

improvement of the said estates; and that interest be computed, at the above-mentioned rate, upon the said several sums, from the times when the same were actually disbursed; and that one of the said accounts be set against the other, and such rests be made in taking the same, as justice may require; and that either party do pay to the other such sum of money as shall be found due, on the balance of the said accounts; and if nothing shall be found due to the defender, or upon payment of what shall be so found due, that the defender do reconvey the said estates to the pursuers, subject to the demands of their creditors, and to the leases, and other contracts, as aforesaid, in such manner as the Court of Session shall think fit to direct; and it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, and that the said Court do give all necessary and proper directions for carrying this judgment into execution."

No 54.

1795. February 4. TRUSTEE of DICKSON *against* CREDITORS of RAE.

THE LORDS found, that a creditor who had received partial payments on interim warrants, was not entitled to deduct the expense of obtaining and extracting these, out of his payments, so as to load the common fund.

No 55.

Fac. Col.

*** This case is No 38. p. 13345.

S E C T. XIII.

Effect of conveyance to the Purchaser of the Debts affecting the Estate.

1788. July 10. CREDITORS of HUGH SETON *against* WALTER SCOTT.

THE bankrupt estate of Appine was purchased at a judicial sale by Mr Seton. On the Creditors receiving payment out of the price, conveyances of their debts were made in trust, for the behoof of Mr Seton, to Mr Scott, his agent or man of business. Mr Scott afterward laid out considerable sums of money on Mr Seton's account; and for Mr Scott's farther security, Mr Seton executed deeds by which he consented and declared, that Mr Scott should continue vested with the rights to the Appine debts, until those due to himself were paid.

Alexander Farquharson, the heir of the cautioner for the price of the estate, then obtained from Mr Scott a disposition to the Appine debts, for the sole purpose of securing his relief against that cautionry obligation.

No 56.

The debts affecting a bankrupt estate, conveyed to the purchaser at a judicial sale, upon payment, are extinguished to every other effect, except that of securing the purchaser.

No 56.

In the process of ranking of Mr Seton's Creditors, he having become bankrupt, Mr Scott, in consequence of those circumstances, claimed a preference over the other Creditors. To this claim they objected; and

Pleaded; By act of Parliament 1695, c. 6. it is enacted, with respect to judicial sales of bankrupt estates, That, upon the payment of the price to the Creditors by the purchaser, the lands purchased "shall be for ever disburdened of all the debts and deeds of the bankrupt." And in order that the purchaser, in the event of the lands being evicted, through defect of title in the bankrupt, might recover the price paid, from the Creditors who received it, they were required, by act of Sederunt of 31st March 1685, to convey their rights and diligences in his favour. Such conveyances, then, being solely corroborative of the purchaser's right, can never operate as a charge against the estate. They are more properly extinctions of debt, discharges or renunciations being never in practice employed for that end. Nor could these last be necessary with respect to debts which are really extinguished by payment itself. That payment has this effect is evident; for, otherwise, the heirs of the bankrupt proprietor might still be sued for them, which will not be maintained. Accordingly, no attempt like the present has ever before occurred.

Were those debts conceived to continue in existence, the consequence would be alarming. Suppose a bankrupt estate judicially purchased a century ago, the debts subsisting by virtue of conveyances to the purchaser, while no prescription could run against them in his own person, the present owner might, after exhausting the estate by granting heritable securities, employ the old unknown conveyances as a new fund of credit, by which he could, in an instant, cut off the whole claims of those real creditors. The operation now in question is evidently of a similar tendency. That the debts do not constitute a separate estate, but subsist merely in aid of the purchase, appears from this, that, if a purchaser at a judicial sale, after taking conveyances of the debts to himself, his heirs, and assignees, were to entail the estate, no separation of succession would result by the debts devolving to the heirs general, but both estate and debts would go to the heirs of provision.

Besides, Mr Scott is not even vested with the right to those debts, he having assigned that right to Mr Farquharson, in whose person it must continue, as long as any part of the Appine debts remain unextinguished.

Answered; No *ipso facto* extinction of debts, affecting an estate, is known in the law of Scotland. Until annulled by discharges and renunciations, therefore, they must subsist as a separate subject from the estate, though both should become the property of the same person. The estate and the debts, accordingly, may be separately disposed of, by transference *inter vivos*, or by succession, or may be differently affected by debts; *Whitekirk contra Ednam*, No 89. p. 2632.; 2d January 1705, *Hope contra Gordon*, No 12. p. 574.; 26th June 1745, *Creditors of Auchinbreck contra Campbell*, *voce* RIGHT IN SECURITY. In the case of entailed estates, this separation is often strongly

exemplified, the heritable debts devolving to one series of heirs, while the lands descend to another. Nor have the enactments, relative to judicial sales, made any alteration of this established rule of law.

The statute of 1695 is evidently framed for the benefit of the purchaser alone, and cannot be construed as if it had been intended for his prejudice, by limiting his rights at common law. It is only so far as it tends to his security, that, as soon as the heritable debts are paid by him, the estate is to become disburdened of them; not that they should be extinguished, with respect to his powers over them. If, indeed, they were thus to be totally extinguished, there would be an absurdity in the idea of conveyances in terms of the act of Sederunt; an act, by the way, which did not introduce those conveyances, they being coeval with the origin of judicial sales, but which had for its object the extent of the warrandice implied. And were there an *ipso jure* extinction of the debts by payment, the same consequence would attend the purchaser's succeeding as heir to any of the creditors; in which case, whether he would or not, he must have become *passive* liable for the whole debts of that predecessor, which is absurd. The keeping up of heritable debts affecting lands sold by judicial sale, is, in many instances, the established practice of the country; such as those of the estates of Covington, Kinross, Haddington, and of Dalmahoy. See also 19th January 1757, Earl of Buchan *contra* His. Father's Creditors, *voce* TAILZIE; 16th December 1725, Cockburn *contra* Creditors of Calderwood, *voce* SURROGATUM. If a purchaser choose to extinguish such debts, he must take the conveyances not *tanquam quilibet*, in the form of the present one, but *qua* purchaser, framed with peculiar clauses, calculated to evacuate them for ever. The idea of insecurity, from unknown or latent burdens affecting the lands, is not well founded. Every debt ranked upon a bankrupt estate is constituted either by infestment or by adjudication, and is entered on record; it is likewise particularly recited in the decret of ranking and sale. Of the existence, then, of such debt, information could not be wanting; after which, no person possessing common prudence would either purchase the estate, or lend money upon it, until he saw himself properly guarded against that obvious hazard.

With respect to the conveyance in favour of Mr Farquharson, it is no more than a burden or rider upon the radical right of Mr Scott, the exercise of which it cannot interrupt.

The Lord Ordinary took the cause to report on informations, when a small majority of the Court were of opinion, that Mr Scott's claim of preference was not well founded; but of that number, it is to be observed, some Judges seemed to be moved solely by the specialty relative to the conveyance to Mr Farquharson.

No 56.

The Court sustained the objections to the preference claimed by Mr Scott; and they adhered to this interlocutor, on advising a reclaiming petition and answers.

Reporter, *Lord Swinton.*

For Mr Scott, *Elphinston, Chs. Hay.*

Alt. Lord Advocats, Abercromby.

Clerk, *Menzies.*

S.

Fol. Dic. v. 4. p. 216. Fac. Col. No 34. p. 55.

* * * This case was appealed :

THE HOUSE OF LORDS, 7th April 1789, Ordered and Adjudged, That the appeal be dismissed, and the interlocutors complained of be affirmed.

S E C T. XIV.

Effect of a Process of Sale in dependence.

1778. *July 7.*

CREDITORS OF YORK-BUILDINGS COMPANY *against* FORDYCE.

No 57.

IN 1735, the Annuitants on the estates of the York-Buildings Company raised a process of ranking and sale of these estates. This action was depending in 1744, when the Duke of Norfolk and others, partners of the Company, applied by petition to the Court for a sequestration, setting forth, That the Company, as proprietors, were giving leases of their lands at an under rent. The Court remitted to an Ordinary to inquire into the facts; and, in the mean time, prohibited the Company to give any lease without the Court's authority. In the interval betwixt presenting the petition and this prohibition, the Company had prorogated a subsisting lease of Belhelvie, to David Fordyce, for 37 years after expiry of the current lease; and Fordyce and his assignees continued to possess on this lease from 1745 to 1776, when the greatest part of the annuities being expired, an act of Parliament was obtained by the postponed creditors for a total sale of the Company's estates. A sequestration ensued; and a factor being appointed, with powers to bring reductions of the leases, a process was brought for that purpose against the assignees of Fordyce. *Urged* for the pursuers, The Company had no power to grant the lease in question; they were insolvent; the annuitants drawing the rents; the lands adjudged; and a process of