

1788. July 9. MR WALTER SCOTT *against* The CREDITORS of HUGH SETON of TOUCH.

#### RANKING AND SALE.

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.

[*Fac. Coll. X. 55 ; Dict. 13,371.*]

MONBODDO. If the assignation had been to Mr Seton, there would have been an end to Mr Scott's claim. Here the debts are distinct, and not sunk *confusione*. The question is as to the effect of the assignation from Seton to Scott. Seton had liberty to assign them to any body: the creditors admit that Scott ranked *pari passu*, which is admitting that the assignation gave some right. I cannot stop there. I must give the assignation its full effect, just as if the original creditors were here claiming. The only question is as to the Act 1696: Mr Scott had come under the obligation, prior to the bankruptcy; this is the same thing as if he had actually paid.

ESKGROVE. The acts of Parliament which authorise judicial sales are most salutary, and give all possible security to purchasers, and those deriving right from them. Here the question is, Whether a mode can be found out for affecting the creditors of a bankrupt by keeping up debts in the person of purchasers, and by private deeds disappointing such creditors. When the purchaser pays the price, the land is disburdened. Here, without any possible discovery from the records, the debts are attempted to be kept up. So long as debts are not satisfied they must be preferable. Here debts were paid, and no manœuvre can recharge the estate. The act of Parliament has not left it in the power of the purchaser to keep up the debts. If he took an assignment to himself, it is admitted that they would be at an end *confusione*. The same is the case when assignment is made to a trustee. The Act of Parliament concerning the frauds of apparent heirs makes no difference between a man and his trustee: the doctrine of accession and confusion has no influence here. The question is, What Mr Seton could do in law? A purchaser, buying under the condition of the debts being extinguished, cannot keep the debts up. Mr Scott's earliest claims are ten years after the purchase. The debts were paid with Mr Seton's money, and so extinguished. Why is a purchaser entitled to have an assignation?—That the debts may avail the purchaser as collateral rights, and that he may have warrandice in case of eviction. Here the other creditors see a purchaser infest and no burden on record: shall an honest creditor, contracting on the faith of an absolute title, be disappointed? When one has land, the law presumes that every man contracts with him on the faith of that estate. If Mr Scot's right is any thing, it is an incumbrance preferable to heritable security: according to his argument it is a right anterior to such security. This claim is

a dangerous novelty, calculated to defeat the Act of Parliament and the security of creditors.

JUSTICE-CLERK. There are two questions here : 1st, Whether a proper subject in this case, on which a security could be constituted? 2dly, Supposing that, whether this constituted *habili modo. Confusio* was a mode of extinguishing obligations by the Roman law, and it operated *ipso jure* : no form of law was necessary to vest an *hereditas*. Confusion is known in the law of Scotland, but on different grounds. With us there is no *ipso jure* transmission of property ; there is always something necessary to be done. While a debt and an estate belong to the same person, there is no separation, but there may be separate interests : the person may keep the debt alive : a purchaser at a judicial sale, or on the debts. The debts may continue as a fund of credit. The law takes care of the creditors of the bankrupt. No man would lend money to the purchaser on the faith of the estate purchased unless he saw discharges of the debts due by the bankrupt, the former proprietor. The trustee will have retention for money lent, or for cautionary obligations, not only against the purchaser, but against those deriving right from him. No creditor can plead *bona fides* in lending money before he knew that the debts of the bankrupt were paid. Any declaration whatever from Mr Seton would have qualified the trust.

HENDERLAND. The charter to Mr Seton does not affect the debts ranked on the bankrupt estate. My difficulty is here : the debts are conveyed to Mr Farquharson. When they are paid, to relieve them, how can they still subsist ?

PRESIDENT. This is a new case ; and we need not wonder at a difference of opinion. I differ altogether from Lord Justice-Clerk. Mr Seton purchased Appin ; Mr Farquharson was cautioner to pay to the creditors as they should be ranked. Mr Seton paid many of the debts, and took assignations to secure against eviction ; for an estate sold judicially may be evicted for want of right in the bankrupt. Fourteen years after the purchase, the heir of Mr Farquharson, the cautioner, desires a conveyance to be made to him, that it might be produced in order to show that the debts were extinguished. Mr Seaton granted an obligation, narrating the fact, and conveying to Mr Farquharson for the declared purpose of showing that the debts were paid. Four years after, Mr Seaton makes a declaration, reserving the right of Mr Farquharson. If Mr Farquharson had followed the intendment of the deed 1780, and desired an act of the Court for delivering up the bond, and if the bond had been delivered, the consequence would have been, that Mr Seton would have held the estate upon proper evidence of the debts having been paid after a judicial sale. Mr Seton gets an assignment, not to set up a title against the estate, but to save from eviction.

DREGHORN. At this moment the debts are not in the person of Mr Scott, but of Mr Farquharson. The obligation is to reconvey to Mr Seton. Here is a *medium impedimentum* by the bankruptcy of Mr Seton.

JUSTICE-CLERK. The creditors ranked on Appin may plead in Mr Farquharson's right, but that is *jus tertii* to the creditors of Mr Seton.

SWINTON. General confusion is out of the question ; for here there is no collision of rights. The Act 1695 does not apply. Nothing in the act prevents the purchaser from taking the right to a trustee. Are the debts to be held extinguished in favour of Mr Farquharson ? Mr Farquharson may be secured by

Mr Scott's discharge, and the creditors of Mr Seton have no farther interest in the question.

On the 8th July 1788, "The Lords sustained the objection to Mr Scott's claim."

*Act.* A. Elphinstone, &c. *Alt.* A. Abercrombie.

*Reporter,* Swinton.

*Diss.* Justice-Clerk, Monboddo, Ankerville, Swinton.

1788. *November 27.* SWINTON. Mr Scott mistook in saying that it was common to take discharges, and to put them on record. The Lord Advocate has well answered a bad argument, and indeed all arguments which are not good. But he has not gone to the true question, whether Mr Scott, by his conduct, necessarily opened a door to fraud. [This is too great a limitation; *probably* might have been a fitter word and less personal.] The text is the act of sederunt 1685, and the Act of Parliament 1695. When the regulations therein contained are complied with, there is a consolidation. The creditors did not dispense to the purchaser, but to Mr Scott. No absolute warrandice was given but only warrandice from fact and deed. The purchaser did not pay the price; the security was not given up and cancelled. The creditors must not found their argument on part of the progress. They ought to have called for the decret of ranking and the conveyances, and then they would not have lent their money and lost it. If Mr Scott's right is not good, neither is Mr Farquharson's.

DREGHORN. The creditors of Seton have a hold of the estate by legal diligence. Mr Scott claims in competition with them. The creditors say, where is your interest? Mr Scott is not *in titulo* to the debts; he has no conveyance from Mr Farquharson: were Mr Scott to receive payment, the claim would be against Mr Farquharson. He is bound along with Mr Seton; he pays the debts, and Mr Scott becomes bound to relieve him and Mr Seton: it is not *jus tertii* to the creditors to object. It is never *jus tertii* for one man to say to another, You have no right. Mr Farquharson can never be bound to give up his right until the estate be disburdened.

ROCKVILLE. There is nothing in law which prevents any purchaser from keeping up a debt after a judicial sale. A man in trade may purchase an estate, and what hinders him from assigning the bonds, which were good against the seller, instead of being at the expense of granting heritable bonds in his own name? Mr Scott has the benefit of retention while he lends his money to Mr Seton. [His Lordship did not see the danger resulting to men who trusted to Mr Seton from appearances, and, while trusting him, had no suspicion of a sweeping creditor behind the curtain.]

MONBODDO. Mr Scott is a lawful creditor of Mr Seton: the Acts 1621 and 1696 are out of the question. There is much in the papers not to the purpose. The doctrine of confusion confounds this cause. Mr Farquharson and Seton are precisely in the same situation; and Mr Farquharson's security will be greater if Mr Seton prevail. The question is, whether, by the conveyance of the debts to Mr Scott or Mr Seton, they were extinguished? In a private sale I may acquire heritable debts, and give security on them. Is there any difference as to a judicial sale? And will a judicial sale extinguish the debts? The

words of the Act 1695 do, at first sight, imply an exoneration of the estate : "The estate shall be disburdened." But that is in favour of the purchaser. To say that the debts are extinguished would be to make the act contradict itself ; for the act says that the purchaser may possess on the debts. How can that be, supposing them extinguished ? Every creditor of a purchaser who lends his money, is bound to inquire whether the debts on the estate purchased have been discharged ?

ESK GROVE. I am for the interlocutor already pronounced. *First*, on the nature of judicial sales ; formerly creditors could not directly force a sale. The Act 1681 allowed a sale by commissioners, with or without the consent of the common debtor. The act declared that the purpose of the law was to extinguish the debts. The creditors said that they were not bound to give absolute warrandice, but only from fact and deed. The act of sederunt 1685 was calculated for the purpose of explaining the statute 1681. The Act 1695 followed : the purchaser was allowed to consign the price ; because, until the price was paid, he could not get a charter. The following words of the act positively declare that the incumbrances should be extinguished, with the single exception in favour of the purchaser ; that is, in security of the purchase against claims on the estate, and none else. I can make no distinction between creditors who have or have not got heritable security. Personal creditors are understood to have contracted on the faith of the records. Suppose they had inquired at Mr Scott whether the debts were paid ? He must have answered in the affirmative. A discharge with warrandice from fact and deed is still a discharge, and the purchaser may dispense with farther warrandice. I hold it impossible for a purchaser to keep up debts for any other end than that of securing his purchase. *Secondly*, by the common law of Scotland, securities may be extinguished in various ways. In personal rights, and in rights under reversion, a right is extinguished by proof of payment. The creditors received payment of their debts when they assigned them to Mr Scott, the trustee : this was the same thing as if the debts had been assigned to Mr Seton, the *truster*. This debt was extinguished two ways : *1st*, As the debt of Stewart of Appin ; *2dly*, As Mr Seton was himself debtor by the purchase ; *Thirdly*, As to the facts in the conduct of Mr Seton and Mr Scott, I am also of Lord Dreghorn's opinion as to Mr Farquharson ; but I do not think it necessary to enter on that subject.

GARDENSTON. If every thing had been done which the statute required, I should have been clear that the estate was disburdened. But there was no declarator, on the part of the purchaser, that the debts were extinguished ; neither was there a decret of exoneration.

JUSTICE-CLERK. 1. The doctrine of confusion has nothing to do with this case. By the civil law *confusio* operated : it is not so by the law of Scotland ; for it is in the power of the purchaser either to keep up or extinguish a debt. If *confusio* were to operate *ipso jure*, then the former debt would be extinguished ; for that is a payment, and so the purchaser would represent the creditor. 2. The second thing to be considered is, What was the proper object of the bankrupt laws, and what alteration they made in the common law ? Their object was to give a good right to a purchaser, and to secure the price of the purchase to creditors. No third party has any interest. The heirs of Appin had no right to insist that the debts should be discharged to the extent of the dividend al-

lotted to the creditors of Appin. I deny that the law meant that the debts should not be kept up. If I purchase an estate, I may take conveyances to debts heritably secured, and do with them what I please. In order to disencumber an estate it is necessary that the debts should be paid and discharged. A discharge on record is not required; though, when any suspicion of unfair dealing is apprehended, such a discharge would be proper. Purchasers may keep debts as a separate estate. Much is said about the security of the records; but no man can contract safely if he looks no farther than the records: he must first of all see the right of the borrower, and then he must go to the records to see whether there are any incumbrances. To be safe, he must see the debts discharged. I think further, that Mr Scott has retention to plead: a trustee originally has a right of retention when he becomes a debtor. Mr Scott had no hand in transacting the heritable bond to the Drummonds; and he cautioned Mr Seton against the granting of it. [This seems a part of Mr Scott's conduct not to be justified but by his extraordinary friendship to Mr Seton, and by his confidence, if not in Mr Seton's credit, in his own security.] I think that there is nothing in the plea as to the right of Mr Farquharson.

PRESIDENT. My general plan is to consider the state of the competing parties. Mr Farquharson, as cautioner in the purchase, might have insisted to have had the vouchers of payment produced, and no objection lay to this: so Mr Seton and Mr Scott granted an obligation to Mr Farquharson, (printed at the end of the answers.) Had that bond been delivered up there would have been no controversy. Mr Scott cannot plead that that was not done; for he ought, as a man of business, to have carried that plan into execution. Mr Scott has no right, either feudal or personal, in the estate of Appin. All those rights are vested in Mr Farquharson to the end and purpose that the debts might be paid and the bond given up. The obligation to reconvey to Mr Seton was, that his sale might be made good against any defect in the bankrupt's right as a collateral title. If the words of the Act 1695 could have authorised a discharge or consignment, *multo magis* in this case. There is no decision, in the course of near a century, which authorises a man to keep up debts so as to make them compete with his creditors.

On the 27th November 1788, "The Lords sustained the objections to Mr Scott's preference;" adhering to their interlocutor of July 1788.

For Mr Scott,—Charles Hay, &c. *Alt.* Hly Campbell, &c.

*Reporter*, Swinton.

*Diss.* Rockville, Swinton, Ankerville, Justice-Clerk, Monboddo, Gardenston.

*Absent.* Elliock, Henderland. [Determined by President's vote.]

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