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Dunlop, both of the debts due by him to Carlyle and Company, and of the whole debts due by that Company to their creditors; yet this is what they are insisting for. They claim to be ranked on Dunlop's estate for L. 17,000, as the amount of the debts due by Carlyle and Company, and moreover for the sum of L. 12,000, said to be due by him to that Company; not indeed to the effect of drawing full payment of both sums, but with this quality, that in consequence of this double ranking, they shall draw no more than L. 17,000 Sterling, due to the creditors of the Company. But this is not just; for if this last sum be the whole they are entitled to draw, they can have no claim to rank for more; and, being once ranked for that sum, it is not competent to rank them for any other sum whatever. If Dunlop pays the first claim, viz. the debts due by Carlyle and Company to their creditors, the debt due by himself to the Company, must be extinguished.—THE LORDS found, That the trustees for the creditors of Carlyle and Company were entitled to be ranked on Dunlop's estate, for the amount of the debts due by him to the said Company; and that, after imputing the dividend arising from the debt so due, and the dividend already paid from the Company's effects, in extinction of the Company's debts, along with the other funds of the Company yet undivided, the said pursuers are entitled to be again ranked on James Dunlop's estate, for the balance that will then remain due to the creditors of Carlyle and Company; the trustees of Dunlop being entitled to an assignation from Carlyle and Company's creditors, so far as they shall draw on the said second ranking; for the purpose of operating relief on Dunlop's estate, from the other partners of Carlyle and Company; in so far as the said creditors shall draw from Dunlop's estate more than his proportional share as a partner of the Company.

Fol. Dic. v. 3. p. 71.

1779. December 9.

LUDOVICK GRANT, *against* MANSFIELD, RAMSAY, and Company.

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A creditor recovering payment out of the estate of the principal debtor, found not bound to assign to postponed creditors, on that estate, his right of action against a cautioner.

MR CHARLES GASCOIGNE entered into a minute of sale with Sir James Campbell, concerning the lands of Dalderse, belonging to the latter. The price was L. 27,000; of which L. 15,000 was to be heritably secured on the lands themselves; L. 3000 was to be paid immediately; and, for the remaining L. 9000, Mr Gascoigne, the purchaser, and his two cautioners, Mr Francis and Mr Samuel Garbet, were to grant a personal bond, which was to be guaranteed by an assignment of L. 12,000 capital stock of the Carron Company, belonging to Mr Samuel Garbet.

After the execution of this minute of sale, which contained neither procuratory of resignation, nor precept of sasine, Mr Gascoigne, the purchaser, and his two cautioners, became insolvent; and Sir James Campbell, in addition to the collateral securities formerly stipulated, insisted, that the whole price should be

come a real burden on the lands. His demand was complied with in the following manner: Sir James granted a disposition, declaring the price to be a real burden on the lands: Mr Gascoigne granted heritable bonds for the price, in the different proportions already mentioned; and the infeftments, on these several rights, were taken and recorded on the same day.

The heritable bonds for L. 9000 and L. 3000, came by assignment into the persons of Mansfield, Ramsay, and Company, bankers in Edinburgh.

The estate of Dalderse was brought to a judicial sale by Mr Gascoigne's creditors. The interests produced were, *1st*, The heritable bond to Sir James Campbell for L. 15,000; *2^{dly}*, The heritable bonds for L. 9000 and L. 3000, in the persons of Mansfield, Ramsay, and Company; and, *3^{dly}*, Several adjudications led by Mr Gascoigne's personal creditors; one of whom, Mr Ludovick Grant, had executed an inhibition after the minute of sale, but before its completion, in the manner already narrated.

In the ranking, two questions occurred. The *first* was, Whether Mansfield, Ramsay, and Company, on drawing the sum of L. 9000 out of the price of Dalderse, the estate of the principal debtor, were obliged to assign to the postponed creditors on that estate, the collateral security of the L. 12,000 Carron stock, granted by Mr Samuel Garbet, the cautioner, to Sir James Campbell.

Pleaded for the postponed creditors:—A creditor preferably secured on two subjects, may take his payment wholly out of one; but, as he cannot, by so doing, postpone in an arbitrary manner, any secondary creditor, he must assign to him, whose security is thereby diminished, that by ranking in the cedent's place, the secondary creditor may communicate the loss resulting from the preferable security, to all those standing in the same degree of preference. Nor can any distinction arise from the nature of the security which is to be assigned. Whether it is a cautionary obligation, or an incumbrance on a separate estate, the catholic creditor might have operated his payment out of it; and equity requires, that his debt should be paid by equal proportions out of the whole funds.

Answered:—Assignments of this nature, having their foundation solely in equity, cannot be demanded where equity requires the catholic creditor to draw his payment, if possible, from particular funds. The obligation of Mr Garbet, to whose prejudice the assignment is here demanded, was merely subsidiary, taking place upon the failure of the principal debtor; and whenever the principal debtor pays, his cautionary obligation is at an end. Hence the creditor taking his payment out of the funds of the principal debtor, does nothing arbitrary or unjust. On the contrary, to act otherwise, would be an extension of the cautionary obligation, palpably wrong and oppressive, to which no court of equity will give a sanction; Principles of Equity, p. 18.

The next question, respected the effect of the inhibition used by Mr Grant after the minute of sale, but before the sale was completed. It was admitted, that the heritable security for L. 15,000, being part of the original bargain, was unchallengeable; and it seemed likewise to be admitted, that the security for L. 3000,

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which, by the original agreement, was to be paid immediately, was in the same predicament. But with regard to that for L. 9000, it was

Pleaded: By the minute of sale, Sir James Campbell became bound to convey the lands, upon receiving L. 3000, an heritable bond for L. 15,000, and a personal bond for the remainder; and although the minute contained no procuratory, nor precept, by which the purchaser could be instated in the feudal right, yet Sir James Campbell could have been compelled by action at law, or by adjudication, to implement the precise terms of his agreement. The after transaction, therefore, by which the whole price is made a burden on the lands, as also the heritable bond for L. 9000, being a deed entirely voluntary on the part of the debtor, must be affected by the inhibition.

Answered: Even after the minute of sale, Sir James Campbell continued in the property of the lands. The insolvency of the purchaser, and his cautioners, entitled him to reprobate their personal security; nor could he have been obliged, either by the purchaser or his creditors, to divest himself before receipt of the price. The condition, therefore, under which this sale was carried into execution, created a real burden on the estate, from which the creditors of the purchaser affecting it, for their payment, cannot shake themselves loose.

As to the *first* point, 'THE LORDS, in respect Mr Garbet was only a cautioner, found, That Mansfield, Ramsay, and Company were not obliged to assign the security granted by him, upon the stock of the Carron Company, in farther security of L. 9000, contained in the bond granted by Charles Gascoigne.'

As to the *second*—THE LORDS 'found, That the inhibition at the instance of Ludovick Grant did not affect either of the bonds in question, so as to make them reducible at his instance.' See INHIBITION.

Lord Ordinary, *Elliock*.
Craigie.

A& Ilay Campbell.
Fol. Dic. v. 3. p. 72.

Alt. Maclaurin.

Fac. Col. No 94. p. 180.

1780. January 14.

JAMES ERSKINE *against* GEORGE MANDERSON.

MANDERSON and HAY were joint acceptors of a bill payable to Erskine, who sued both of them for payment; and, as Hay pleaded no defence, immediately obtained decret against him.

Manderson, however, being still sued for the whole debt, made offer of payment, on condition of receiving an assignation to the decret against Hay, the *correus debendi*; which being refused, he, in a process of suspension, brought on that ground,

Pleaded: 'A creditor cannot arbitrarily discharge his diligence done against one *correus debendi* to the hurt of the rest, who have a right to claim assignation;' Dalrymple's Decisions, No 167.* When a debt is discharged by a *correus*, it is

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A co-debtor found entitled to receive assignation of diligence from the creditor, that he might the more speedily operate his relief.

* Page 231. Wallace against Elibank, 25th January 1717, *voce* DEBTOR and CREDITOR.