1755. *July* 9. Ranking of THE CREDITORS of Bonjedward.

THIS case is reported by *Elchies, (Competition,* No. 14;) by *Kames (Mor.* p. 743 and 10,178;) and in the *Fac. Coll. (Mor.* p. 724.)

Lord KILKERRAN gives the following account of the proceedings, and of the opinions of the Judges:—

"This is the only question in the ranking of the creditors on the estate of Bonjedward, a very considerable subject, sold at the instance of the apparent heir; and the division of the price is delayed till the decision of it, to the great disadvantage of the concerned.

"*Nov.* 14. DRUMORE—That the arrestment was good. KAIMES inclined so too, on account of expediency, but doubted in point of principle, as he considered the creditors to have no personal action against the purchaser, but that only the land lay open to a poinding of the ground.

"That both in expediency, and in point of principle, the arrestment was good, as the apparent heir was neither debtor nor creditor, but only had right to the residue, after payment of the creditors making up his title.

"The next question was, supposing the arrestment good, how the preference should go.

"KAIMES—That the principal sum and annual-rents, were two different subjects; and that Lord Cassillis should draw proportionally out of these subjects, and the remaining annual-rents be carried by the arrestment.

"DRUMORE—That the arresters should draw the whole annual-rents due at the date of the arrestments, because, were Lord Cassillis taking, as he might, the whole annual-rents, he behoved to assign to the arresters.

"——— was of the same opinion, upon this ground, that were my Lord Ross not in the field, this would be the case; and he could not see that the supervenient disposition to Lord Ross would vary the case.

"ELCHIES doubted high, and he thought, had the land not been sold, and that my Lord Cassillis had pursued poinding the ground, he would have drawn the whole annual-rents; and he doubted if the sale made any alteration. (The cause appointed to be heard.)

"*Friday* 23. ANDREW PRINGLE—That had Lord Cranstoun died, and that there had not been either assignation to Lord Ross, nor arrestment, the heir of Lord Cranstoun would have drawn the whole, after Lord Cassillis' payment, and his executors nothing.

"The heir of Lord Cranstoun is the same with Lord Cranstoun; and Cassillis, in a question with Cranstoun, must draw the annual-rents before the principal sum. This upon an obvious principle of equity. But here Cranstoun's interest is not in the question, for he must pay all his debts. And another principle of equity obtains, that a Catholic creditor cannot act arbitrarily, but must draw proportionally, or, which is the same thing, grant an assignation.

"I wrote what is upon the preceding page as the first thought, upon making the report; when the case came to be heard, a variety of notions cast up; 1*st*, At the bar, from R. Craigie, who maintained for Ross and Wauchope, that nothing remained with Lord Cranstoun, after his disposition to Lord Cassillis but a reversion, to be carried by an adjudication. 2*d*, That the creditors, where a sale was at the instance of an apparent heir, behoved all to adjudge, and that the purchaser

could not otherways be secure. But then such a variety of things was thrown out by Kaimes, in his usual way of refining, that would take too long time particularly to mention. So must own, some of them rather disturbed my imagination, than gave me that clear light which possibly they merited to do. And now that the advising the cause is continued till to-morrow, I have conceived the following simple notion; how it will be received by my brethren I know not. It is, in short, this:—

"That the arresters can take nothing in this case, for the reasons following: That Lord Cassillis is preferable for both his principal and annual-rents no body disputes, and all the question is, whether, when he draws both, he is obliged to assign. In forming my opinion upon this, I first suppose Bonjedward alive, and pursuing a multiplepoinding, and then to consider what odds it makes when the question is with the purchaser or at the sale by the apparent heir.

"If the first were the case, Lord Cassillis would answer to the arrester that he is not bound to assign; for this reason, that it could not be said that he was arbitrarily preferring one to another by drawing his whole by virtue of his catholic security out of one subject on which the arresters had a security, which is the foundation of the doctrine of assignation, so he is giving no preference arbitrarily, he is making no choice; he is but doing what the law directs, when he is taking first payment of his annualrents, and next of his principal; and if so, that his payment exhausts the annualrents, and that he is not obliged to assign; it follows that there is no subject for the arrestment; that it is not good reply to this, that though, in a question with Lord Cranstoun, such might be the application of Lord Cassillis' payment, that it first applies to the annualrents, and next to the principal, yet it varies the case when a third party, the arrester, comes in, for then the subject is to be considered as two different estates, viz. the principal as one estate, the annualrents as another, both liable to Lord Cassillis' payment, and the annualrents, by being affected by the arrestment he might assign to the arrester. I say this is no answer, for it is still but one estate; and the annualrents being exhausted by the application which the law makes, there is no subject, as has been said, to be affected by the arrestment: and this leads to the second point, what difference it makes that this question is not in a multiplepoinding at the instance of Bonjedward; and it would appear to me that it makes none that this action is against the purchaser at this sale, for though it may be true that bygone annualrents are the proper subject of arrestment, it still recurs, that there is no subject to be affected by it, for the reason that has been given.

"When this day I delivered the above opinion, Elchies concurred with me in every article of it, and enlarged a good deal in support of it.

"ANSWERED,—*Drumore*, That all the above reasoning did well apply, had Lord Cassillis drawn his payment; but the case was different, when the case here was, that he had not drawn his payment, and that the money was supposed to be lying on the table, which is the supposition the Lords go on in rankings.—Then, said he, the Lords direct the application, and ought so to do in this case, agreeably to the usual rule in rankings.

"To this Elchies answered, that the supposal of its lying on the table could not vary the case, for still the Lords could not direct an application different from what the law appointed, which was, that the annualrents should first go towards Lord Cassillis' payment, which was *toto cœlo* different from the

case of a catholic creditor over more subjects, and who was taking his payment arbitrarily out of one of the subjects.

" *November* 24.—The vote being stated, whether the arrestment could draw any thing, it carried by the casting vote, (Minto in the chair,) that it did; and then, that being determined, it carried pretty unanimously that the arresters and the assignees, Ross and Wauchope, should draw proportionally."

[Here Lord KILKERRAN's note of the proceedings at the hearing in presence, ends.]

November 28, 1753.—The interlocutor pronounced by the Court was: "Upon the report of Lord Murkle, and having heard parties procurators in their own presence, and having considered the debate, find the arrestments used by John Ainslie and the other personal creditors of Lord Cranstoun, were a habile diligence to affect the annualrents that were due to the Lord Cranstoun, and find the Earl of Cassillis preferable *primo loco* upon both the principal and annualrents due to Lord Cranstoun. But find he must draw his payment proportionally out of the capital sum and out of the annualrents due to the said Lord Cranstoun, according to the proportion that the said two sums bear to one another; and find that Ainslie and the other arresters, are preferable *secundo loco* on the remaining annualrents; and find the Master of Ross and Mr. Wauchope preferable *secundo loco* on the remaining part of the capital sum and annualrents thereof from and after the term of Whitsunday 1751, and remit to the Lord Ordinary in the cause to proceed accordingly."

A petition was presented against this interlocutor by the Master of Ross and Mr. Wauchope, the disponees of Lord Cranstoun.

On advising which the Court altered their interlocutor, and prefer the petitioners to the surplus of the debt within mentioned, after payment of the Lord Cassillis.

July 9, 1755.—Against this last interlocutor a petition was presented by the arresters; but the Court, of this date adhered. Lord Kilkerran has the following note of what passed on the bench at advising the last mentioned petition with answers:—

" On moving this bill, the President said, though the points were ingeniously argued, yet the arguments proceeded on an erroneous supposition, that the principal sum and annual rents were two different subjects, and that indeed was the footing upon which I put my opinion for the disponees, that they were the same subject. But the President said nothing on his own favourite point, that the right was no other than a reversion, which could only be adjudged; but without entering on ought, Kaimes and the President being with me, moved to see, which was agreed on."

On advising the petition and answers, Lord Kilkerran observes,—

" The President still insisted on his own favourite point, that there was nothing in the debtor but a reversion, which could only be carried by an adjudication; and that there was no difference now a-days between rights in security and proper wadsets; for even proper wadsets being redeemed, the reverser's infeftment revives without any new infeftment, though it was otherways in Lord Stair's time; for which reason it was proper to make the distinction which he lays down between proper wadsets and rights in security; and in all cases there is nothing in the granter of a right in security but a reversion to be carried by an adjudication. But whatever be in the other point, that

there is here two different subjects, one to be carried by arrestment, the other by adjudication, it was a groundless notion was always my opinion, and so the Lords continued to think; and that were there no payment made to Earl Cassillis, but that the subject remained *in medio*, the Lord Cassillis could not take his payment otherways than, in the first place, in extinction of his annual-rents, as I have fully stated on a former paper; and indeed to say otherways, were to introduce a new form of ranking hitherto never heard of before."

1755. *August* 9. STRAITON of Kirkside *against* SCOTT of Comiston and FULLERTON of Kinnaber.

IN this case Lord KILKERRAN was Ordinary, and reported it to the Court. —His Lordship's report, bound up with the Session Papers, is in the following terms:—

"In 1581, A charter is granted to the predecessor of Straiton of Kirkside, of his lands of Kirkside, in the shire of Kincardin, *cum piscariis salmonum in mari infra limites et bondas dictarum terrarum*, in terms of which charter it is admitted, at least supposed, that he and his predecessors have been in use to fish upon the sea opposite to his said lands.

"In 1672, A charter is granted to Fullarton of Kinnaber of the lands and barrony of Kinnaber, in the shire of Forfar, *cum piscationibus salmonum in aqua de Northesk tam intra fluxum maris tam extra eundem in quavis parte dictæ aquæ ex adversa dictarum terrarum et baroniæ de Kinnaber.*

"There is produced for Colonel Scott a charter granted to his father, in 1708, of the lands of Wardroperton, which lie on the north side of the river Northesk, in the shire of Kincardin, for the river is the march of the shires, *juxta et infra bondas predictarum terrarum de Wardroperton.* These are all the clauses in the charters that are necessary to mention; for though Kinnaber had also a part of the fishings on the north side of the river, respecting one half of the lands of Wardroperton, which also belonged to his predecessors, yet that has no influence in the present question, and therefore shall not trouble your Lordships with resuming these rights, though you have them stated in the information for Kinnaber, and Colonel Scott.

"Had the river continued to run in the manner it did when these several rights were granted, there could have been no question betwixt the parties, as their rights stood clear of each other; the river Northesk, which is the march between the two shires of Forfar and Kincardin, did then empty itself into the sea, within the bounds of the lands of Kinnaber; and while it did so, Kinnaber had his fishing in the river, *tam intra tam extra fluxum maris*, without any body to interfere with him; so had Colonel Scot's predecessors his fishing in the river on the north side thereof, without any body to interfere with him; and so had Kirkside the free exercise of his fishing in the sea, *ex adverso*, of the lands of Kirkside, without interfering with any of the other two.

"But it has happened that the river, which formerly ran into the sea at low ebb, *ex adverso*, of the lands of Kinnaber, has, by degrees, taken its course so far