

May 26, 1826. should no longer be continued the curator bonis. Still there arises a difficulty to which regard must be had: If he is not the person, what other person is there who will be entitled to sue out that brieve and inquest? My Lords, I certainly speak without sufficient information; but I cannot believe that the subjects of his Majesty in Scotland who may unfortunately be visited by this dreadful malady, are in a state in which it is the duty of no one to interfere; and I apprehend it may be very well worthy of consideration, whether my Lord Advocate of Scotland is not a party entitled to interpose in such cases. I have made these general observations, for the purpose of asking your Lordships' permission to word an order of remittal of the case of *Bryce v. Graham* to the Court of Session in Scotland, to the same Division before whom it had been heard, desiring them to take the opinion of the other Chamber, and likewise of the Lords Ordinary—that is, the whole of the Fifteen Judges; reserving the consideration of the questions in the other appeal, until we have the opinion produced to us which that remit is calculated to bring before this House.

Appellant's Authorities.—4 Ersk. Inst. 3. 6.—2. 7. 48. 53.—1. 7. 49.—A. S. Feb. 13, 1730. (1475, c. 67.)—Balfour's Practics, c. 7.—Craig de Feudis, 1. 12. 29.—Stair's Inst. 4. 3. 7.—1. 25. 6.—Mackenzie on the Statutes, (1475, c. 67.)—Bank. Inst. 1. 7. 9. and 4. 14. 11.—Lock. July 29, 1638. (6278.)—Christie, Feb. 13, 1700. (6283.)—Blair, June 18, 1748. (13217.)—Stuart, Jan. 21, 1663. (6279.)—Moncrieff, Feb. 23, 1710. (6286.)—Ederline, Feb. 27, 1740. (Elchies.)—Haliburton, June 1791. (16379.)

Respondents' Authorities.—A. S. Feb. 13. 1730.

SPOTTISWOODE and ROBERTSON—ALEXANDER MUNDELL,
Solicitors.

No. 37.

JOHN DICK, Esq., Appellant.

JOHN DONALD, and (by revivor) DONALD CUTHBERTSON,
Trustee on the Sequestrated Estate of James Corbett, Re-
spondent.

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Sale.—Husband and Wife.—A party having purchased a property, and taken the title in name of his wife, and thereafter become bankrupt, and fled the country; and his wife having, in his absence, conveyed the property to the trustee for his creditors, who exposed it to sale, under articles of roup, by which he bound himself to execute, and deliver to the purchaser, a valid, irredeemable disposition; and the purchaser having objected that the title granted by the wife was inept, and refused to pay the price; and the Court of Session having found that the trustee was not bound, at the expense of the bankrupt estate, to make any addition to the title, but only at the purchaser's expense—Held, (reversing the judgment,) that the trustee was bound to give the purchaser a good and valid title, and that the one which he offered was not good.

Dec. 12, 1826.

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2D DIVISION.
Lord Reston.

IN April 1813, James Corbett purchased from Andrew M'Kendrick five acres of land near Glasgow, at the price of L.800; and took the title in name of his wife, who was infest.

On the security of this property and his own personal bond, Dec. 12, 1826. Corbett afterwards obtained loans of money to the extent of L.1200, for which the heritable bonds were executed by his wife.

Corbett built a house on the property, and about two years after the purchase, he became bankrupt, absconded, and fled from the country. The estate having been sequestrated, Donald was appointed trustee, and prevailed on Mrs Corbett to grant a disposition in his favour of the property. This deed proceeded on the narrative, that Corbett had bought the lands, and taken the disposition to her, at a time when he was insolvent; that she was satisfied that the money paid as the price, and in erecting the buildings, belonged to his creditors; and as Corbett had been ordained, under the sequestration, to execute a conveyance in favour of the trustee, it was just and proper that, as the title had been taken in her name, she should denude and grant the requisite deeds to Donald. She accordingly, on the 9th April 1816, conveyed the lands to him, with full power to sell, and apply the price as directed by the bankrupt statute.

Thereafter, the trustee exposed these subjects to sale, by public auction, at the upset price of L.1300. By the articles of sale it was stipulated, that the purchaser should be bound to pay the price, under deduction of the amount of the heritable bonds granted by Mrs Corbett, 'as proprietrix of the said subjects,' which were to make part of the price, and be payable by the purchaser to the creditors in the bonds, to save the expense of the stamp and disposition, and also to execute and deliver at his own expense, within ten days after the roup, a bond for the price.

The articles then stated, that upon these conditions being performed, 'the exposer shall be bound to execute and deliver a valid irredeemable disposition of the aforesaid subjects, as described in her own or constituent's title thereto, in favour of the purchaser, his heirs or assignees, and containing obligation to infest, to be holden a me under the burden of the feu-duty payable to the superior, in terms of the title-deeds of the property, and particularly of the feu-duty specified in the disposition of the subjects, by the said Andrew M'Kendrick, in favour of the said Janet Gillies or Corbett, and the instrument of seisin thereon in her favour; and the said disposition in favour of the purchaser, shall also contain procuratory of resignation, &c.; and along with the said disposition, the exposer shall also deliver to the purchaser the foresaid dispo-

Dec. 12, 1826. ' sition and instrument of seisin thereon, in favour of the said
' Janet Gillies 'or Corbett, and a disposition by her in his, the
' exposer's, favour, which are all the title-deeds of the property
' in his custody.' It was also declared that the trustee, before
payment of the price, should produce a search of encumbrances
affecting the subjects since the purchase from M'Kendrick, and
that all questions which might ' arise between the exposer and
' purchaser, relative to the sale and subject matter of the articles
' and minutes of the roup, or implement hereof,' should be re-
ferred to arbitration.

Dick, who had been educated to the profession of the law, and afterwards was admitted as an advocate at the Scottish Bar, became purchaser, under these articles and conditions, at the upset price. Having discovered that the disposition by Mrs Corbett to the trustee had been granted without the consent of her husband, and without her judicial ratification, he refused to accept of a disposition offered to him by the trustee, or to grant bond for the price, on the ground that the title which the trustee held from Mrs Corbett, was not valid. A charge of horning having been then given to him to grant bond for the payment of the price, he brought a suspension.

The Lord Ordinary found the letters orderly proceeded, and decerned; and thereafter, on the 11th March 1818, on considering a representation, with answers, his Lordship, ' in re-
' spect of the terms of the articles of roup, and whole circum-
' stances of this very special case, found, that the respondent is
' not bound, at the expense of the bankrupt estate, to make any
' addition to the title offered by him; but that he is bound, at
' the risk and expense of the representer (Dick), to concur in
' any supplementary title he may wish to have executed; and
' with this explanation, refused the desire of the representation,
' and adhered to the interlocutor represented against.'

Dick having reclaimed, the Court, on advising his petition, with answers, adhered, and found him liable in expenses; and to this judgment, on advising a reclaiming petition, with answers, they again adhered, on the 23d of June 1820.*

Thereafter, a deed of ratification, by Corbett, and a judicial ratification by his wife, were obtained and produced in process.

* Not reported.—In the appeal case for Dick it is stated, ' that a considerable dif-
' ference of opinion prevailed among their Lordships at pronouncing their first interlo-
' cutor, two of their number having been of opinion against the interlocutor of the
' Lord Ordinary, and three in favour of it; ' and, ' at pronouncing the last interlo-

Dick appealed.

Dec. 12, 1826.

Appellant.—The trustee has not implemented his obligation in relation to the appellant's purchase. The appellant is not barred by anything contained in the conditions of sale, from objecting to the titles. If he had been put upon his guard that the titles were defective, and it had been conditioned that the purchaser should, beforehand, satisfy himself in that matter, that would have been a contract, which would have bound both parties. But that is not the case here. On the contrary, the trustee, as exposor, became bound, in express terms, to deliver to the purchaser a valid irredeemable disposition of the subjects; and if difficulties did occur, a reference was appointed to arbiters. But the disposition is utterly defective. It was granted by Mrs Corbett alone, and not with the advice, or by the consent, of her husband. Neither was it judicially ratified by her. But a disposition by a married woman without consent of her husband is inept; and consequently, the conveyance to the trustee is null and void; and therefore, he could not, in terms of the articles of sale, grant a valid irredeemable disposition. If so, then, as the trustee, at the time of the sale, could not grant a valid title, the appellant cannot be bound by his purchase; and therefore, the husband's supervenient ratification could not have the retrospective effect of making the disposition valid, at least the appellant could not be obliged to accept of it.

Respondent.—The appellant was quite aware of the nature and description of the titles that would be given to him, and he agreed to accept them. There is no ground for the distinction between the case when the purchaser undertakes to satisfy himself as to the titles, and where the nature of the titles is distinctly specified. In neither case can the purchaser be permitted to resist payment because the titles are not perfect. In both, he is equally bound to satisfy himself before he becomes purchaser. But the titles are unexceptionable. In the peculiar circumstances in which the present question originated, even had the property been bona fide Mrs Corbett's, her disposition to the trustee would have been valid. The taking the disposition from the seller to her was a fraud on the hus-

‘cutor, the two Judges who had been of opinion against the interlocutor of the Lord Ordinary were absent, one from indisposition, and the other attending his duty as a criminal judge, in another place.’

Dec. 12, 1826. band's creditors, and the deed could have been reduced. Therefore, Mrs Corbett was only acting with common honesty when she granted the disposition to the trustee, who could easily have reduced it, and obtained a special adjudication, which he offered to do, but the appellant declined to accede to the proposal. Besides, as Corbett was out of the kingdom, the deed of his wife was perfectly effectual; and to remove all objection, his ratification of it, and that of his wife, judicially, had been procured and tendered to the appellant, so that all ground of objection was removed.

The House of Lords ordered and adjudged, ' that so much of
 ' the said interlocutor of the 11th March 1818, as found 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 the
 ' representer a good and valid title; and that the title offered
 ' to the representer is not such a 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 declara-
 ' tion, and the practice of the Court in proceedings of the na-
 ' ture of that in which the interlocutors have been pronounced.'

Nov. 29, 1826.

LORD CHANCELLOR.—With regard to the question upon the merits made under this appeal, I have no manner of doubt (unless my mind is affected by the eclipse of to-day) that this gentleman is entitled to a valid title. Our rule of law is, in England, that a person who purchases an estate, has a right to a good and valid title, unless it shall be as clear as the sun at noonday that he had waived his right.

In the present case, the first interlocutor I see bears date in 1817, and the last in 1820; and the whole matter at stake is a property of the value of £1300. It is, therefore, highly desirable that it should be concluded.

The real question in this case is, whether the appellant has waived his right to a good and valid title. I think the opinions of the Judges are quite enough to show that it is not a good title. The first Judge says, in the notes handed up to us, that the title is not what it ought to be; another says, that he doubts the title, but the danger of eviction is not immediate; a third (Lord Bannatyne) is of the same opinion with the two

former, and by these Judges the case at that time was decided in favour Dec. 12, 1826. of the respondent. The other two Judges, the Lord Justice Clerk and Lord Robertson, concurred that the title was bad, and were of opinion with the appellant.

I can see nothing in the articles of roup to take away the appellant's right to a good and valid title. The articles bear, that the appellant is to receive a valid irredeemable disposition of the premises. This must be made by some person who had right to grant it. In regard to the deeds mentioned in these articles, though it was specified that these were the only deeds to be delivered over, that had no operation in regard to the purchaser's right to demand that the seller should show a good title.

Upon the point of form stated by some of the Judges, and founded on by the respondent, I shall look very narrowly through the proceedings, to see if this point of form prevents us from deciding at present upon the merits. I shall endeavour to give my judgment thereon to-morrow, at the meeting of the House.

Dec. 12, 1826.

LORD CHANCELLOR.—My Lords, there was a case, Dick v. Donald, argued at your Lordships' bar a short time ago, and in the course of the argument, a difficulty arose, whether this House could, according to the practice of the Court of Session, give any declaration as to the title of the parties when it was allowed to depend on what was termed articles of roup, or whether the Court of Session ought not to have asked for a bond of caution. On looking into the interlocutor of the Lord Ordinary, which must be considered as confirmed by the subsequent interlocutor of the Court of Session, I perceive the Lord Ordinary finds thus, 'That the respondent is not bound, at the expense of the bankrupt estate, to make any addition to the title offered by him, but that he is bound, at the risk and expense of the representer (Dick), to concur in any supplementary title he may wish to have executed.' Now, if it be the opinion of this House, as I apprehend it to be, that this declaration in law is wrong, there can be no difficulty in reversing this declaration of law, stating what is the law upon the true construction of these articles of roup, and in that shape send back the case to the Court of Session in such a way as to prevent the expense the parties are likely to be put to.

Appellant's Authorities.—Rowan, Nov. 24, 1769, (14178.)—Nairn, June 13, 1676, (14169.)—Lockhart, 13 July, 1742, (14176.)—Tait, 20 Dec. 1743, (14177.)—Reg. Maj. 1. 30. 6.—Quon. Attach. 21. 1.—Craig de Feud. 1. 12. 28.—Stair's Inst. 1. 4. 13, &c.—Bank. Inst. 1. 5. 67.—Ersk. Inst. 1. 6. 22, &c.—Bullion's, Dec. 4, 1793, (6149.)—Dunbar, Feb. 12, 1566, (6001.)—Scott, Aug. 10, 1776, (6108.)—Ersk. Inst. 4. 1. 33.

Respondents' Authorities.—Churnside, July 11, 1789, (6082.)—Ersk. Inst. 1. 6. 27, &c.—Clark, Jan. 31, 1717, (5996.)

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