

BENEFICIUM CEDENDARUM ACTIONUM.

1751. June 12.

The CREDITORS of JOHN FULLARTON, *against* The CREDITORS of HUGH FULLARTON.

CAPTAIN HUGH FULLARTON of Carleton, 21st October 1743, became bound to pay to Mr James Murray, minister of Penpont, 3000 merks Scots; and, for his further security, disposed to him certain acres and tenements in Kirkcudbright, 'declaring that the said houses, &c. should be redeemable by him and his heirs, &c. at Martinmas 1744, by payment of the said sum, penalty and annualrents resting.' Upon complete payment whereof Mr Murray should be obliged to deliver to him a valid discharge and renunciation. On this right infestment followed, 23d April 1744.

The Captain, 9th April 1746, disposed these acres to Samuel Fullarton his second son, with absolute warrandice, reserving his liferent; who was infest 11th that month.

Upon Captain Fullarton's death, John, his eldest son, entered to the possession of the remainder of his estate; and Mr Murray led an adjudication comprehending the estates of both the brothers.

Creditors of the Captain, and others of John, adjudged his particular estate; all the adjudgers whereon, as being within year and day of the first infest, were ranked *pari passu*: Besides which, Mr Murray had a preference to Samuel's creditors upon his.

A sale was pursued of Captain Fullarton's estate, comprehending both; and Thomas Bean, in Mr Murray's right, being ranked on both, a question arose betwixt the creditors affecting each, concerning his being obliged to assign to either, the right he had on the other subject.

Pleaded for the creditors of John, The debt was by Captain Fullarton primarily laid on the subjects disposed to Samuel; these he disposed to Mr Murray; and though he, for his further security, has adjudged the rest of the Captain's estate, he ought to take his payment out of the subject disposed to him; and if he takes it out of any other, to assign.

No 1.

A person disposed lands to a creditor, in security. Afterwards he disposed the same lands to his second son, with absolute warrandice. The eldest son succeeded to the rest of his father's property. The creditor adjudged, and ranked on both estates. The second son, on account of his absolute warrandice, was entitled to an assignation from the creditor.

No 1.

Pleaded for Samuel and his creditors, The disposition was to him with absolute warrantice, whereby his father became bound to free his estate of Mr Murray's debt : This obligation rested on John, his father's heir ; and cannot be contraverted by their creditors.

THE LORDS, 23d January, ' Found, That in case Thomas Bean should be ranked, in virtue of his diligence, on the estate that devolved from Captain Hugh Fullarton, to John Fullarton, his eldest son, the creditors of the said Captain Hugh and John Fullartons were not entitled to an assignment from Thomas Bean, to his infestment, for the same debt, upon the lands conveyed to the said Captain Hugh Fullarton, his second son, with absolute warrantice ; but found, That in case Thomas Bean should be ranked, in virtue of his second infestment, upon the lands conveyed to the said Samuel Fullarton, by his said father, he the said Samuel and his creditors, were entitled to a conveyance from Thomas Bean to his diligence affecting the estate, which devolved to the said John Fullarton.'

Pleaded in a reclaiming bill, Captain Fullarton wadseted these lands, which he afterwards disposed to his son Samuel, to Mr Murray ; he retained only in himself the reversion, which was all that could be carried by Samuel's disposition. A wadsetter on redemption is bound to make over to the reverfer the lands, but not to assign the debt, which becomes extinct ; and if this debt is not assigned, Samuel will not be able to relieve himself by affecting John's estate.

Answered, There was no wadset, but a debt contracted, and the lands disposed in security. The Captain retained the fee, which he disposed to his son ; and this fee being subject to a debt, from which the disponent was bound to relieve it ; the creditor getting his money out of the cautionary security, ought to assign.

THE LORDS adhered.

For the Creditors of John, *H. Home.*

Alt. A. Macdougall.

Clerk, Justice.

Fol. Dic. v. 3. p. 70. D. Falconer, v. 2. No 207. p. 249.

* * The same case is reported by Lord Kames :

CAPTAIN HUGH FULLARTON of Carleton, proprietor of the lands of Carleton, and of houses and burrow-acres in and about the town of Kirkcudbright, borrowed from James Murray 3000 merks, and gave him a real security upon the said houses and acres, in which the creditor was infest April 1724. In April 1726, Captain Hugh Fullarton executed a disposition in favour of his second son Samuel, of the said houses and acres, upon the narrative of its being a patrimony or portion to him. The granter's liferent is reserved, and the subjects disposed are warranted ' to be free, safe, and sure from all perils, dangers, and incumbrances ' whatever.' Samuel was infest upon this disposition, April 1726. James Murray deduced an adjudication anno 1732, not only of the subjects contained in his heritable bond, but also of the Estate of Carleton.

After the Captain's death, his eldest son John succeeded to his estate; and he, without making up titles, having added to his father's debts his own contractions; the creditors, upon the medium of special charges, proceeded to adjudge not only the estate of Carleton, but also the said houses and acres, which were understood to be *in hæreditate jacente* of the Captain.

A sale being raised, Samuel Fullarton appeared in the ranking; and observing that Murray was ranked *primo loco* upon the houses and acres, insisted, That if Murray chose to draw his payment out of these subjects, he ought to assign his adjudication, in order that Samuel might draw, out of the estate of Carleton, whatever should be drawn out of his own estate, by virtue of the heritable bond.

'It carried by a plurality, that Samuel, to whom the houses and acres were disposed with absolute warrandice, was, for that reason, entitled to the assignment demanded.'

The matter was considered in the following light: That Samuel Fullarton was in effect cautioner in Murray's debt; and, therefore, that the adjudication led by Murray was to be considered as a security for Samuel the cautioner, as well as for himself; and that Samuel, upon payment out of his subject, was entitled to demand from the creditor, an assignment to his debt and diligence. See CAUTIONER.

Rem. Dec. v. 2. No 123. p. 259.

1776. August 8.

DUNLOP, and OTHER TRUSTEES of CARLYLE and Co. *against* SPIERS and Others.

MESSRS JAMES DUNLOP, DOUGLAS, and WHITE, entered into co-partnery, under the firm of James White and Company; and afterwards, on White's death, a new co-partnery was formed betwixt James Dunlop, Douglas, Carlyle, and Gavin White, under the firm of John Carlyle and Company. This co-partnery failed in 1763; and their creditors following joint measures, named certain of their number trustees for the whole; and the same persons were likewise, at the same time, appointed trustees by Carlyle and Company, for gathering in and dividing their effects. At the time of the failure of Carlyle and Company, the first Company of White and Company stood indebted to them in L. 5072 Sterling; and the whole debts due by James Dunlop to Carlyle and Company, both on his private account, and as a member of the co-partnery of White and Company, amounted to about L. 12,000 Sterling. Spiers, Blackburne, and others, who had been appointed trustees for the creditors of James Dunlop, who had become bankrupt a short time before the failure of Carlyle and Company, in which he was engaged, were pursued by the trustees of the creditors of Carlyle and Company, who claimed to be ranked on Dunlop's funds, both for the debts due by him to Carlyle and Company, and likewise for the whole debts due to the pursuers and their constituents by that Company itself.—*Urged* in defence, That the pursuers cannot be allowed to claim payment from the estate of James

No 1.

No 2.

Creditors of a Company drawing dividends out of the estate of an individual partner of the Company, found, in certain circumstances, obliged to assign to the creditors of the individual, in order to operate relief from the estates of the other partners.