

No. 1. burden on the lands for many years, during all which time the purchaser must be disabled from either selling, impignoring them, or giving security upon them, however much his affairs may require it. That these hardships were particularly applicable to the present case, where the purchaser's own funds were not sufficient for paying the whole price; and it is out of his power to raise any money by heritable security upon the lands themselves for that purpose. If, therefore, the creditors were allowed to obtain acts and warrants for their payment, his interest would be very much injured.

It was answered by the creditor, that a scheme of division was not necessary to secure the purchaser's right. For an act and warrant from the Court for the payment of any creditor was just as good and sufficient an exoneration to the purchaser *pro tanto* of the sum paid, as the most formal scheme and decret of division possibly could be. Neither could his interest be thereby affected. For if he had occasion to borrow money, an assignment of the debt, paid upon the warrant of the Court, would afford better security for a loan than an infeftment upon the lands.

The Court, considering that by the late act of parliament 1695, C. 6. a purchaser may be exonerated, and may receive up his bond of caution, upon consignation of the price; in respect the purchaser had not offered to consign the price in terms of that act of parliament, refused the petition, and authorized the warrant granted by the Lord Ordinary.

Lord Ordinary, *Hailes.*

Actor, *Wight.*

Alt. *D. Armstrong.*

*D. C.*

1777. June 27.

WILLIAM CHARLES CRAIGIE, and JOHN WALKER, *against* WILLIAM DOUGLAS.

No. 2.  
Extent and effect of the common debtor's interest in the reversion.

THE family of Douglas of Dornock having been for a long time involved in debt to a large amount, the estate came to be sequestrated in 1756, and a process of ranking and sale was brought in 1758. The ranking being concluded, interests were produced and sustained to such an amount, besides a large sum of unranked debts, that they were thought far to exceed the value of the estate, the proven value being only £14000 Sterling, while the ranked debts alone amounted to £26000.

In this situation of affairs, the estate being considered as totally bankrupt, no reversion was expected. Mr. William Alexander, merchant in Edinburgh, however, coming to hear of the desperate situation of Dornock's affairs, and it being observed to him that if Dornock had the command of money, something might be done with his creditors for him, a private agreement was accordingly

(6th July 1768), entered into betwixt Mr. Alexander and Dornock, by which Mr. Alexander agreed to relieve Dornock of the whole banked debts contained in the decree of banking, and also of the unranked debts, to the amount of £4000 Sterling. In case the total amount of these debts, and necessary burdens and expenses, should fall short of £23000 Sterling, Mr. Alexander became bound to pay Dornock the difference. He also became bound to pay Dornock an annuity of £100 Sterling. If the total amount of the debts exceeded £24000 Sterling, then the whole bygone rents in the hands of the factor and tenants were to belong to Mr. Alexander, he at the same time paying the balance to Dornock which would remain after his own indemnification; the annuity to be paid to Mr. Douglas being at the same time to suffer a diminution according to a certain rate.

Mr. Alexander, thus having acquired the reversion, when the judicial roup of the estate came on, thought himself safe to offer any sum for the different lots. He accordingly purchased the whole lots except one, for which a very high price was offered. And the total amount of the price yielded at the sale was £38151 Sterling.

This circumstance of the estate having yielded so high a price was taken hold of by William Douglas, Dornock's son, who thereupon brought an action concluding that he is heir of tailzie in the lands of Bodesbeck, part of the estate, and as heir of provision in the whole other lands by the marriage contract, was entitled to have the minute of sale annulled, and to be declared to have right to the reversion of the price.

After several steps of procedure in this process, it ended in a decree arbitral, pronounced by Messrs. Lockhart and M<sup>r</sup>. Queen, advocates; by which they found, that William Douglas the son was entitled to the reversion of the estate of Dornock, at the prices in the judicial sale, under certain burdens and restrictions.

In consequence of this, Mr. Craigie, as assignee of sundry creditors of old Dornock, whose debts were contracted some before and some after the date of the minute of sale, but all prior to the decree arbitral, and likewise as factor upon the sequestrated personal effects of Dornock, executed a summons against him for having these debts properly ascertained, and upon the dependence used arrestments in the hands of Mr. Alexander, who thereupon brought a multipointing, which, together with some claims made by Alexander himself, were remitted to the Lord Kennet Ordinary. His Lordship, (13th November 1766), pronounced the following interlocutor: " Finds, that by the minute of sale betwixt the said Archibald Douglas and William Alexander, Archibald Douglas was denuded of any right to the reversion of the price of the estate of Dornock, other than what was stipulated by the said minute of sale to be paid to him or his creditors, and by the decree of sale he was denuded of the estate itself, and therefore finds, that the creditors who contracted with him posterior to Whitsunday 1768, are not entitled to draw any part of the

No. 2. “ reversion of the price, unless in so far as the said Archibald Douglas has  
 “ right thereto by the said minute of sale, or by the decree-arbitral in the sub-  
 “ mission ; and before further answer allows the respondents to prove *habili*  
 “ *modo* what of the debts they found on were contracted before that period ;”  
 and to this interlocutor, his Lordship adhered, upon advising a representation  
 with answers. The cause, upon this, was brought before the whole Lords.

Pleaded for Mr. Craigie : The minute of sale was a personal latent deed,  
 uncompleted and not carried into execution till after the debts in question  
 were contracted : Now the foundation of the whole argument on the part of Mr.  
 Douglas younger, is, that all right to the reversion having been made over by  
 Dornock elder to Mr. Alexander, he could not thereafter contract debt or  
 do any act or deed, to enable any person to claim upon his estate in preference  
 to Mr. Alexander, and that now by the decree-arbitral, Mr. Douglas young-  
 er has come exactly into the place of Mr. Alexander, and is entitled to carry  
 off the reversion without being liable in any debts not authorised by the  
 minute of sale. But whatever operation this argument may have among the  
 parties themselves, it ought not to militate against creditors ; for as old Mr.  
 Douglas stood in the full possession of the fee of the estate, apparently under  
 no limitations, and certainly under none which could affect creditors, these  
 debts must be paid out of the reversion remaining after payment to the pre-  
 ferable creditors, and neither Dornock elder nor younger can by means of any  
 compromise, submission, or transaction among themselves, be allowed to  
 pocket this reversion, to the exclusion of fair and onerous creditors. Dornock  
 younger, whatever claims he might have against his father, under a latent tailzie  
 or postnuptial contract of marriage, could not pretend to compete with his  
 onerous creditors, while he stood in the fee of the estate, neither could any  
 private transaction with Mr. Alexander, during the dependence of the sale, and  
 after the estate had been sequestrated, hurt them in the smallest degree. In-  
 deed, after the sale of the estate, third parties were *in bona fide* to deal with old  
 Mr. Douglas upon the supposition, that he had full right to the reversion which  
 had come in place of the estate itself, and that he was precisely in the same  
 circumstances, as if a part of the estate to that amount had been left unsold.  
 The reversion remained an heritable subject, in the hands of the purchasers,  
 till they should be exonerated, and had Dornock in the mean time died, it would  
 have gone to his heirs and not to his executors. It was a *surrogatum* in place of  
 the estate, and the titles of the estate on record were the only rule by which it  
 could be discovered to whom this reversion belonged, or what claims lay  
 against it. These titles shewed it to be the unlimited property of Dornock  
 elder, and third parties consequently were entitled to contract with him upon  
 the faith of this unlimited property.

William Douglas the son could neither *præceptione hæreditatis*, by succession,  
 by agreement, or by decree-arbitral, become possessed of the reversion of the

family estate, without being subject to the debts of his father, then existing. The reversion could not be transferred *brevi manu* from the father to the son, during the father's life, unless by some voluntary transaction which could not affect the father's prior creditors. The son was a creditor by the latent tailzie and contract of marriage only to the effect of setting aside gratuitous deeds, and obliging to purge incumbrances. As to the lands of Bodesbeck, the son may indeed have been entitled to procure a declarator of irritancy against his father; but till some step of this kind was taken, creditors and purchasers were safe to contract with him. With regard to the debts claimed by Mr. Alexander, it is contended, that he was *in mala fide* to make advances to him. But as Mr. Alexander was bound, by the private agreement, to pay Dornock's unranked debts to a certain amount, and as Dornock was distressed for these debts and for his daily subsistence, such advances were absolutely necessary. The reversion also did then certainly belong to Dornock elder, or to Alexander; and Dornock younger cannot be allowed to run away with it from both without making it liable for the advances made out of it. It is besides only to a very small part of the sum, for which Mr. Craigie craves to be ranked, that the objection of the debts being in the person of Mr. Alexander can possibly apply.

Pleaded for Mr. Douglas: Dornock elder having sold all the interest which he had in his estate to Mr. Alexander, no contractions of his could after this period affect the estate, nor could any act or deed of his enable any person to claim on that estate, in preference to Mr. Alexander, who, if nothing more had happened, would, in terms of the minute of sale, have come in place of Dornock, whose after creditors had no fund to affect but Dornock's annuity, or the sums he might become entitled to draw by virtue of the minute of sale. The right which had been vested in Mr. Alexander, was by the decree-arbital vested in the respondent, Mr. Douglas younger, who comes by it precisely in Mr. Alexander's place, in the same manner as if he had purchased the estate from his father himself.

As to the objection that the contract with Mr. Alexander was a personal latent deed, uncompleted and not carried into execution till after the debts in question were contracted,—this is of no importance to the cause. Dornock's obligation by that minute was as valid and effectual in law, as any other he could enter into. The debts he contracted were mere personal obligations upon him, and equally latent with the minute of sale. There is therefore no priority of right, which the holders of such obligations have to the holder of the minute of sale. The contrary is the case; for by the minute of sale a direct interest is given to the reversion itself, in consequence of a contract and onerous prestations, while the debts contracted posterior to it give nothing but a personal obligation, not affecting the estate in any shape whatever.

There is a great difference between the creditors before the date of the minute of sale, and those who became creditors to Dornock afterward. The

No. 2. former were in the view of the parties contractors at making the bargain. The latter took the chance of Dornock's personal security, subject to the risk of all his debts and deeds prior to their contraction.

Supposing the personal creditors posterior to the minute of sale, had attempted an adjudication of the reversion of the estate, would not an adjudication in implement by Mr. Alexander of a specific obligation, have prevailed over an adjudication in security of a general personal debt?

Were the doctrine pleaded by the pursuers just, there would be no necessity for adjudications, inhibitions, or other diligence to affect real estates; for as long as a man owed a personal debt in the world, he could not sell or dispose of his estate for the most onerous cause. Nay, though he had even actually sold his estate and received payment of the price, yet, as long as the purchaser had not completed his titles, and put his infestment upon record, every debt contracted in the meantime by the seller, must by this reasoning prove effectual against the purchaser.

It is a fallacy to say that the decree-arbitral transferred Dornock's right to Mr. Douglas younger; for Dornock had previously alienated his right to Mr. Alexander, and it was this later right *tantum et tale* as it stood in Mr. Alexander, which was transferred by the decree-arbitral.

The advances claimed by Mr. Alexander were, it was said, such as entitled them to no favour, being too liberally made and spent by Dornock in every species of extravagance.

The Court, (28th February 1777,) pronounced the following interlocutor: "Find that the onerous creditors of Archibald Douglas the father, in debts contracted prior to the date of the decree-arbitral within mentioned, are entitled to draw their payment out of the reversion of the price of Dornock, which still remained in his person until the said decree-arbitral was pronounced; and remit to the Lord Kennet Ordinary to proceed accordingly, and specially to hear parties on the nature of said debts, and all relevant objections thereto, and to proceed in the cause, and do as he shall see just."

And to this interlocutor the Court, (27th June 1777), adhered, upon advising a reclaiming petition and answers.

Lord Ordinary, *Kennet.*

Act. *Ilay Campbell.*

Alt. *Crosbie.*

J. W.