

these lands, and his mother and Lady to renounce their infestments; Sir James to pay the half of the agreed price at Whitsunday 1714, the time of his entry, and to give security for the other half, payable at Martinmas 1715, and the surplus of the price over purchasing those debts to be applied for payment of other creditors to be named by the Earl, or to be paid to himself; and 9th June 1714, the Earl granted an obligation, bearing, that Sir James had purchased debts to the full value of the lands, therefore obliging him never to quarrel any rights acquired by him for securing to him the said lands, but that he and his heirs shall enjoy them forever. It appeared by Sir James's letters after this deed that a balance of the price was still resting; and in the ranking and sale of Sir James's estate this Earl claimed preference on these lands for that balance, and founded on Corse's adjudications as preferable. Answered, That by the law of Scotland the seller has no hypothec for the price, that the Earl was as much denuded as ever he was intended to be when the price was paid. Replied, Corse's adjudications are preferable, and not renounced, and the Earl is not bound to perform the contract 1713 to Sir James till he performs his part, and quoted December 5, 1746, Graham against Creditors of Trail, No. 7. *supra*. Duplied, The creditors have no use for the contract 1713, and the obligation 1714 is a sufficient renunciation of all rights in the Earl's or his trustee's person. The Lords found the Earl preferable for the balance yet resting of the price. (See DICT. No. 71. p. 2832. No. 33. p. 14129. No. 34. p. 14131.)

1753. November 22. RANKING of the CREDITORS of BONJEDWARD.

LORD CRANSTON was creditor on the estate of Bonjedward, by an heritable bond and infestment, in L.2400 sterling and many annualrents, and conveyed the whole to Mr Boyle for security of L.2000 sterling; and he also was infest, which L.2000 is now in the person of the Earl of Cassillis. When the debt was in this state the lands were sold at the instance of the apparent heir on the act 1695, and the purchaser gave security to pay the price to the apparent heir and creditors as they should be preferred. Then Ainslie and others, personal creditors of Lord Cranston arrested in the purchaser's hands, after which Lord Cranston made over the debt, or what should remain after Earl of Cassillis's payment, for security and relief of L.600 sterling, wherein the Master of Ross and Mr Wauchope were bound for him, and which they were afterwards obliged to pay. The competition

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was touching this L.2400 and interest thereon. The Earl of Cassillis was clearly preferable to both the other parties. Ainslie and the other personal creditors craved to be preferred on the annualrents resting Lord Cranston at the date of their arrestments, and insisted that the Earl of Cassillis could not take his payment out of the annualrents *in æmulationem* of them ; or if he did that, he must assign to them so much of his debt ; as when one has a preferable infestment over two tenements, and competes with a posterior infestment of property, or in security in one of them. The Master of Ross alleged, that the arrestments were not a habile diligence to affect even the annualrents due to Lord Cranston, for that the purchaser was not debtor to Lord Cranston, but only to the apparent heir, and they were not creditors to the apparent heir but to Lord Cranston. *2do*, That Lord Cranston was denuded of the debt both principal and annualrents to Mr Boyle, now to Earl of Cassillis, and had nothing remaining but the reversion, which was not arrestable. *3tio*, That supposing arrestment a habile diligence, yet nothing did or could remain after payment of the Earl of Cassillis, that could be the subject of arrestment ; for this was not like an infestment in two different subjects distinct and independent of one another, but one subject and its accessory ; viz. the principal sum and annualrents of that sum ; and the Earl of Cassillis could not, if he were willing, take his payment out of the capital and leave one shilling of annualrents resting ; nay, Bonjedward and he could not by mutual concert do so ; for whether they would or would not, the law would apply the payments first to the annualrents, and only after extinguishing them to the capital ; so that the conveyance to Mr Boyle is of the the same import as if it had conveyed in the first place the annualrents, and in the next place the capital, for so the law applies all payments ; and therefore the Earl of Cassillis does not here take his payment out of the annualrents *in æmulationem*, for the law will not permit him to do otherwise ; and as he must draw his payment first before any of the other parties can draw theirs, nothing can remain after his payment but capital, which cannot be the subject of arrestment. The Court was pretty much divided as to all the points, but at last agreed without a vote, to find the arrestment a habile diligence to affect annualrents ; for we thought that the purchaser was debtor to all the creditors as well as the apparent heir, as they should be ranked. It is for their payment that the estate is sold, and the practice is to call all that are known ; and the purchaser's bond was in these terms ; and we thought that Lord Cranston had a further interest in the debt than a power to redeem. The Earl of Cassillis's debt was extinguishable by payment or intromission, and then Lord Cranston would have the sole right ; and if the annualrents due to Lord Cranston had been more than would have paid

the Earl of Cassillis's whole debt, there would have been little doubt that the surplus annualrents might be affected by arrestment. But we were still more divided as to the last point. Some thought (*inter quos ego*) that the Earl of Cassillis could not take his payment out of the capital while any part of annualrents were due to Lord Cranston, and that he had no choice, and this was not taking his payment *in æmulationem* of another, no more than if the conveyance had been first of annualrent and next of the capital. Others thought that he should draw his annualrents out of the annualrents due to Lord Cranston, and his capital out of the capital; and others again thought that he should draw his whole aggregate debt and annualrents out of the capital due to Lord Cranston, and out of the annualrent due to him proportionally, according to the proportion that these two bore to one another. Therefore the first question put was, Whether in this case the creditors arresters were entitled to draw any part of the annualrents due to Lord Cranston? and it carried by the vote of the President for the week, (Lord Minto) that they were. Then it carried by a great majority, that Cassillis should draw *primo loco* proportionally out of both, and that the arresters should draw *secundo loco* the annualrents, and the Master of Ross *tertio loco*, the capital. But the question is still under review by bill and answers. (See the result Dict. No. 56. p. 724.)

See Creditors of Thomson, 25th July 1739, *voce* CLAUSE.

See Ogilvie against Aberdeen's Creditors, 13th November 1747, *voce* BANKRUPT.

See Creditors of Sir John Douglas, 28th November 1748, *voce* ANNUAL-RENT.

See Gibson against Murray, 9th November 1748, *voce* ARRESTMENT.

See NOTES.