

Oct. 1, 1831. present claim, in respect that it arises out of transactions prohibited or declared illegal by public statutes.

To this the allegation of acquiescence or homologation affords no relevant answer.

Lord Chancellor.—My Lords, upon a full consideration of the case upon the grounds on which it was dealt with and decided in the Court below, I feel it to be my duty humbly to advise your Lordships that the judgment be affirmed.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

MONCRIEFF, WEBSTER, and THOMSON—M'CRÆ,—Solicitors.

No. 53. JOHN DICK, Appellant.—*Lord Advocate (Jeffrey)*—*Burge*.

DONALD CUTHBERTSON, Respondent.—*Serjeant Spankie*—*Rutherford*.

Sale—Expenses.—Held (affirming the judgment of the Court of Session), 1. That the purchaser of a property at public sale, who had successfully suspended a charge for payment on the ground of a defect in the title offered, and had frequently insisted for fulfilment, but who had never proposed to abandon the bargain, was not entitled, on a good title being offered after a lapse of eleven years, to refuse it on the pretext of being free altogether. 2. Held competent to award the prior expenses to a party, who was successful in a former appeal.

Oct. 1, 1831.
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2^D DIVISION.
Lds. Cringletie
and
Fullerton.

WHEN this case was formerly before the House of Lords on appeal* their Lordships (Dec. 12, 1826) ordered and adjudged, “ That so much of the said interlocutor of 11th March 1818, as “ finds that the respondent is not bound, at the expense of the “ bankrupt’s estate, to make any addition to the title offered by “ him, but that he is bound, at the risk and expense of the “ representer (appellant), to concur in any supplementary title “ he may wish to have executed, be, and the same is hereby “ reversed; and it is declared that the respondent is bound to “ make to the representer a good and valid title, and that the

* 2 Wilson & Shaw, 522.

Oct. 1, 1831.

“ title offered to the representer is not such good and valid title ;
 “ and with this reversal and declaration, It is ordered that the
 “ cause be remitted back to the Court of Session in Scotland, to
 “ review the several interlocutors complained of in the said
 “ appeal, and to do therein as is consistent with this reversal and
 “ declaration, and the practice of the Court in proceedings of
 “ the nature of that in which these interlocutors have been pro-
 “ nounced.”

The Court of Session proceeded to apply the judgment, and Janet Gillies, the wife of James Corbet the bankrupt, (May 8, 1828,) with consent of her husband, and the said James Corbet, for his own right and interest, executed at Lancaster, in Upper Canada, a disposition of the villa and acres adjoining in question in favour of Cuthbertson as trustee on the sequestrated estate. This disposition Cuthbertson tendered, removing the only objection which Dick had ever raised against implementing the purchase, namely, that the disposition by the wife had not been granted with consent of her husband. Dick denied that this was a good title, and that, even if good, he was no longer after so many years delay bound to accept of any title or complete the purchase. He also objected to the validity of the title on the ground of an alleged objection to the election of Cuthbertson the successor of Donald, formerly trustee, but who had died during the appeal.

The Lord Ordinary Cringletie (12th May 1829) “ appointed
 “ parties to attend by their counsel to close the record ;” and added the subjoined note.*

* “ The Lord Ordinary has advised this cause ; he will hear the parties after the
 “ record shall be closed ; but at present he confesses that the objections to the title of
 “ the trustee appear to him to be very ill-founded, because the suspender (objector)
 “ concurred and joined issue with the respondent, quà trustee, in the House of Lords.
 “ With him the question was there tried ; and the judgment was there obtained which
 “ has brought back the cause to this Court. Here again, in this Court, the objector
 “ put in his petition to have the judgment of the House of Lords applied. It has
 “ been applied ; and after all this, that the objector should turn round and object to
 “ the title of the trustee quà such, does seem to the Lord Ordinary not only to be
 “ ill-founded, but very ill-judged. If there was no proper respondent in the appeal,
 “ the judgment of the House of Lords must be null ; and the consequence of that
 “ would be, that the decree of this Court, which was pronounced between competent
 “ parties, must still be in force ; but that cannot be assumed in the circumstances of
 “ the case. The objector has homologated the appointment of the trustee ; the House
 “ of Lords have recognised him in this case ; and the whole proceedings in that

Oct. 1, 1831.

And thereafter (19th Dec. 1829) the Lord Ordinary Fullerton, before whom the case had come, “in respect that the
 “title now offered by the charger (Cuthbertson) appears to be
 “a good and valid title to the property purchased by the sus-
 “pender (Dick), found the letters orderly proceeded, and
 “decerns: Finds the suspender entitled to the expenses of the
 “litigation prior to the appeal: In regard to the litigation sub-
 “sequent to the appeal, finds the charger entitled to expenses
 “from the date of the Lord Ordinary’s interlocutor of 14th
 “January 1829.”*

“right honourable Tribunal, and in this Court since the cause returned to it, have
 “been on the basis of the acknowledgment of the validity of his title. All the ob-
 “jections founded on the contrary assumption, therefore, appear to be extremely ill-
 “founded. As to the objection that the suspender is entitled now to repudiate the
 “bargain, that appears to be incompetent in this action, which does not involve the
 “validity of the articles of sale, and contract made thereon by the suspender, but
 “only the interpretation of its terms. Whether there may be room for a claim of
 “damages competently made and proved, is a different question. And with regard
 “to the objection to the title as now made up, the Lord Ordinary is not aware of any
 “sound objection to it. Donations by wives to husbands (admitting this to be a
 “donation by a wife to her husband) are not revocable when the deeds said to consti-
 “tute the donation are made to a third party for onerous causes. On all these, and
 “the other points of the cause, particularly the question of the expenses of process
 “prior to the appeal, the Lord Ordinary will hear parties after the record shall be
 “closed.”

* “The title now offered to the suspender seems to be good. The ratification and
 “disposition by Corbet and his wife effectually secure the suspender against all chal-
 “lenge at the instance of the wife, or any person succeeding to her right; and in
 “regard to the danger of challenge from another quarter, that of the creditors, in
 “consequence of the supposed informality of the present charger’s appointment as
 “trustee, it is to be observed, first, that his appointment took place under the autho-
 “rity of an interlocutor of the Court, specially founding on an order of the House of
 “Lords, which interlocutor could not well admit of a challenge on the part of the
 “creditors; and, secondly, (which appears to be conclusive,) that, even on the suppo-
 “sition of such challenge of the charger’s appointment being competent, the creditors,
 “and any new trustee they might appoint, could never dispute, but would necessarily
 “be bound to warrant and maintain the sale made to the suspender by Donald, the
 “original trustee, whose appointment was confessedly unobjectionable. Holding the
 “title now offered to be good, and considering the nature and grounds of the present
 “suspension, the demand of the suspender to be set free from the bargain, in conse-
 “quence of the delay in producing that title, does not appear to be admissible. Such
 “a plea may perhaps form a good ground of suspension, as it may form a good defence
 “against an ordinary action for implement; but the present suspension is one of an
 “essentially different character. It proceeds, not on the assumed extinction of the
 “original bargain, in consequence of the seller’s failure to implement, but merely on
 “the incompetency of enforcing its obligations against the suspender, whilst that con-
 “tracted towards him, of affording a good title, is not implemented on the other side.

Oct. 1, 1831.

In consequence of the Lord Ordinary having in his note alluded to “ a separate action founded on the special circumstances of the case,” Dick, to obviate any difficulty in point of form, raised an action concluding that he ought and should “ be found and declared to be freed and relieved of all obligations incumbent on him under the said articles of roup and sale, and of all action or diligence competent to the exposor, or others in his right, under the said articles of roup and sale, against the pursuer for implement thereof, with all that has followed, or may be competent to follow thereon ;” and also concluding for reduction of the appointment of Cuthbertson as trustee upon the estate of James Corbett. This action having been conjoined with the suspension, the Court found (Nov. 30, 1830), “ That the suspender is not entitled to be freed and relieved of the obligations incumbent on him under the articles of sale of the property in question, and that the charger’s title thereto being now complete, a good and valid title has been offered to the suspender : Adhere to the interlocutor reclaimed against in the suspension, and refuse the desire of both notes : And in the declarator and reduction, sustain the defences, and assoilzie the defender from the conclusion summons, and decern : Of new, find the suspender and pursuer liable in the expenses incurred by the charger and defender subsequent to the inter-

“ The original bill of suspension recites and proceeds upon a protest made by the suspender, which sets forth, ‘ That the said John Dick had repeatedly offered to pay the price, and was still ready to do so, on a legal title being produced ;’ and the very first reason of suspension is, ‘ That the charger, before he can call for payment of the price, must produce a legal and valid title to the property which he has taken it upon him to sell.’ A suspension of this kind seems necessarily to imply the competency of supporting the charge, by producing a good title in the course of the process ; and the judgment of the House of Lords is perfectly consistent with this view. For although this question seems to have been raised in the appellant’s case, the House of Lords, after reversing the findings in the interlocutors of the Court, proceeds to declare, ‘ That the respondent is bound to make to the representer a good and valid title, and that the title offered to the representer is not such good and valid title.’ Whatever grounds, then, there may be for the suspender’s plea of mora, and whatever effect it may be entitled to in a separate action founded on the special circumstances of the case, it does not appear to the Lord Ordinary to be admissible in the present process. The suspender’s claim for the expenses prior to the appeal seems necessarily to follow from the nature of the discussion, in which he was ultimately successful ; but the Lord Ordinary has found him liable in the expenses created by his unfounded objections to the title offered to him since the case was remitted by the House of Lords.”—6 Shaw & Dunlop, p. 396.

Oct. 1, 1831.

“ locutor of 14th January 1829, and remit to the Lord Ordinary
 “ to modify and decern for the same, along with the expenses
 “ found due to the suspender by the interlocutor reclaimed
 “ against; reserving to the suspender all legal action and claim
 “ competent to him for damages which may be alleged to arise
 “ from the delay in the charger’s completing his title, and to the
 “ charger his defences thereto.”*

Dick appealed against as much of this interlocutor as found that he was not entitled to be freed and relieved of the obligations incumbent on him under the articles of sale of the property in question, and that the respondent’s title thereto being now complete, a good and valid title had been offered, and also against so much of it as adhered to the interlocutor reclaimed against in the suspension, and refused the desire of the appellant’s reclaiming note, and in the action of declarator and reduction sustained the defences, and assoilzied the defender from the conclusions of the summons, and of new found the appellant liable in the expense found due by the interlocutor of 19th December 1829.

Cuthbertson cross-appealed against the interlocutor in so far as it found him liable in expenses prior to the former appeal.

Appellant (Dick).—1. It was a condition of the contract of sale in 1817, that a good and valid title should be granted to the appellant at Whitsunday 1817. This condition the respondent and his predecessors failed to implement, during a period of more than nine years thereafter. The appellant is thereby entitled to be declared free and relieved of the obligations incumbent on him under the contract of sale.

2. The appellant is entitled to be declared free and relieved of the obligations incumbent on him under the contract of sale in question, because the title even now offered to him is not a good and valid title.

Respondent.—1. The judgment of the House of Lords, of 12th December 1826, plainly implies that the respondent was bound to give, and the appellant to accept, of a good and valid title to the property purchased by the latter. No undue

* 9 Shaw & Dunlop, p. 93.

Oct. 1, 1831.

delay took place, after this judgment was pronounced, in offering to the appellant such good and valid title.

2. The appellant has neither title nor interest to challenge the respondent's appointment and confirmation as trustee on the sequestrated estate of Corbet, the proceedings in regard to which were sanctioned by the order of the House of Lords, and are in every respect legal and correct. Besides, the validity of the title offered to the appellant does not depend upon the efficacy of the respondent's title as trustee, the disposition and ratification being granted in favour of Mr. Cuthbertson nominatim, whereby he is enabled to give a good and valid title to the appellant, even though objections could be stated to his nomination as trustee.

Appellant (Cuthbertson in the cross appeal). The interlocutor of the Court below finding it competent to award the expenses prior to the appeal, and actually awarding these expenses to Dick, are alterations of the judgment of this House, not warranted either by the judgment itself, or by any principle of law or justice. But independent of this plea there are no equitable grounds in the circumstances of this case, on which the appellant can claim any of the expenses incurred by him, and in justice the whole expenses of this litigation ought to be awarded against him.

Respondent.—It was decided by the Court of Session, after a very mature consideration of the authorities, that it was competent for that Court to award the expenses incurred in the litigation in the Court of Session prior to the appeal to this House. Being competent, it was equitable and just to find the appellant Mr. Dick entitled to the expenses incurred by him in the litigation prior to the appeal, seeing that by the judgment of this House, pronounced in the appeal, it was found that he had been altogether right in that part of the litigation, and had thus been improperly and illegally put to these expenses by the respondent and his predecessor.

LORD CHANCELLOR.—My Lords, in this case my opinion was in favour of the judgment in the Court below on the original appeal, but there was a doubt remaining in my mind, whether the Court of Session had the power which they had assumed, of dealing with the question of costs upon its being sent back for their consideration. Upon looking

Oct. 1, 1831. into that part of the case, however, I entertain no further doubt. The opinion to which I then inclined is now confirmed; and I would move your Lordships that the judgment of the Court below, both in the original and the the cross appeal, be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—(*Sale.*)—Little, 14th Feb. 1749 (Mor. 14,177); Brown on Sale, p. 234; Sugden on Law of Vendors, 5th edit. p. 206, 334; Pothier, *Traité de Vente*, No. 75; 1 Ersk., 6, 29, 35; *Scott v. Lady Cranstoun*, 10th Aug. 1776 (No. 1, App. Husband and Wife). (*Expenses.*)—Falljeff, House of Lords, 12th March 1794, not reported; Maberly, 11th March 1826 (4 S. & D. No. 362); Spiers, 30th May 1827 (5 S. & D. No. 344).

Respondent's Authorities.—(*Expenses.*)—Campbell and Company, 21st May 1803 (No. 3. App. Exp.); *Fleshers of Canongate*, 7th July 1809 (F. C.); *Falconer*, 4th March 1815 (F. C.); *Wilson*, 12th Nov. 1814 (F. C.); *Bowie*, 5th Dec. 1816 (F. C.); *Pringle*, 6th March 1799 (No. 1, App. Exp.); *Geddes*, 16th Feb. 1816 (F. C.); *Wilson*, 18th June 1818 (F. C.); *Reid*, 18th Nov. 1825 (4 S. & D. No. 166); *Agnew's Executrix*, 24th June 1826 (4 S. & D. No. 456); *Earl of Fife*, 8th July 1826 (4 S. & D. No. 497); *Wallace* (Shaw's App. Ca. 42).

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,
—Solicitors.

No. 54. J. B. KER and others, Appellants.—*Lord Advocate* (*Jeffrey*)—*Tinney*.

SIR R. W. VAUGHAN, &C. (LADY ESSEX KER'S TRUSTEES),
Respondents.—*Dr. Lushington*—*Murray*.

Deathbed—Title to pursue.—A party mortis causa conveyed heritage in liege poustie to trustees, with directions to sell, to pay legacies, &c., and then to pay the residue to such persons as she should direct by any writing under her hand; and in default of making such writing, to pay the residue to her next of kin; and thereafter executed a writing of directions on deathbed, which was challenged by the heir at law.—Held (affirming the judgment of the Court of Session), that if the heir could set aside such writing, he would thereby occasion that default, in the event of which the liege poustie deed had disposed in favour of the next of kin; and therefore he was barred by want of interest from insisting in a reduction of the deed.

Oct. 1, 1831.
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1ST DIVISION.
Lord Newton.

ON the 1st of March 1819, Lady Essex Ker, who was possessed of landed estates in Scotland, executed a trust-disposition and deed of settlement, in favour of the late Earl of Winchelsea