the Lord Ordinary to open his objections to the defender's rights, before answer as to the preliminary point, it appeared, that the whole of them were identically the same that had been argued and over-ruled in the former tedious litigation. The pursuer then means nothing less at present, than to make the Lords overturn all that they formerly did upon the most mature deliberation, without having one word to say, that can throw any new light upon the matter.

"THE LORDS sustained the defence of *res judicata*."

Act. *G. Cockburne.* Alt. *Rae.*

D. R. *Fol. Dic. v.* 4. *p.* 236. *Fac. Col. No* 265. *p.* 491.

1761. *February* 17.

JOHN GORDON of Achanachie, and Mr ALEXANDER GORDON of Whiteley, Advocate, his Trustee, *against* GRIZEL OGILVIE, Eldest Daughter and Heiress of Mr John Ogilvie, Advocate.

No 55.
An apparent heiress having made up titles in the person of a trustee by an adjudication upon a trust-bond, in order to challenge her predecessor's deed; and decree-absolvitor having passed against her,

ANDREW MIDDLETON of Balbegno was twice married. By his first wife he had a daughter Elizabeth, married to Charles Gordon of Achanachie, and mother of the pursuer. By his second he had three sons, of whom Robert the eldest succeeded him in his estate of Balbegno.

Robert married a sister of Mr John Ogilvie advocate; and his two brothers having predeceased him without issue, and he himself having no children, he, in 1709, settled his lands and estate of Balbegno upon his brother-in-law Mr John Ogilvie, declaring the same to be redeemable for a rose noble, by himself, or any heir-male or female of his body, upon such heir attaining the age of 21 years.