

26th June 1752, The Lords after long reasoning altered, and found these new bonds cannot be ranked upon these estates, as the old bonds would have been.

No. 13. 1753, July 27. CREDITORS of CAMPBELL *against* EARL of LAUDERDALE.

NOVEMBER 1713 the then Earl of Lauderdale sold Glassery to Sir James Campbell, but being advised not to represent his predecessors, the method devised was, that Sir James should purchase certain diligences by adjudication and other debts affecting the lands, after the said debts should be adjusted between the Earl and the creditors; and these rights being conveyed to Sir James, thereby to have right to the lands for ever, without being quarrelled by the Earl, his heirs and successors,—who was also to cause John Corse renounce some adjudications that he had right to, but truly in trust to the Earl, and to cause the Countess his mother and the Countess his Lady renounce their infestments. The price of the lands was ascertained, and Sir James was to pay the half at Whitsunday 1714, which was declared the term of his entry to the lands, and was to give security for payment of the other half at Martinmas 1715; and if the price exceeded the sum to be paid to the creditors, whose rights Sir James was to purchase, then the surplus was to be applied for payment of the other creditors to be named by the Earl, or to be paid to the Earl himself,—and a contract was executed between them in these terms.—19th June 1714 The Earl granted Sir James an obligation, bearing that Sir James had acquired rights and diligences to the full value of these lands,—therefore he obliged him, his heirs, &c. never to quarrel or impugn directly or indirectly the rights and diligences acquired by him, or that he should acquire, for securing to him the said lands, but that he and his heirs may enjoy them for ever. Notwithstanding this last deed there still remained a balance of the price unpaid, as appeared by Sir James's creditors many years after; but it did not appear what that balance was. In the ranking of Sir James's creditors, Earl of Lauderdale craved to be preferred upon the price.—Answered: By the law of Scotland a seller after he is denuded has no security or hypothec for the price, and the Earl was denuded by the diligences acquired by Sir James and the Earl's obligation never to quarrel them, which was equal to a ratification.—Answered: John Corse's adjudications are preferable to the diligences acquired by Sir James, and although on payment of the price the Earl was obliged to cause Corse renounce them, yet he cannot be obliged to perform his part of the contract till Sir James or his creditors perform theirs; and quoted our decision 5th December 1746, Graham against Creditors of Trail, (No. 7. *hujus tituli*.)—Answered: That that decision cannot apply: The question there was, Whether Trail's back-bond was not a good defence against Graham's obligation of warrandice, which doubtless it was, or 2dly, Whether a personal disposition by Graham's wife with his consent and taking burden on him for his wife, whereon no infestment either did or could follow, would carry two infestments of annualrent afterwards purchased by Graham as *jura supervenientia auctori*, and which he purchased agreeable to the covenant of parties, whereby the purchaser was to retain part of the price till the incumbrances were purged; and the Court there thought that an infestment of annualrent could not accresce to a personal disposition, which does not apply to this case. The creditors do not

need the contract 1713. The obligation 1714 not to quarrel Sir James's rights was an effectual renunciation of any adjudication in his own or in Corse's person. However the Lords found the Earl preferable for the balance yet due of the price—*me quidem renitente*.

No. 14. 1753, Nov. 22. RANKING of the CREDITORS of BONJEDWARD.

CRANSTON was creditor on the estate of Bonjedward by an heritable bond in L.2400 sterling principal, and L.860 sterling of annualrents, and when it was in this state the estate was sold. The estate was sold at the instance of the apparent-heir on the act 1695, and the purchaser granted bond in common form to pay to the apparent-heir and the creditors of the defunct as they should be preferred. Then Ainslie and other creditors of Lord Cranston arrested in the purchasers hands,—and I should have noticed that before the sale Cranston had conveyed the whole debt to Mr Bogle for security and payment of L.2000 sterling, which is now in Earl of Cassillis and he infest,—and after the arrestments Lord Cranston conveyed the same debt to the Master of Ross and Mr Wauchope for security and relief of certain engagements for L.600 sterling which they paid. The Earl of Cassillis was unquestionably preferable to both the other classes on both the principal and annualrents due Lord Cranston;—but the arresters craved preference on the whole annualrents due Lord Cranston at the date of their arrestment, which were no less than L.700, in which case Lord Cassillis's debt, principal and annualrents, would exhaust the whole principal sum due to Lord Cranston, and leave nothing or next to nothing to the Master of Ross and Mr Wauchope;—and alleged that Lord Cassillis could not emulously take his payment out of the annualrents affected by them, whereby to give a preference to the Master of Ross and Mr Wauchope, whose infestment was posterior to their arrestment, or if he did, that he must in so far assign his infestment to them. Mr Craigie again for the Master of Ross and Mr Wauchope contended that the arrestment was void, first, being made in the hands of the purchaser, who was not debtor to Lord Cranston but to the apparent-heir, *2do*, for that Lord Cranston after granting Lord Cassillis's infestment had nothing in him but a right of reversion, which is not arrestable, and therefore also would not affect the annualrents. The Court was much divided: Some thought the arrestment not a habile diligence to affect the annualrents,—but I thought it was, and the purchaser by his purchase became debtor to all the creditors as they should be ranked, (especially after he had given his bond and caution in these terms,) though in sales on the act 1695, (in which the regulation appointing the ranking to precede the sale does not take place,) the quantity does not appear till the ranking, and that in this there is no difference betwixt sales on the act 1695 and those on the act 1681, to which the act 1695 has a plain reference; and therefore though it is not expressed, all the creditors must be called in sales on the act 1695 as well as in sales on the act 1681, those in possession in common form, and all others edictally, and in practice they are commonly then ranked, even personal creditors, and that ranking is only declaratory of the preference they are entitled to by law; and as to the second, that if there were as many annualrents due Lord Cranston as would pay both Lord Cassillis and the arresters, I had no doubt that these annualrents would be carried by the arrestments, and therefore the diligence was habile,—and that Lord Cranston had a further right than that of