

1753. November 28. & 1755. February 4.

Competition of the CREDITORS of BENJEDWARD.

No 17.

Competition of creditors upon the price of a bankrupt estate, relative to arrears of interest of an heritable debt where there was one catholic creditor, and two secondary.

DOUGLAS of Benjedward, April 1739, granted an heritable bond to Lord Cranston for the sum of L. 2400 Sterling, which the same year was conveyed by his Lordship to the Earl of Cassillis, for security of the sum of L. 2000 ; and, upon this conveyance, infestment was exped. In the year 1751, the estate of Benjedward was sold by public roup, upon a process brought by the apparent heir ; and the Lord Cranston was preferred, in the *first* place, for the said principal sum of L. 2400 Sterling, and for the interest due thereon, extending, at Whitsunday 1751, to L. 860 Sterling. This sum of bygone interest was arrested in the purchaser's hands by some of Lord Cranston's personal creditors ; and, after the date of the arrestments, his Lordship conveyed the heritable bond, with the arrears of interest, to the Master of Ross, for security to him of a debt of L. 600. The purchaser brought all the creditors into the Court by a multiple-poining, in order to have their preferences adjusted. This case created a good deal of struggle. But, after a hearing in presence, it was found to resolve into the simple case of a catholic creditor over two subjects, and two secondary creditors, one upon each subject. The principal sum, and the bygone interest, contained in the bond due to Lord Cranston, were considered as the two subjects, the former affected by the Master of Ross, the latter by the arresters ; and the Earl of Cassillis was the catholic creditor, preferable upon both subjects. After attaining this just view of the matter, the judgment was easy, namely, that the scheme of division should be so adjusted, as that the debt due to Lord Cassillis was to be taken out of the principal sum, and out of the interest proportionally ; which left a residue of the principal to be drawn by the Master of Ross, and a residue of the interest to be drawn by the arresters.

The opinion of Lord Elchies was, That whatever payments are drawn by Lord Cassillis, must impute, in the *first* place, to extinguish the interest due upon the heritable bond ; and that whatever residue is over, after Lord Cassillis draws the sum due to him, must be a part of the principal to be drawn by the Master of Ross. I answered, That this might hold by the old form of an annualrent-right, where infestment was given for security of the interest solely ; and consequently, that whatever was levied by a poining of the ground must impute into the interest ; but that the present form of an annualrent-right was different, being a security for the principal as well as the interest. Hence, when the rents are levied by the poining of the ground, there is nothing in the nature of the right which bars an application either to the principal or interest, as the creditor pleases. It is true, that indefinite intromission, as well as indefinite payment, is applied first to the interest in a question with the debtor ; but that this proceeds upon a principle of equity for which there is

no place when the debtor is out of the question by his bankruptcy. When this is the case, another principle of equity takes place, that the catholic creditor must act impartially, and forbear to benefit one secondary creditor by oppressing another.

No 17.

The following objection touched some of the Judges. Laying aside the Master of Ross, the arresters would be secure of their payment; for if the Earl chose to levy the interest for his payment, they would be entitled to demand from him an assignment to the principal sum. And it was thought that the arresters could not be hurt by the conveyance to the Master of Ross of the principal sum, after their arrestments were laid on. But the answer to this was obvious, that the security taken by the Master of Ross, in the course of commerce, was lawful; and that, in adjusting matters betwixt him and the arresters, with regard to the being entitled to an assignation, priority is no plea, they being *in pari casu* with regard to every equitable consideration; that is, being equally *certantes de damno evitando*, they are equally entitled to an assignation from the catholic creditor; their claim being founded upon equity, and not upon strict law.

This case was reviewed upon a petition for the Master of Ross, who *pleaded* a new point, which I thought without foundation, viz. That Lord Cranston's infefiment of annualrent was totally conveyed to Lord Cassillis, and that nothing remained with the disponer but a personal reversion, which could not be affected by arrestment. The Court, 4th February 1755, altered and preferred the Master of Ross to the arresters; whether upon this new point, or upon what was formerly pleaded against the arrestments, as informally laid on in the hands of the purchaser of the estate, I cannot take upon me to say. I can only say, that there was no intention to alter the above interlocutor, which is certainly well founded, supposing the arrestments effectual to carry the bygone interest of the heritable bond. But the arresters having afterwards reclaimed, the Court, upon their petition, with answers for the Master of Ross, adhered, 9th July 1755. In advising this petition and answers, the Court lost sight altogether of the principles of equity above set forth. They adhered to their last interlocutor, upon this footing, That Cassillis was bound in law to take payment of the interest *primo loco*; that this was his duty, even after the arrestments were laid on; and, therefore, that Cassillis having done nothing arbitrarily, was not bound to grant an assignation to the arresters; nor could he justly grant it.

Sel. Dec. No 59. p. 77.

1760. August 7. Younger Children of HENDERSON *against* CREDITORS.

No 18.

A RESERVED faculty to burden with a certain sum, in a disposition of lands by a father to his eldest son, being exercised afterwards by way of legacy or