

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

thereby come in his place, he was consequently liable to all his prestations, *tantumquam utens jure auctoris*.

Answered for Sir William Menzies, to the *first*; That James Clerk having the right of reversion, and that right being carried from him by the creditors diligence, and thereby stood in their persons, and he denuded, that reversion could never afterwards be burdened without their consent; just as if a man should dispose the fee of lands, but with a faculty to burden, if that faculty were adjudged from him, he could never thereafter exercise it in prejudice of the adjudger: For although, before the act 1696, infestments of relief were valid for debts contracted after the date of the infestment, yet not for debts thereafter acquired voluntarily; and therefore the act takes only notice of debts contracted, not of those acquired; and the reason of the difference is, that, by borrowing, the reverser consents that the lands be further burdened, but the acquiring is only a deed of the creditors; and, if it were otherways, it were in the power of Sir John Clerk to alter the preference, and to make those debts, which were once posterior, to become preferable, which no diligence could prevent; whereas creditors, by inhibiting, can prevent further contracting. To the *2d*, That, if the creditors are in the same case with James Clerk, then they are in the same case he was in at the time they denuded him of the reversion by their diligences; and so no burden brought upon the reversion after their diligence can be effectual without their consent.

Replied for Sir John Clerk; *imo*, That it is not absurd Sir John should have it in his power to prefer one creditor to another, since, if he had not granted the back-bond to the common debtor, the competitor's author, the said competitor's diligence could never have affected the subject; besides, that there are many cases where debts, that are not so much as really secured, are yet preferable to other debts whereupon adjudication has followed, as particularly in the case of Sir John's own expenses, modified already in this cause, which are found to be a condition affecting the reversion, and that Sir John is not obliged to denude till these expenses be paid.

Duplied for Sir William Menzies; *imo*, That the expenses is quite another case, because particularly expressed in the back-bond, but not one word of debts afterwards to be acquired. *2do*, The expenses were a kind of accessory of the debt, and came in place of the penalties. *3tio*, The Lords have decided this matter already in several parallel cases; 17th July 1706, Sir Hugh Campbell against the Creditors of Park, *voce* PERSONAL AND REAL; and 10th January 1715, the Creditors of Hackburn competing. No 210, p. 1153.

THE LORDS found, That, after James Clerk's creditors had adjudged any right competent to him, Sir John Clerk could not acquire any right due by him in prejudice of the adjudgers.'

For Sir John Clerk, Gray.

Alt. Robert Dundas.

Clerk, Sir James Justice.

Fol. Dic. v. 1. p. 222. Bruce, No 24. p. 31.