

ness belonging thereto, which absolute warrandice, that can import no more but to warrant the property of the lands, and the mosses, and muirs, as they had been possessed by the charger for 40 years before; so that this tolerance and moss-live being granted many years before, it must be understood that the suspender bought the lands with the burden of that servitude; as in the case of servitude of aqueduct, highways, and passages through the ground, which albeit they will be oft-times of great prejudice to the heritor, yet, when a man sells the lands, he is not obliged to warrant against these servitudes, especially where the parties having right to the same are in possession the time of the selling of the lands; seeing it cannot be understood that he sold the lands upon any other condition but as he possessed the same himself; and the suspender cannot retain the sum upon that account, of the want of a sufficient progress, seeing he is not distressed, nor any part of the lands evicted for want of a progress; and he having relied upon the absolute warrandice, which sufficiently secures him, he cannot retain the sum; but when he shall be distressed, or any part of the lands evicted, the charger shall then secure him. The Lords found the servitude did not import a contravention of the warrandice, and that the superior had no interest to retain the price upon any alleged defect in the progress, in respect the lands were disposed with warrandice; and that the 40 years progress, given to the suspender, was sufficient till the contrary appear, seeing there was no eviction nor distress.

Fal. Dic. v. 2. p. 358. P. Home, v. 1. No 196.

1720. June 21.

JOHN COUPER, *alias* CHALMERS, against Sir ANDREW MIRETON of Gogar.

MR THOMAS CHALMERS having contracted many debts, the estate of Gogar, whereof he had only the liferent, was, by an alleged collusion betwixt him and his creditors, brought to a judicial sale before the Lords, at which Sir Andrew Mireton became purchaser. His son John Couper, *alias* Chalmers, then an infant, in whose person the fee truly was at the time of the judicial sale, intended a process of reduction and improbation against Sir Andrew Mireton the purchaser, for having his titles set aside by which he possessed the estate. The purchaser produced his decret of sale, and contended, That his right by that decret was unquerrable in virtue of the act 1695, anent the sale of bankrupt estates.

The pursuer *pleaded*, That it was neither in the words nor the spirit of the act, to render the sale of any other lands unquarrellable, but only of those which truly belonged to the bankrupt. The words are expressly concerning the sale of bankrupts' estates, and the provision is, That the lands shall be disburdened of all debts and deeds of the bankrupt, or his predecessors from whom he had right; implying plainly, that no security was intended to be granted

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The purchaser at a judicial sale found to be secure against all exceptions to the title of the bankrupt, even although it turned out that he had not been the real proprietor, but only liferenter.

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for any lands, other than those which belonged to the bankrupt. And the meaning of the law, were the words ambiguous, cannot possibly be construed to another sense; because it would be subversive of all notions of equity, that one man's lands could be sold in discharge of the debts of another, and yet that he should be barred from an opportunity of complaining of that hardship. This interpretation is confirmed by the opinion of the Lords, appearing by the constant and uniform style of this and all decreets of sale, whereby the creditors are decerned to denude, *omni habili modo*, of their several diligences, with absolute warrandice as to the sums to be received by them, which would be entirely useless and unnecessary, if a decret of sale, *quovis modo* obtained, could absolutely secure the purchaser against all questions and objections founded on intrinsic nullities. The pursuer concluded with the particular favourableness of his case, that at the time of the sale he was a *minor indefensus*, and could not be precluded by any omission that might be alleged in his not compearing at the sale to give in his claim.

On the other hand, it was *contended* for Sir Andrew Mireton the purchaser, That his acquisition of the estate of Gogar, at a public roup, excludes the pursuer's action, his right being sovereign and unexceptionable, standing upon the public faith. For illustration of this it was noticed, that expired adjudications, or apprisings, have been subjected to review upon nullities or informalities, because there the creditor looks to his own security, and if he be misled, *sibi imputet*; and assignees to, and purchasers of such rights, are in the same case, *caveat emptor*. But it is quite otherwise in judicial sales, where the Lords being, in some respect, the legal authors of the purchase, do, before adjudging of the lands to the highest offerer, review and reconsider the whole steps of the process, and find and declare that the same has proceeded regularly. And if it were otherwise, no purchaser at roups should be found; for these purchasers, relying entirely upon the public faith, are never concerned, nor have any access to know about the procedure of the process, right or wrong. The purchaser's absolute security, in a sale by roup, stands further confirmed by this, that after such sales are closed, and the highest offerer preferred, the whole process of sale, from its original summons to its last period, is, for an ultimate stroke, brought under the Lords' review; and the Lords, by their solemn interlocutory sentence, find the sale hath regularly proceeded; and whatever objection comes after that, is too late, being competent and omitted. And that the pursuer was minor at the time, will afford him no argument, the act 1695 expressly securing the purchaser against minority, so that minors have no privilege in this case. In answer to the argument drawn from the warrandice, it is true, that the anxiety of the law in favour of purchasers at roup, hath allowed them to bruik by virtue of the creditors' diligence, from whom they are to have express warrandice. But to lay this view a little open, it must be noticed, *imo*, That at present decreets of ranking must precede sale; *2do*, A

purchaser is not allowed to make the least exception against any nullity in the creditor's rights, which if once ranked the purchaser must pay; *3tio*, The case may, and often does occur, where a purchaser can have no effectual warrandice; seeing every creditor, even the most opulent, is at absolute freedom to assign his right to the most indigent person, either before or after the ranking; and the share will be drawn upon the assignee's warrandice, which is none at all; so that the chief security of purchasers stands upon the public faith; and therefore, in a late case, betwixt James Murray, purchaser of Scotsraig, and the Creditors, the purchaser having, for his security, looked into the records, and there discovered several rights affecting the purchase, preferable to those ranked, the ranking having proceeded only on a suspension of multiplepointing, meaned himself to the Lords, that the creditors should purge these incumbrances, while the matter was yet entire, and no part of the price paid; the LORDS refused once and again his petitions, and ordained him to pay up the price *propter fidem publicam*, judging, that however preferable the debts on record might be, the purchaser was secure, as these things occur from our practice and municipal statutes. The Lords will likewise please consider the plenary and extensive faith and security of a public roup, as it stands in the eye of the common law, and the municipal customs of our neighbouring nations. And it is positively contended for Sir Andrew Mireton, that *subhastation*, or sale by public authority, secures the purchaser from all emergent claims. By the Roman law, if any person had in his custody, *titulo depositi vel commodati*, any species of goods, and the party in possession, though not proprietor, had given the same in pledge to another, and had not relieved or redeemed the pledge conform to agreement, public certiorations were to be made, before the receivers of a pledge could bring it to roup, and after these were duly published, the pledge was sold *sub hasta*, which differed only from our sale and roup in certain formalities, but in nothing material; and yet, if the purchaser by *subhastation* had attained possession and paid the price, the thing sold could never have been recovered by the original proprietor; and if this take place in moveables, it must hold *multo magis* in land-rights. The like obtains in all the United Provinces of Holland. To conclude, our sovereign judges have been so very anxious in regulating the procedure in roups, that no human prudence or equity could be more tenderly cautious, to prevent the surprise or prejudice of any having interest; which is clear from the many and various certiorations, common and edictal; the variety of acts to be extracted; the extention of all the legal *induciae* given in other cases; the solemn publications at the roup, and the caution of the articles whereby the same proceeds; and, after all, the necessary previous review and reconsideration of the whole by the Lords, whereby every step of the process must be found to have proceeded orderly and regularly, and all this before the sale by roup can be perfected. Now, why all this scrupulous nicity, if it was not intended thereby, that purchasers should have absolute security, and be freed from all latent

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claims? If the pursuer has a just claim, it were indeed hard to cut him off; but has not the law provided him a remedy? May he not insist, as accords, against the creditors who brought the estate to a sale, and who received the price, and who consequently are *locupletiores ejus jactura*? Surely it would be severe, above measure, upon the purchaser, to make him liable, who, relying upon the public faith, made a fair and open purchase, as the highest bidder, at a public roup, who has paid the utmost farthing of the price, and who was none of the creditors, made no compositions, nor got eases to the value of a sixpence.

“THE LORDS found the decret of sale was a sufficient production made for the purchaser, to exclude the pursuer’s title.”

Dalrymple, No 182. p. 250.

1724. December 29.

MR PATRICK HALDANE of Beacrofts, Advocate, *against* SIR ALEXANDER ANSTRUTHER and his CREDITORS.

No 14.

In what light adjudications of an old date, but where the expiry of the legal had not been declared, are to be considered as a title?

THE defender’s lady, by virtue of a factory from him, entered into a minute of sale, whereby she sold to the pursuer, at 32 years purchase, the lands of Newgrange, and obliged the defender to grant a disposition and progress of rights thereto.

The defender, Sir Alexander, having become bankrupt, his Creditors arrested the price; and a disposition and progress being offered by Sir Alexander to the pursuer, he raised a multiplepinding, calling Sir Alexander and his Creditors, and repeated a reduction of the minute, founded on the following objections to the progress.

1^{mo}, That the foundation of Sir Alexander’s right, upon which his author was infest, being no other than certain apprisings led against William Carstairs of Kilconquhar, former heritor of Newgrange, by his creditors, upon which no declarator of extinction of the legal had followed, and the reversion was only renounced by the apparent heir who never entered, the same was liable to challenge at the instance of any subsequent heir, who might enter to the predecessor against whom the apprisings had been led; and Sir Alexander being now bankrupt, the pursuer could not depend on his warrandice; 7th July 1676, Edgar against Miln, No 4. p. 285.

2^{do}, That Sir Alexander never having been infest himself upon the disposition from his author, a conveyance from him of his personal right could not secure the pursuer against any latent deeds of his, such as backbonds or declarations of trust; 12th July 1670, Kennedy against Wallace, No 39. p. 10205.

3^{tio}, The personal right was adjudged from Sir Alexander since the minute, by other creditors than the arresters; so that the adjudgers would be preferable to the pursuer, though he should get a disposition in terms of the minute.