DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

HENRY HOME, LORD KAMES.

1734. *February* 16. The Earls of LOUDON and GLASGOW *contra* Lord ROSS.

IN a ranking of the creditors of Galston, a question occurred among the adjudgers; to clear which, the case shall be stated in the simplest terms. Suppose two adjudgers coming in *pari passu* upon a fund in value 12; and suppose the accumulated sum in each adjudication to be 12, but that the adjudger A. has recovered half of his accumulate sum out of a separate subject belonging to the debtor. In what proportion must they divide the land in competition, or the price of the land when sold? Will the two adjudgers draw equally, in which case A. will draw 6, his whole remaining claim, and B. 6, the half of his claim? Or will they divide the subject in proportion to their claims presently subsisting, viz. in proportion of 6 to 12; by which method A. will draw but 4, and B. 8? In favour of the latter scheme it was pleaded, that A.'s adjudication, by the payment he recovered out of the separate subject, was extinguished as to the one half; and in this competition can draw no more than if it had been only led for the debt 6. On the other hand, it was contended, that the former method is founded upon the very nature of a right in security; and the train of reasoning urged in support of that method is as follows:

Suppose I obtain from my debtor a preferable security over his whole estate for payment of L1000, what is the nature of this right? In the first place, it is plain that as every inch of the estate is a security for the whole debt, so every shilling of the debt is secured upon the whole estate; and that accordingly the last shilling

remaining unpaid is as amply secured as the first shilling. Hence it follows, that the security does not lessen as the debt lessens, but remains the same, constant and invariable over the whole estate, till the last shilling be paid. Another creditor, ranked *secundo loco*, cannot touch a farthing of the rents, nor of the price, till the preferable debt be wholly extinguished.

Suppose, in the next place, an estate disponed to A. and B. *pro indiviso*, for security and payment to each of L1000. Each of these creditors is entitled to draw the half of what is recovered out of that estate, the half of the rents and the half of the price, so long as a shilling remains due to them; which, in other words, is saying that A. is preferable upon the one half, and B. upon the other. For a man is not entitled to draw but so far as his right is exclusive; or, which is the same, is preferable: but a preference upon the half of a subject disponed *pro indiviso*, cannot take effect but by an actual division of the subject, or of the rents, or of the price; and this division being made, the result is the same as if the one half were disponed to A. and the other half to B. *pro diviso*. Thus a security *pro indiviso* to two creditors, comes in effect to be the same with disponing to each a half; which resolving into the first case mentioned, must be governed by the same principles, viz. that each is preferable upon his own half, till he recover the last shilling of his debt; and that neither can encroach upon the other, till that last shilling be recovered.

The case of two adjudgers ranked *pari passu*, is precisely similar to that of two creditors, to whom an estate is disponed *pro indiviso*, for their security and payment. The adjudger A. is preferable upon the one half, and is entitled to draw his last shilling out of it before B. the other adjudger, can come in for any share; and B. is in the same condition with regard to his half. Hence it clearly follows, that whatever share of his debt either of the adjudgers may have received out of a separate fund, he is entitled to recover the remainder out of his own half; excluding totally the other adjudger till that remainder be fully paid up.

The mistake of those who espouse the latter scheme, lies in confounding two things that ought to be distinguished. Partial payment, they say, cuts down the adjudication *pro tanto*. If they mean the debt in the adjudication, they are in the right, but if they mean the adjudication, or the real right by which the debt is secured, they are undoubtedly in the wrong. The real right acquired by adjudging is not a fluctuating security, lessening by degrees, and becoming narrower and narrower in proportion as the sum secured is lessened by partial payments. On the contrary, the real security once established, continues invariably the same, not less extensive for drawing the last moiety than it was originally when the security was constituted.

It is true, indeed, that in a competition of adjudgers ranked *pari passu*, a payment made before leading an adjudication, must have an effect to limit the real security. For though these co-adjudgers, whether their debts be great or small, are preferable upon the whole subjects adjudged, and are entitled to draw the last shilling of their debts, before admitting to any share the extraneous creditors who are ranked *secundo loco*; yet, in a competition among the co-adjudgers themselves, each draws in proportion to the extent of the sum adjudged for; which is, in other words, saying, that his real security is commensurate with that sum. But though the real security by adjudication be commensurate with the debt ad-

judged for, yet the real right, once established to that extent, continues unvariably the same, till the last farthing be recovered.

Found, that the adjudger, who had recovered the partial payment out of the debtor's separate funds, ought, notwithstanding, to be ranked for the whole sum in his adjudication, *pari passu* with the other adjudgers, in order to recover payment of the remainder.

Remarkable Decisions, Vol. II. No. 6. page 11.

1740. *December.* LAING *against* NICOL.

A decree of furthcoming in absence, being suspended, the charger, to instruct the debt due by the arrestee to the common debtor, produced a bond which the arrestee had granted to a third party, with a general disposition of moveables by the third party to the common debtor.

The objection to this progress was, that a general disposition of moveables without confirmation, is not a vesting right, more than a disposition of land without infeftment: that the subject still remained *in hæreditate jacente* of the disponer, insomuch, that a creditor of his confirming, would exclude the general disponee; that, therefore, the arrestment laid in the hands of a person who owed nothing to the common debtor, but to his cedent, could not be effectual. *2do*, Confirmation being *actus legitimus*, no person is entitled to confirm but he alone to whom the subject belongs. Creditors have no power to confirm their debtors: if this could be, there had been no occasion for the Act 1621, inventing the charge against an heir at the instance of his proper creditors.

What most difficulted the judges was, that the arrester could not confirm a disposition to which he had no right. Precedents of the Commissary Court were appointed to be searched. None were found; and there the matter was suffered to rest.

The first point also seems well founded. A general disposition establishes no right, till it be completed by confirmation: and a decree of furthcoming, cannot oblige the arrestee to make payment to the arrester, when he is not bound to make payment to the common debtor. And, if it be demanded, by what sort of diligence then is a general assignation of moveables to be carried, where there is no confirmation; the answer is, that it must be carried by a process of adjudication, which is the legal remedy where others fail. Nor is it a novelty, that moveable subjects should be affected by adjudication. Where the debtor in a moveable bond dies, without any to represent him, there can be no arrestment, because there is no person against whom it can be executed: the only remedy is to adjudge the bond from the creditor, which will entitle the adjudger to prosecute diligence, as the original creditor himself might have done. In the same manner, where a general assignee is not confirmed, his creditors cannot poind the goods contained in the general assignation, because these goods are not his before confirmation: as little can there be a decreee of furthcoming; and so the only remedy is a legal conveyance of the general assignation itself, by adjudication.

Remarkable Decisions, Vol. II. No. 17. *page* 31.