

1757. July 8.

HENRY DUKE of BUCCLEUGH, and his TUTOR *ad litem*, against The CREDITORS of FRANCIS DUKE of BUCCLEUGH.

FRANCIS Duke of Buccleugh, grandfather of the present Duke, held the estate of Buccleugh in Scotland under a strict entail, by which the heirs of entail were prohibited to contract debts beyond the extent of 100,000 merks; and it was thereby provided, That the heir of entail contravening, should forfeit the estate, not only for himself, but for his descendants. The Duke was possessed of another estate in the county of Lincoln, in England, which was settled, after the failure of the heirs, to revert to the Crown; which disabled any of the heirs to burden or dispose of the lands, so long as the reversion remained with the Crown.

The Duke of Buccleugh having contracted debts to a very considerable extent; in order to provide a fund for payment of these debts, it was judged expedient, that application should be made to Parliament, for a discharge of the reversion competent to the Crown upon the English estate, which the Duke might thereby be enabled to sell for the above purpose.

Accordingly, an act of Parliament was obtained in 1749, and the estate sold for L. 63,000 Sterling, which sum was applied towards payment of the Duke's debts.

The late Earl of Dalkeith, eldest son and heir of entail in both estates to the Duke, concurred with him in carrying into execution this scheme for payment of his debts; and also in another scheme proposed for raising L. 15,000 Sterling, as a portion for Lady Jean Scot, the Duke's daughter; and farther, discharged the Duke of some considerable debts which were due by him to the Earl.

While this bill depended in Parliament, the Duke executed a deed in favour of the Earl, which proceeded upon a recital "of the Earl's consent to the sale of the said estate, upon the bill's being passed into an act of Parliament, and to the application of the price to the payment of all the Duke's just and lawful debts, and the surplus of the price, if any should be, to pay the sum of L. 15,000, the portion of Lady Jean Scot, for which the Earl granted security at the Duke's desire;" and further recited, "That in consideration of the premises, it had been agreed between them, That the Earl should be secured in the fee of the Duke's whole lands and estate in Scotland, freed of all debts and incumbrances, contracted or charged upon said estate, or to be contracted upon the same by the Duke in time coming; therefore the Duke thereby grants and dispones to the said Earl, and the heirs of his body, the whole estate of Buccleugh, reserving to the Duke his liferent thereof," &c.; and further, "Dispones and assigns to the Earl, all the arrears of rent, &c. which might be due upon the said estate by the vassals and tenants at the time of the Duke's decease." And by a separate deed, of the same date, the Duke, upon the like

No 469.

Narrative of a disposition *inter conjunctos*, if probative against creditors?

Delivery *restituta possessione*.

No 469. recital as in the other disposition, and moreover reciting, That the Earl had granted him a discharge of L. 6446 Sterling due by him to the Earl, he sold and disposed the whole furniture, plate and china excepted, of whatever kind or denomination, in any of his the Duke's houses in Scotland; and therefore assigned to the Earl, under the aforesaid exception of the plate and china, the whole personal estate in Scotland that should belong to the Duke at the time of his decease.

The Earl of Dalkeith died in April 1750, before the sale of the English estate was fully completed, whereby it became necessary to obtain another act of Parliament for completing the sale. This act proceeds upon the recital of the before-mentioned agreement betwixt the Duke and the Earl, and of the subsequent conveyances above recited by the Duke, of his estate and arrears, and of the furniture, &c. in favour of the Earl; and in consideration thereof, trustees are named in the act for carrying the sale of the English estate into execution, and for paying off the Duke's debts, as had been agreed by the Earl. The estate was accordingly sold by the trustees, and the price applied towards payment of the debts of the Duke.

In April 1751, the Duke died; and was succeeded by the present Duke his grandson, and in his name, being then a pupil, a confirmation was expedite, as executor *qua* nearest in kin, of the arrears of rent and feu-duties due to his grandfather, amounting to L. 7650 : 17 : 5 Sterling; and the other personal estate, being L. 566 : 13 : 10, including plate and china, the value of which amounted to L. 426 : 19 : 11.

A process of multiplepointing was soon after brought, at the Duke's instance, wherein sundry persons were called, who, as creditors of the late Duke, claim preference to the subjects which had been confirmed by the present Duke, and to the furniture; which last, the Duke *contended*, had been solemnly delivered to the Earl his father, at the time of the above-recited settlement.

The debate in this process was reported to the Court, 13th January 1757, and the Lords then "found, That the creditors had right to the furniture, notwithstanding the disposition; as also, That they had right to the arrears, notwithstanding the disposition and confirmation; and likewise, to the personal estate in Scotland, notwithstanding the disposition and confirmation; and preferred the creditors on these several subjects; but found the faculty to burden (*i. e.* the Buccleugh estate with 100,000 merks) was properly and effectually discharged."

The Duke reclaimed against this interlocutor, and *pleaded*; That from the whole circumstances of the before-mentioned transaction betwixt his grandfather and father, it appeared to have been a fair purchase made by the Earl, for onerous and valuable considerations, where he gave a great deal more for payment of his father's creditors than the value of the subjects conveyed to him; and therefore, that such purchase made from a debtor, was not liable to be challenged by his creditors after his death; and that he was entitled to take

payment of the debts due to himself out of the first end of the subjects confirmed. No 469.

*Answered* for the Creditors, The narratives of the deeds before recited, being *inter conjunctos*, do not prove further than as they are astructured. They are held, *præsumptione juris*, to be collusive and fictitious; and the suspicion which the law justly entertains of deeds between a father and son, when pleaded in bar of lawful creditors, would be entirely frustrated, if countenance was to be given to private latent deeds of this kind. And although the creditors do not mean to insinuate, that any actual fraud was thereby designed between these Noble persons, to the prejudice of the just and lawful creditors; yet the law can give no faith to the narratives of these deeds, when urged as sufficient to support their onerosity. *2do*, From a particular examination of the whole circumstances of the transaction between the Duke and the Earl, the pretended onerosity of these deeds is disproved; and the Earl was fully recompensed for any thing done upon his part by the other parts of the settlement made by the Duke, without insisting on these conveyances in opposition to the just claim of lawful creditors, whose payment was never intended to be thereby obstructed. And, *3tio*, Those arrears which might be due by the Duke's vassals and tenants at his death, and his other personal estate that might then belong to him, were subjects not existing at the time of the transaction, and to which the Earl could have no right during the Duke's life; and when the title came to take place upon his death, it could only be understood *deductis debitis*, which fell to be a natural burden upon these arrears, and other personal estate.

With respect to the furniture, a separate ground was founded on by the Earl; viz. that the transmission of it had actually been completed by delivery to the Earl. The conveyance, which was put into the register, refers to particular inventories which were made up and signed, and a receipt granted by the person who got the custody of the furniture, with an obligation to be accountable to the Earl for the same; so that the property thereof was fully transmitted to the Earl for very onerous causes; and no creditor can have reason to say, that he trusted the Duke upon the faith of his property in that furniture, which he was denuded of in a fair and open manner.

*Answered* for the Creditors; *imo*, The pretended onerous cause in the narrative of the conveyance, fails here as well as in the other deeds; *2do*, This was but a simulate delivery, *retenta possessione*. The furniture remained with the Duke at his death, under the custody of the Duke's servants, who had formerly the charge of it; and therefore must be held, in a question with creditors, as part of the Duke's personal estate at his death.

"THE LORDS altered, and found, with respect to the household-furniture, That the Earl of Dalkeith, and the Duke of Buccleugh his son, in his right, was *pari passu* preferable with the other creditors; but adhered to the former interlocutor, with regard to the arrears of rent, and the personal estate."

Act. Fergusson.

Alt. Lockhart.

Clerk, Forbes.

G. C.

Fol. Dic. v. 4. p. 167. Fac. Col. No 40. p. 65.