

Lords of Session, his title to the lands in Cairnbuilg by him purchased, and the value thereof; and in case the Lords of Session shall approve of his title thereto, or to any part thereof, the appellant shall convey the same or such part thereof, according to the intention of the said bond of the late Lord Saltoun: And so much as the Lords of Session shall find the lands so by the appellant conveyed to be really worth, not exceeding the price paid by the appellant for the same, they shall cause to be paid back to the said appellant out of the said 4000l. so soon as such value is ascertained and conveyance made: and those lands so conveyed shall be esteemed part of the purchase directed to be made with the said 4000l., as aforesaid: And it is further ordered, that the appellant and the respondent William Fraser, may each of them have liberty to propose to the Lords of Session, from time to time, securities or purchases for the said money.

For Appellants, *Rob. Raymond. Sam. Mead. Dun. Forbes.*
 For Respondents, *Rob. Dundas. Tho. Lutwyche. Tho. Kennedy.*

Thomas Fairholm of Piltoun, - - - *Appellant;* Case 69.
 Sir William Cockburn, and Sir George
 Hamilton, Baronet, - - - *Respondents.*

21st May 1720.

Mutual Contract — Personal and real.—A creditor by adjudication, with an unexpired legal and without infestment, enters into an agreement with two other creditors, by which he consents that they shall be paid before him; in a competition between a singular successor of the adjudger with notice, and the representatives of those two creditors, it is found that the preference in the contract was perpetual, and that as it concerned a personal subject on which no infestment had followed, it was effectual against the singular successors of the contractors.

Fraud.—A creditor pursuing a judicial sale, enters into a contract before the sale to sell to a third party at a certain sum; he afterwards, at the sale, purchases for a smaller sum, but is obliged to account for the larger sum, which had been paid to him on terms of the prior contract.

Bona fides.—A purchaser at a judicial sale having paid a debt *bona fide* to creditors ranked before him; in accounting to creditors who were prior to both, has allowance of such *bona fide* payment; but action of repetition is reserved to the prior creditors.

Costs.—6*l.* costs given against the appellant.

IN 1682, James Riddell was possessed of the estate of Kinglass; but was indebted to several persons in various sums of money. To Sir James Cockburn, and Sir Robert Mill, under whom the respondents claim, he owed a debt of 8443*l.* Scots; and Sir James and Sir Robert had used inhibition against their debtor, and he having forfeited his single and life-rent escheat to the Crown, the same was granted to them. To Walter Riddell, his brother, he owed another debt of 42,624 merks Scots, for which Walter Riddell had obtained a decree of adjudication in 1681; no infestment had been obtained by Walter Riddell.

The creditors afterwards came to an agreement among themselves and with their common debtors, and one Dr. Livingston agreed to become tenant of the premises at a certain rent, and purchaser upon certain conditions if upon trial he was pleased with the bargain during the currency of the tack. Of same date two deeds were executed; the one a tack, whereby the debtor, James Riddell, with consent of his creditors, let to the said Dr. Livingston the estate of Kinglafs for the term of seven years, at the rent of 2760 merks Scots yearly, payable to the creditors; of which rent Sir James Cockburn and Sir Robert Mill were annually to receive a greater portion than answered to the interest of their money: the other a contract, whereby James Riddell and his creditors are obliged to convey the estate to Dr. Livingston for the price of 46,000 merks Scots, if he at any time during the currency of the tack intimated his willingness to purchase: by this contract it was agreed, "upon the whole matter, and as to
 " the persons to whom the said price shall be paid, in case of in-
 " timation as said is; and that the said bargain be consummated
 " in manner aforesaid," that Sir James Cockburn and Sir Robert Mill should be paid the whole sums due to them, in the first place; it was further agreed, that in case Dr. Livingston should not hold the bargain, but that the same, after the expiration of the said lease, should be given to another, or that the said James Riddell could have a purchaser for certain lands and interests that he possessed in Leith, the said Sir James and Sir Robert were still to be paid what was due to them, out of either of the interests that should be first disposed of; and it was also further agreed, that Sir James Cockburn and Sir Robert Mill should adjudge the estate for their debts, and the said Walter Riddell agreed never to object to them, that the said adjudication was not within year and day of his own, but allowed them to have their payment of their just debts, as then stated and agreed to, and preserve therein the way and manner above prescribed. On the other hand, Sir James and Sir Robert agreed that their diligence should not militate against the said Walter, or his right, so as to debar him, but that both parties should take their satisfaction in the way and manner, and according to the division specified in the said lease and contract; and all the creditors were mutually bound to communicate and make forthcoming their debts and titles to each other, for the ends of this contract, and to defend against all others.

Dr. Livingston was, in virtue of the lease, put in possession of the estate; but he dying soon after, the intended bargain for the sale of the lands took no effect: however the doctor whilst he lived, and his executors during the remaining term of his lease, possessed the lands and paid the rents to the creditors. The intended sale of the lands being thus disappointed, Sir James Cockburn and Sir Robert Miln did not take adjudications on their debts.

Walter Riddell conveyed his adjudication to his four daughters, and he, or they, entered to possession of the premises. In May 1690, these daughters conveyed the adjudication and all their
 right

right to the premises to William Kintore; and in the conveyance to him they mentioned the said agreement among the creditors of James Riddell, which in the clause of warrandice is thus excepted: "Excepting always forth and from this present warrandice the contract above mentioned, and all clauses therein contained, whereby the said Walter Riddell stands any manner of way obliged, with this express proviso and condition, that this exception shall import no homologation by Mr. Kintore of the said contract, we, our heirs and successors, being always free as to any warrandice or performance of the same, and whereof the said Mr. William Kintore by acceptation hereof is to free and relieve us; and with the obligation of which relief this present right is hereby declared to be expressly affected."

In May 1700, Kintore conveyed his right to the premises, also with notice of the said contract, to George Clark, one of the bailies of Edinburgh; and Clark granted a back bond, that the conveyance to him was redeemable upon payment of 2666*l.* 13*s.* 4*d.* This bond Kintore conveyed to Dr. Scott, Dean of Hamilton.

In 1702 Dr. Scott, intending to redeem that right which was in the person of Clark, paid him up 1000*l.* sterling, and made an agreement that Clark should retain the right, as a security for the remainder of the sum, being 1666*l.* 13*s.* 4*d.*: and accordingly George Clark reconveyed to Dr. Scott the rights to the adjudication and lands of Kinglass, reserving to himself these rights as a security for the sum still remaining due to him.

In 1705, Thomas Fairholm, the appellant, being creditor to George Clark, obtained from him for security and satisfaction of his debt a disposition of that reserved interest which George Clark had in the adjudication which affected the lands of Kinglass; and upon this disposition was infest. The appellant, who thus had acquired right to the adjudication affecting the estate of Kinglass to the extent of 1666*l.* 13*s.* 4*d.*, was opposed in his possession by the creditors of Dr. Scott, who had become bankrupt, and he brought an action of ranking and sale against them before the Court of Session. In the ranking he was preferred by the Court to these creditors of Dr. Scott, who were the only parties, in a sum exceeding the value of the estate. After the usual steps of proceeding, the estate was brought to a judicial sale, and purchased by the appellant at a price of 1092*l.* 5*s.* 11*d.* sterling, being 18 years' purchase of a rental which had been previously proved.

Soon afterwards the appellant was sued by the executors of Sir Samuel McClellan, who had received from the said George Clark some right to the premises prior and preferable to that from Clark to the appellant; and, after some litigation, the Court ordained the appellant to pay to these executors a sum of 10,000*l.* Scots, which he paid accordingly.

Prior to the judicial sale of the premises, the appellant entered into an agreement with an agent of the Dukes of Hamilton, that he should purchase the said lands at such sale, and afterwards convey

convey the same to the duchefs for 44,000 merks Scots (2555*l.* 11*s.* 1*d.* sterling); and accordingly, a few months after the sale, the duchefs paid him this sum as the price thereof.

In 1719, the respondents, who had obtained rights to the debts, which stood in the persons of Sir James Cockburn and Sir Robert Mill, brought their action against the appellant before the Court of Session for payment to them of the said sum of 8443*l.* Scots, with interest from 1682, upon this ground, that by the contract before mentioned between James Riddell and his creditors on the one part, and Dr. Livingston on the other, it was agreed that the debts due to Sir James Cockburn and Sir Robert Mill should be paid out of the price of the lands preferably to the debt due to Walter Riddell; and these lands having now been sold, and the price having been recovered by the appellant in virtue of Walter Riddell's adjudication, he ought to make that sum forthcoming to the respondents; and they stated that the appellant had had sufficient notice of the said contract, not only by the recital of it in the several intermediate conveyances to him, but the same had been recorded in 1703. The appellant made defences, and the Court, after report of the Lord Ordinary, on the 6th of June 1719, "Found that the preference in the contract libelled on and
" produced is perpetual, and that the said contract being con-
" cerning a personal subject, whereon no infestment followed,
" that it is effectual against the singular successors of the con-
" tractors; but remitted to the Lord Ordinary to hear parties
" how far the appellant is personally liable." And to this interlocutor the Court adhered on the 26th of the said month of June.

Parties having accordingly gone before the Lord Ordinary, and the debate being reported by his lordship, the Court, on the 11th of November 1719, "Found the price of the lands of Kinglafs
" liable to the respondents for payment of the sums for which
" they stand preferred by the contract libelled on, and found the
" appellant personally liable in as far as he had intromitted there-
" with."

The appellant then insisted, that he ought to have a deduction of the sums he had paid to Sir Samuel M'Clellan's children, who were creditors of Mr. Clark, to whom he was accountable; and the Court, on the 29th of December 1719, "Found that the
" payment to Sir Samuel M'Clellan's children by the appel-
" lant was made *bona fide*, and that he must have deduction of
" the said payment out of the price of the lands of Kinglafs, re-
" serving action to the respondents against the children of the
" said Sir Samuel M'Clellan for the sums received by them as
" accords."

The respondents afterwards petitioned the Court that he might be accountable for the price which he had received from the duchefs of Hamilton for the said lands, in terms of the agreement with her Grace, made previous to the sale. This being referred to the Lord Ordinary, and afterwards reported to the Court, their lordships, on the 22d of January 1719-20, "Found that the
" appellant

“ appellant having made a previous agreement with the Duchefs
 “ of Hamilton to fell her the lands of Kinglafs for 44,000 merks,
 “ and having received the faid fum from the duchefs, he is liable
 “ for the respondent’s debts, as if the lands had been fold at
 “ that fum.”

The appeal was brought from “ feveral interlocutory fentences
 “ or decrees of the Lords of Seffion in Scotland of the 6th of
 “ June, and the 11th of November 1719, and 22d of January
 “ 1719-20.”

Entered,
 27 Feb.
 1719-20.

Heads of the Appellant’s Argument.

The contract yielding a preference of the debts due to Sir James Cockburn and Sir Robert Mill was not absolute and perpetual, but conditional only, and to take place if the fale of the estate to Dr. Livingfton then projected, fhould take effect; or if the bargain which by the fettlement was intended for Dr. Livingfton, fhould be given to any other perfon.

But fupposing this had been otherwise, yet it could only have been effectual againft, or obligatory upon Walter Riddell, the party contracting, and his heirs, but not againft a third party purchafing for a valuable confideration. Walter Riddell’s adjudication was the paramount title to the estate; and adjudications, when they become irredeemable by the expiration of the legal, and are completed heritable rights by infeftment (a), cannot by the law of Scotland be fubject to the effect of contracts, or other perfonal deeds of the ancient proprietors of fuch adjudications in prejudice of a purchafers bona fide for a valuable confideration.

Supposing ftill further, that the contract or perfonal deed of Walter Riddell could affect that adjudication whereof he once ftood poffeffed, in prejudice of a purchafers for a valuable confideration, yet the appellant was not properly fuch a purchafers: he was only in right of the affignment from George Clarke, a creditor to Dr. Scott, in whose perfon the right to Walter Riddell’s adjudication ftood. However the respondents might have been found preferable to Dr. Scott, had they appeared and claimed that preference when the estate was brought to a judicial fale; yet they having neglected to claim in that manner, and the appellant, having by the proper courfe of law, as creditor, recovered payment from Dr. Scott of what was due to him out of the price of the lands, cannot be compelled to enter into an account with the respondents on this fingle pretence, that the right, which they omitted to claim, was preferable to that of Dr. Scott his debtor; and therefore he could not be perfonally liable to them for the fum fued for.

The highest price offered by the appellant at the judicial fale, for which the lands were by fentence of the Court adjudged to have been lawfully purchafed, is that alone which he can be compelled to account for; and he purchafed the estate at the fale,

(a) It appears that this adjudication had not been followed by infeftment.

not as a creditor, but *tanquam quilibet* : and as he must have stood the loss if the lands had fallen in value below the price at which he purchased them at the judicial sale, he must be entitled to the profit of any more advantageous sale, which he may have made. Nor does it alter the case, that he agreed with the Duchefs of Hamilton, previous to the sale, to convey the lands to her at a certain price, if he should be declared purchaser; because that bargain hindered nobody at the public roup from bidding higher : and it was in view of that advantageous bargain with the duchefs that the appellant bid so high as he did, whereby the creditors were in so far benefited. And the appellant is so far from having any advantage, that considering the debt due to him, which is sunk, he still has a very hard bargain.

Heads of the Respondents' Argument.

Since the two creditors under whom the respondents claim, at the time of executing the contract, had not only an exclusive right to all the debtor's personal estate, and the rents and profits of his real estate during his life; but could likewise have cut off several of the debts claimed by the other creditors it could never be imagined they would have quitted all these privileges upon the view of a preference only for a limited time. That intention is supported by the words of the contract, whereby it is agreed, that in case the then intended purchaser should not hold the bargain, but that the same should be given to another (that is, sold to another) still the same preference was to subsist, and the persons under whom the respondents claim were to be paid their debts; and Walter Riddell, under whom the appellant claims, agreed never to make use of his adjudication as a ground of preference, but that both parties should take their satisfaction in the way and manner, and according to the division specified in the said contract.

An adjudication till the legal is expired, and till clothed with investment (as in the present case it was not) is but a personal right, and may be limited, restricted, or conveyed by any personal deed: besides, the appellant cannot claim the benefit of a purchaser without notice, since this contract is taken notice of in all the intermediate conveyances of this adjudication, and it is always conveyed subject to the conditions in that contract.

The appellant contended, that even Walter Riddell the adjudger would not have been personally liable for these debts, and much less ought he who received this adjudication in payment of a sum of money due to him: but though it be true, that the adjudger himself, and those claiming under him, are not by the contract personally liable; yet the estate being liable, if the adjudger had sold the estate and received the money, he must have been personally liable. And since the adjudication is conveyed to the appellant subject to that contract, and that by virtue thereof he has received the price, he ought to make satisfaction to the respondents, the creditors.

The judicial sale was merely imaginary, for the appellant was both pursuer and defender in the action for carrying it on. Dr. Scott, the person against whom that sale was carried on, had no manner of interest in the estate. The appellant, knowing that he was accountable to the respondents, and finding that the Duchess of Hamilton intended to be a purchaser, to prevent that, made a previous agreement with her grace, whereby he bound himself to dispose the lands to her for 44,000 merks Scots, as the price, and to become purchaser at the sale for her behoof. Though he purchased for a smaller sum, yet that must not be reputed the price, since it is plain the sale was carried on with a fraudulent design, as appears from all the steps of it before taken notice of; and no Court will encourage a trustee (for such was the appellant's case) under any colour to put so great a sum in his own pocket, in defraud of creditors he knew he was accountable to: and the Court, in the action at the instance of Sir Samuel M'Clellan's children, decreed the appellant to be accountable for that price.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutory sentences or decrees therein complained of be affirmed: and it is further ordered, that the appellant do pay or cause to be paid to the respondents the sum of 60l. for their costs in respect of the said appeal.*

Judgment,
21 May
1720.

For Appellant, *Tho. Lutwyche. Dun. Forbes.*
For Respondents, *Rob. Raymond. Will. Hamilton.*