

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

the reversion, for he had right to the whole debt due by Bonjedward that should be over paying Lord Cassillis. At last we agreed to find without a vote, that the arrestment was a habile diligence to affect annualrents due to Lord Cranston their debtor. Bnt we were more divided, Whether any of the annualrents in this case were affected?—and what determined me and others to think that they were not, was that Lord Cassillis was undoubtedly preferable, and must draw in the first place; that it was not in his power and Bonjedward's both together, the one to give and the other to take his payment out of the capital, and leave the annualrents resting unpaid; and if it were so expressed in the receipt or discharge of the money, the law would repudiate it, and impute the payment first to the annualrents and next to the capital, and all that remains would be capital,—so that the security given Lord Cassillis is in effect the same as if it had expressly conveyed first the annualrents and next the principal sum;—that if his security were in two different subjects or estates, the one supposed to be real and the other personal, there indeed he has his choice out of what estate he shall take his payment, and if both or either of them is affected by or conveyed to another creditor, he cannot emulously make that choice, to cut out that creditor, or to prefer one to another, or if he does, must assign,—because the creditor disappointed by that choice could have paid him with his own money, and compelled him to assign, and equity will save the expense of that circuit, and oblige him directly to assign. But here Earl of Cassillis has no choice,—the law determines it,—and should he assign, and the arresters compete both on that assignation and their arrestments, as they must do to cut out the Master of Ross, the effect would be the same,—for on Lord Cassillis's debt they must be preferred first on the annualrents and next on the principal sum, whereby the remaining sum would be all capital not arrestable. Another question was, If the arrestment could draw any part, then how much? or in other words, Whether Earl of Cassillis behoved to draw his whole principal and annualrent out of the capital due Cranston first, and so far as it was short of his debt to draw the rents out of the annualrents, so as to leave as many annualrents as possible for the arresters? or 2dly, If he should draw only his annualrents out of annualrents, and his capital out of the capital, whereby L.400 capital would remain for the Master of Ross not arrestable? or 3tio, If he should draw his whole principal and annualrents proportionally out of the principal due Lord Cranston, and out of the annualrents thereof proper according to the proportion they bore to one another? As the Court was divided on both points, the question first was, Whether in this case the arresters were entitled to draw any of the annualrents? and it carried by Lord Minto's vote, who was in the chair, that they were entitled to draw.—*Con.* were Milton, Strichen, Kilkerran, Shewalton, *et ego.*—*Pro* were Drummore, Kames, Justice-Clerk, Murkle, Woodhall.—Then on the vote it carried by a great majority, that Cassillis should draw proportionally of both. I suppose the interlocutor will find the arrestment a habile diligence that Earl of Cassillis should draw proportionally out of both principal and annualrents. The arresters drew the remaining annualrents, and Master of Ross and Wauchope the remaining capital.