

1715. February 22. BRIGADIER PRESTON *against* COLONEL ERSKINE.

No 27.

Creditors not bound to assign, when to their own prejudice.

BRIGADIER PRESTON, purchaser of the estate of Valleyfield, at a roup, gave in a petition to the Lords, representing, that he was preferable creditor, or had paid the whole price to the preferable creditors; and therefore craving up his bond, conform to the 6th act, Parliament 1695.

The Brigadier gave in a scheme of the decret of preference, and of the rights acquired by him to the debts preferred, whereby it did appear, that some debts preferred, to which the Brigadier had right, were preferable over the whole estate of Valleyfield. Other rights, which the Brigadier had also purchased, were preferable upon particular parts of the said estate, but did not affect the whole or any other part. And the Brigadier, in the scheme of the payment of the price, did pretend to exhaust the value of the particular lands of Valleyfield, with those rights that were found preferable over the whole estate.

Colonel Erskine objected, and *alleged*, That these debts that were preferable upon the whole estate ought to be taken off the whole head of the price, whereby the value of every particular part of the estate would be diminished proportionally; which was just in itself, and whereby Colonel Erskine would get a share of the price, and otherwise would be wholly excluded; because, by the Brigadier's scheme, he pretends to exhaust the value of the lands of Valleyfield entirely, by the sovereign rights that go over the whole estate, and leaves no fund to the Colonel, whose diligence affects the lands of Valleyfield. And again the Brigadier pretends to exhaust the price of the other parcels of the estate, by virtue of the preferable debts upon these particular parts to which he has right, and which parcels are not affected with Colonel Erskine's debts, whereby the Brigadier gets payment of all, and the Colonel wholly excluded; whereas creditors, by sovereign rights over all, affecting any particular part which stand affected with other less preferable diligences, the posterior creditors are entitled to obtain assignations to such sovereign rights, that they may recover out of one part of the estate what they lose in another.

It was *answered* for the Brigadier; That every creditor is allowed to make the best use he can of his debts and diligences for obtaining his payment, providing it be without emulation of his co-creditor; and therefore it is, that a creditor, having a sovereign right over all, cannot *in emulationem* burden any part, to the exclusion of a creditor who has a particular interest in that part, if the posterior creditor be willing to purge and take an assignation to the debt; but, if the preferable creditor upon the whole subject have also other rights upon parts of it, he will not be obliged to assign in his own prejudice, but with a quality that his assignation shall not be made use of to affect the separate subject upon which he hath other rights; for that would be directly to assign against himself. And that is directly the Brigadier's case; for, by some rights and diligences, he is preferable upon the whole subject; and other rights of his

do only affect particular parts. If he should take the value of the sovereign rights of the whole head, there would not remain a fund sufficient to pay his other debts affecting parts of the estate only. Whereas, by taking the value of his sovereign right out of such parts as are not affected by his debts, he operates his own payment of all, as far as the price goes. And if, by that method, the Colonel come to be excluded, the Brigadier is sorry the fund falls short. But it is his right to use his preference to the best advantage.

THE LORDS found the Brigadier might exhaust the price of any part of the estate by his sovereign rights affecting the whole; and that he might make the best use he could of his rights, providing the same were not acquired or made use of *in æmulationem* of the Colonel.

Fol. Dic. v. 1. p. 223. Dalrymple, No 140. p. 193.

* * * Bruce reports the same case :

THE Brigadier having purchased the lands of Valleyfield, Overtoun, Pitfouly, and others, as highest offerer at the roup, and given bond for the price, presents a bill craving his bond may be given up to him, because he had paid the price to the creditors conform to the decret of ranking. And having also given a scheme of the price and debts, Colonel Erskine, a creditor, gives in this objection against the same, viz. that the Brigadier, by the scheme, laid the whole preferable debts, so as to exhaust the price of Valleyfield, without taking any part of them out of the price of Overtoun and others, upon which these debts are also preferably ranked; and this to the Colonel's prejudice, who is ranked upon Valleyfield, after these preferable creditors, but is not ranked upon Overtoun, &c.

Answered for the Brigadier; That he may use his securities in the most profitable way for himself; nor does thereby any thing in emulation of the Colonel, but only uses his right in a warrantable way, and may draw his full payment out of Valleyfield, without any regard to the Colonel's debt; specially since otherwise the Brigadier would be cut off from the payment of these debts affecting the separate estate, which is untouched by the Colonel's diligence. Whereby it appears, that the Brigadier is not taking this method *in æmulationem*; nor can any creditor give rules to another how he is to use his diligence, since thereof he is *liber moderator et arbiter*.

Replied for the Colonel; That as these preferable debts were a general burden affecting the whole estate, so they affected not one part more than another, and therefore the different parts were, according to their value, to confer their proportions for discharging this common burden; and although the creditor might distress any one part for the whole, yet that did not alter the natural tye on the respective parts for conferring their shares to their joint mutual relief.

No 27. And, in such cases, very often our law, and the Lords practice, order assignations, after the example of the Roman *beneficium cedendarum actionum*.

Duplied for the Brigadier ; That no such assignation was ever ordained to be granted, where there was an evident prejudice thereby to the prior creditor, to the exclusion of his other rights ; as was decided in the ranking of the creditors of the same estate of Valleyfield, betwixt these same parties contending.

THE LORDS found, that the Brigadier may affect the lands of Valleyfield with the debts which are preferable on the whole subject exposed to roup, to the effect he may get payment of his other debts, affecting particular subjects, which he may use to his own best advantage, without emulation to Colonel Erskine.

Bruce, No 88. p. 105.

1716. July 25. SIR WILLIAM MENZIES *against* SIR JOHN CLERK.

No 28.
A preferable creditor can do no arbitrary deed to prefer one secondary creditor to another.

A DISPOSITION being granted by James Clerk, to his brother Sir John, of his lands of Wrights-houses, but qualified with a back-bond, obliging him to denude in favours of the cedent, so soon as he should relieve him of some debts, all mentioned in the bond in which he already stood engaged for him, and pay him such sums of money as he should happen to be resting to him thereafter, or for which he should be engaged. Some years thereafter, Sir John gets also an heritable bond for security of the same sums mentioned in the back-bond, and some others he then was engaged in for him ; and grants another back-bond, with a clause of reversion much of the tenor of the former, either of which rights he was to be at liberty to make use of as he thought fit, and then gets himself infest upon both securities in one day. After granting of which rights, but before infestment thereon, James Clerk became debtor to Sir William Menzies, whereupon he adjudged not only the lands, but the said back-bond and reversion competent to the common debtor, and stands infest, but posterior to Sir John's infestment ; and the Lords, in a competition, having ordained Sir John to denude in favours of Sir William upon his purging the above debts, and paying a certain sum in name of expenses, and Sir John having acquired some other debts after Sir William's adjudication, this question came under debate, viz. Whether Sir William should be obliged also to pay these latter debts, (whereupon adjudication had also followed), before Sir John were obliged to denude ?

And here it was *alleged* for Sir John Clerk ; *imo*, That the foresaid clause (all other sums which James Clerk should be resting to him thereafter) being an express quality and condition of the reversion, he could not be bound to denude till he were also paid of the said posterior debts. *2do*, Sir William having adjudged the back-bond and reversion competent to the common debtor, and