

1755. July 9. RANKING of the CREDITORS of BONJEDBURGH.

No 56.

A person infest on an heritable bond assigned his security, to one to whom he owed a less sum. The estate burdened, was sold by the apparent heir. Arrestments were used in the hands of the purchaser, by creditors of the original holder of the bond, in order to affect the annualrents; but he having conveyed the bond to another creditor, that creditor was found preferable to the arresters, as to the reversion of the bond and annualrents, after paying the first disponee.

IN the year 1739, George Douglas granted an heritable bond over his lands of Bonjedburgh, for infesting Lord Cranston in an annualrent of L. 120, and for infesting him in the property of the lands themselves, for payment to him of the sum of L. 2400: Infestment followed.

Soon after, Lord Cranston and George Douglas granted an heritable bond to James Bogle for L. 2000 Sterling; and for his further security, Lord Cranston, in the same bond, disposed to him his heritable bond on the lands of Bonjedburgh.

This conveyance was conceived in the following form: He therein *sells, annualizies, and dispones* to James Bogle heritably, and under reversion, not only all and hail an yearly annualrent of L. 120 Sterling, but also the property of said lands, for further security and payment of the aforesaid accumulate principal sum of L. 2400, &c.; and that, in so far allenary as concerns, or may be extended to, the aforesaid sum of L. 2000 principal, L. 400 penalty, and annualrents that shall happen to fall due on said principal sum of L. 2000, and no further; and, for security whereof, this present right is granted, and no further. These qualifications are repeated in the procuratory of resignation and precept of sasine. The clause assigning the heritable bond is qualified in the same manner, surrogating and substituting Bogle in the right of Lord Cranston, in so far allenary as concerns the sum of L. 2000, &c. And the whole concludes with this provision, That this present right and disposition, annualrent, lands, and others above disposed in security, shall be redeemable by payment making to James Bogle of the principal sum of L. 2000 Sterling, annualrents thereof that shall become due, and liquidate penalties engaged therefor; and that thereupon our said former right and infestments shall revert to us, as if this present right and disposition had never been made: Infestment followed.

Bogle's debt coming into the person of Lord Cassilis, he, in the year 1747, adjudged from Lord Cranston this heritable security upon the estate of Bonjedburgh.

George Douglas having died, his apparent heir brought a sale of his estate: Archibald Jardine became purchaser in March 1751, and granted bond for the price, payable at Martinmas following, to the apparent heir and his predecessor's creditors, as they should be ranked.

In April that year, John Ainslie and others, personal creditors of Lord Cranston, arrested in the hands of Jardine the purchaser, the bygone annualrents due to Lord Cranston on his heritable bond, amounting to L. 820.

In June thereafter, Mr Wauchope of Edmonstone, and the Master of Ross, became sureties for Lord Cranston in a debt of L. 600; and, for their relief, he conveyed to them his security in the lands of Bonjedburgh, in the same form in which it was conveyed to him: Infestment followed.

Jardine brought a multiplepounding, in which Lord Cassilis was preferred on his L. 2000, and L. 551 of annualrents then resting; but then a competition arose betwixt Mr Wauchop and Mr Ross, the disponees of Lord Cranston on the one hand, and the arresting personal creditors of Lord Cranston on the other.

The disponees *objected* to the arresters: *First*, That their diligence of arrestment was inept; and *next*, That Lord Cassilis, in order to be paid his L. 2551 of principal and annualrents, should be supposed to have drawn, *first*, all the annualrents then due on Bonjedburgh's bond; and *next*, as much of the principal of the bond itself as would have extinguished his debt; in which case, the disponees would have drawn their payment out of what remained of the principal.

The arresters, on the other hand, *contended*, That Lord Cassilis should be supposed to draw his payment proportionally out of the principal sum, and out of the annualrents due to Lord Cranston, according to the proportion that the said two sums bear to each other; in which case, a certain portion of the annualrents would have been left for them to affect.

Pleaded for the disponees, in support of the first objection:-

By Lord Cranston's disposition to Bogle, now in the person of Lord Cassilis, the right of the annualrent, constituted in favours of Lord Cranston, and the disposition of the property of the lands of Bonjedburgh, were transferred from him, and fully vested in Lord Cassilis, under reversion of Lord Cranston; but as long as Lord Cassilis's infestment stood unredeemed, there was nothing for Lord Cranston's creditors to take but his right of reversion; which was not the subject of an arrestment at all, but only of an adjudication or voluntary conveyance.

If Lord Cassilis, in place of the voluntary right from Lord Cranston, had, in payment of his debt of L. 2000 Sterling, adjudged the bond from Lord Cranston, and had been infest, the adjudication would have denuded Lord Cranston of the whole sum; nothing would have remained with him but the reversion; and his voluntary denuding himself, by a conveyance of the whole to Lord Cassilis, cannot have a less effect.

In support of the second objection, *pleaded* for the disponees:-

When a partial payment is made to a creditor by one who owes him both principal and annualrents, the payment is always imputed to extinguish, in the first place, the annualrents. Either in an arrestment of a moveable debt, or in an adjudication of a real one, any payment made by the debtor will be considered as made first out of the annualrents due by him, and the residue out of the principal debt due by him. If this is the rule in voluntary payments, and in payments on execution, payment by decree of a Court must, in the same manner, be deemed made to Lord Cassilis, first out of the annualrent, and the residue out of the principal sum.

Answered for the arresters, to the first objection:—The conveyance of the bond from Lord Cranston bears only to be in security, in so far as concerns the principal sum of L. 2000 Sterling, penalty, and annualrents that shall be due on that sum: It surrogates James Bogle in the right of Lord Cranston, in so far as allentary.

No 56. as concerns that sum ; and, on the payment of L. 2000 Sterling, annualrents, and penalty, the right and infeftment is to revert to Lord Cranston : There is no power given to Bogle to uplift more than the sum of L. 2000, annualrents and penalty due to him ; no obligation upon him to account for the remaining sums in the bond, which could not have been omitted, if a total assignation had been intended ; and as Bogle had a right in security only to the extent of L. 2000, so Lord Cranston still retained a right in the L. 400 which was over.

A conveyance in security divests not the granter ; it is no other than a pledge consistent with the right of property which remains with him, Stair, lib. 2. tit. 10. § 1. In a disposition of this kind, an order of redemption is not necessary to re-invest the proprietor ; and the disponer in it has still right to the superplus of the subject conveyed above the debt secured.

An adjudication may perhaps divest a debtor of the whole subject, because it adjudges the whole ; but the disposition in question cannot, because it conveys no more to Bogle than effects to the sums due to him.

Answered to the *second* objection : The reason of imputing payments *primo loco* to the extinction of the annualrents, is for the benefit of the original creditor, that he may not have his principal sum extinguished, which bears interest, and the bygone annualrents remaining as a dead stock ; but this reason applies not to the present case ; for the whole L. 820 of annualrents were accumulated into a principal sum, at the entry of the purchaser in the judicial sale, who gave bond for the whole price of the estate to the creditors upon it.

Again, *pleaded* for the arresters, in support of the manner of imputing Lord Cassilis's payment, which they contended for :

Where there is a catholic creditor having a double security upon different subjects, or upon different parts of the same subject, and secondary creditors having partial securities thereon, the catholic creditor cannot make an arbitrary use of his catholic right, to the prejudice of any of the secondary creditors ; but he is understood to draw proportionally out of all the subjects over which his security stretches, so as the subsequent creditors may be ranked in the same manner as they would have been independent of it. Here then Lord Cassilis having a security over two subjects, the principal sum and the annualrents, must draw his debt proportionally out of both.

Answered for the disponees : The fallacy of this argument lies in considering the principal sum and annualrent as two different subjects ; whereas Lord Cassilis had but one security, to wit, the heritable bond itself ; under which was comprehended the interests, which were no more than a part of it.

' THE LORDS, upon a report and hearing in presence, found, That the arrestments were a habile diligence to affect the annualrents due to Lord Cranston, and that Lord Cassilis must draw his payment proportionally out of the capital sum, and out of the annualrents due to Lord Cranston, and that the arresters were preferable on the annualrent after him.'

But thereafter, on a reclaiming petition from the disponees, and answers,

' THE LORDS preferred the disponees to the superplus of the debt, after payment of Lord Cassilis. And, on a reclaiming petition from the arresters and answers, adhered.'

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For the disponees, *Lockhart, &c.* For the arresters, *Ferguson, &c.* Clerk, *Home*.
J. Dalrymple. *Fac. Col. No 157. p. 235.*

1758. February 15.

MAJOR WILLIAM CUNINGHAM of Enterkine *against* WILLIAM WEMYSS,
 Writer in Edinburgh.

ROBERT LUDGATE in Coldingham, in 1745, disposed certain subjects, lying in the town of Coldingham, to Robert Robertson and others, his creditors, jointly, their heirs and assignees, under this provision, ' That the said lands shall be redeemable at any term betwixt and the term of Martinmas 1753 inclusive, upon premonition of sixty days, and payment making to them of a certain sum of money.'

No 57.
 Wadset sum
 consigned, after
 an order of
 redemption
 used, but before
 decret of
 declarator,
 found not
 arrestable.

In March 1751, Lieutenant-Colonel John Cuningham purchased this wadset-right from the said Robertson, &c. for a certain sum of money; and, of that date, they executed a conveyance of the subject in his favour, redeemable in terms of the disposition to them.

William Ludgate, son and heir to the said Robert Ludgate, the original reverfer, at the term of Martinmas 1753, duly used an order of redemption; and having taken a proper instrument against Colonel Cuningham for not receiving the money in terms of the clause of redemption, consigned the wadset-sum in the hands of one Matthew Craig.

Major William Cuningham being creditor to the said Colonel John Cuningham, arrested the consigned sum in the hands of the said Matthew Craig; and William Wemyss, writer in Edinburgh, another creditor of Colonel Cuningham's, used arrestment in the hands of the said Matthew Craig, and likewise in the hands of William Ludgate the consigner.

Major Cuningham being advised, that the above-mentioned arrestments would be ineffectual, as the sum still remained heritable, no declarator of redemption having been obtained, although a summons of declarator had been raised in January 1755, procured from Colonel Cuningham, in February 1755, a disposition to the wadset lands; and a competition having thereupon ensued upon a multiple-pounding raised by Craig, Major Cuningham contended, That the sum consigned not being moveable, could not be arrested; and that, therefore, he was preferable in virtue of his foresaid disposition from the Colonel; and offered to accept of the wadset-sum without the trouble of a declarator.

Pleaded for Mr Wemyss, the preferable arrester, A wadset-right is a mutual contract, by which the granter conveys an heritable subject, with this condition adjoined, That when he uses the order stipulated, he shall again return to his