

S E C T. V.

Collateral Security.—Novation.—Partial Renunciation of a Security.

No 47.

A co-obligant in a bond is entitled to demand from the creditor a conveyance to any collateral security which the other co-obligant has granted to the creditor.

1752. June 9.

Mr ROBERT BLACKWOOD of Pitreavie, Advocate, *against* The CREDITORS of the deceased Sir ROBERT MILN of Barnton, and of Sir GEORGE HAMILTON of Tulliallan, and of Sir ARCHIBALD FLEMING of Farm.

In 1683, Richard Lord Maitland granted an infestment of annualrent upon the estate of Didhope, corresponding to the principal sum of L. 11,000 Scots, in favour of Robert Miln of Barnton.

There having been sundry transactions betwixt the said Sir Robert Miln and Sir George Hamilton, in 1697, they entered into a submission; and, by decret-arbitral, Sir Robert was found debtor to Sir George in a considerable sum, and was decerned to pay the same, or to assign debts to the extent. In implementation of this decret-arbitral, Sir Robert conveyed sundry debts and subjects to Sir George, and, amongst others, the said infestment of annualrent upon the lands of Didhope.

In 1699, Sir George Hamilton conveyed the said infestment of annualrent, together with other subjects, in favour of certain of his creditors; but, as the subjects conveyed exceeded the debts, the creditors were taken bound to be accountable for any surplus that should be intromitted with by them, or to reprocess Sir George after they had received payment of their debts. And, in 1709, these creditors were infest in the said annualrent.

Sir Archibald Fleming of Farm, son-in-law to Sir George Hamilton, being engaged as cautioner for him in sundry debts, obtained for his security from Sir George, in 1702, an heritable bond of relief, and a disposition of the estate of Tulliallan, and of the foresaid infestment of annualrent upon the lands of Didhope. Upon this right, Sir Archibald expedite his infestment in the lands of Tulliallan said year 1702, and in the said annualrent in 1706. The instrument of sasine upon the annualrent, in a few days after its date, was brought to the general register of sasines to be recorded. But it so happened; that Sir Archibald, or his doers, neglected to get it back from the keeper of the register.

In 1704, the said Sir George Hamilton granted bond to Sir Robert Blackwood for the sum of L. 7,500 Scots; and for his further security, conveyed to him certain debts due to Sir George; and in 1705, the said Sir George and Sir Archibald Fleming granted another bond to Sir Robert, narrating the former, and obliging themselves to pay the sums therein contained.

Upon this last mentioned bond in 1716, Mr Robert Blackwood, son to the said Sir Robert, obtained a decret of constitution against Sir William Fleming, apparent heir to the said Sir Archibald his father; and, upon a special charge to enter heir, adjudged from Sir William the foresaid heritable bond of relief and disposition granted by Sir George Hamilton to Sir Archibald Fleming; and up-

on this adjudication, Mr Blackwood expedite a charter under the Great Seal in 1718, and was thereupon infeft in the lands of Tulliallan, and such other subjects, contained in his adjudication, as held of the Crown.

In 1734, a ranking and sale of the lands of Didhope was brought at the instance of a creditor of Richard Lord Maitland; in which process, compearance was made for the Creditors of Sir George Hamilton, as having right to the foresaid infeftment of annualrent by the deed 1699, and infeftment thereon in 1709; and for Mr Blackwood, as having right thereto in virtue of the conveyance thereof by Sir George to Sir Archibald Fleming in 1702, and of Mr Blackwood's adjudication thereof above mentioned. And as, by reason of the sasines being neglected to be taken back from the recorders, as above mentioned, it was not then known that Sir Archibald had been infeft in the said annualrent-right in 1706, Sir George Hamilton's Creditors were preferred by virtue of their infeftment in 1709; and as their debts exceeded the value of the subject, no other creditor was ranked thereon: The decret of ranking was extracted in 1743, and the lands of Didhope sold.

After this, Mr Blackwood discovered in the register Sir Archibald Fleming's sasine of the foresaid annualrent out of Didhope, taken in 1706, and brought a process of reduction of the decret of ranking, the price of the lands being still *in medio*; and objected to the process of ranking, that it had been raised in the name of a person who was dead before raising thereof. 'THE LORDS, 3d January 1749, sustained the reasons of reduction so far as to entitle Mr Blackwood to be heard to dispute upon his infeftment, notwithstanding of the extracted decret of ranking, and his compearing and competing therein.'

Mr Blackwood being thus admitted, several particular objections were made to the preference claimed by him. And, 1st, it was *objected* by the Creditors of Sir Robert Miln, That, in the year 1697, Sir Robert Miln granted thirteen separate conveyances of his land-estate and heritable debts, and a general disposition of his whole personal estate in favour of Sir George Hamilton: That these were equal to a disposition *omnium bonorum*; and, as Sir Robert was thereby rendered insolvent, these conveyances, (and particularly this conveyance of the annualrent-right) were reducible at the instance of his prior creditors at common law, independent of the statute 1621, unless Mr Blackwood (who derives right to the said infeftment of annualrent through Sir George Hamilton) will prove that Sir Robert had other funds sufficient to satisfy his creditors.

Answered for Mr Blackwood, That he is not obliged, after so great a lapse of time, to bring a proof of Sir Robert Miln's solvency, or separate funds.

2dly, The conveyances were not voluntary, but in implement of a decret-arbitral.

'THE LORDS repelled the objection.'

Thomas Boyes and Douglas of Garvat, creditors of Sir Archibald Fleming, *objected* to the preference claimed by Mr Blackwood, that as Sir George Hamilton was the debtor, in the original bond, to Sir Robert Blackwood, and that Sir Archibald Fleming became bound in a bond of corroboration, it was evi-

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dent Sir Archibald was only cautioner, and therefore free, by the septennial prescription, introduced by the 5th act of Parl. 1695.

Answered, That the statute is a correctory law, and therefore ought to be, and always has been, strictly interpreted, and has not been extended beyond the words thereof; and the present obligation does not fall under the words of it; for there is no clause of relief in the bond, nor bond of relief intimated to the creditor at receiving of the bond; but both obligants are bound conjunctly and severally, and are equally principal debtors.

‘THE LORDS repelled the objection.’

The said Thomas Boyes and Douglas of Garvat next *insisted*, That though Sir Archibald Fleming was not found entitled to the benefit of the septennial prescription; yet it was evident Sir George Hamilton was the original debtor to Sir Robert Blackwood; and that Sir Archibald, who became bound in the bond of corroboration, was only cautioner; and therefore, would have been entitled, in point of right, upon payment of the debt, to have demanded a conveyance from Mr Blackwood, of the debts assigned by Sir George to Sir Robert Blackwood, in security of the debt due to Sir Robert; from which it follows, that the diligence against Sir Archibald’s estate cannot be carried into execution, to his creditor’s prejudice, unless Mr Blackwood assigned to them the collateral securities granted by Sir George to Sir Robert Blackwood.

Answered for Mr Blackwood, That cautioners are entitled to demand from the creditor an assignation to collateral securities, upon this principle, that cautioners are only *subsidiarie* liable, after the principal debtor and his estate are discussed; and therefore the creditor cannot, to the cautioner’s prejudice, give up any security he has on the debtor’s estate. But the case is different with respect to co-obligants, who are bound conjunctly and severally, as Sir George and Sir Archibald are; for both of them are considered as principal debtors, and have not the benefit of discussion.

‘THE LORDS found it competent to Thomas Boyes and Douglas of Garvat, as creditors to Sir Archibald Fleming, to insist, that if Mr Blackwood should recover payment out of the annualrent-right, he ought to convey to them any collateral securities which were given to Sir Robert Blackwood by Sir George Hamilton.’

The said Thomas Boyes, as creditor to Sir George Hamilton and Sir Archibald Fleming, claimed to be preferred to Mr Blackwood, upon the said annualrent-right, for the following reasons, viz. That he had, upon Sir George and Sir Archibald’s joint bond, led an adjudication against them in 1709, particularly adjudging from Sir Archibald the disposition of relief granted by Sir George to him; and, upon this adjudication, Mr Boyes expedite a charter in 1747, and was infeft in the said annualrent; and, as his adjudication was long prior to Mr Blackwood’s he insisted to be preferred; and also *objected*, that Mr Blackwood’s adjudication was void and null, as it proceeded upon a special charge against Sir William Fleming, to enter heir to his father Sir Archibald. And in the special charge,

neither the said annualrent nor the lands are contained ; but the letters of special charge still remain blank ; also Mr Blackwood's charter of adjudication was void, because it is from the Crown, though the annualrent holds of a subject ; and the sasine thereon was void, because not taken on the lands of Didhope, out of which the annualrent is upliftable, but is taken upon the lands of Tulliallan, with which this annualrent has not the least connection.

Mr Blackwood made no answer to these objections ; but *alleged*, That Mr Boyes's adjudication did not carry the said annualrent-right ; for the adjudication is led both against Sir George Hamilton and Sir Archibald Fleming, and adjudges both their estates separately, and adjudges this annualrent as belonging to Sir George ; and then it proceeds to adjudge several lands and subjects belonging to Sir Archibald ; and, among others, ' an heritable bond, disposition, or other right of relief, of what debts he stood bound for the said Sir George upon the foresaid lands and barony of Tulliallan.' Then there follows the usual general clause : ' Together with all and sundry reversions, bonds, &c. and all other rights, &c. made and granted in favours of the said Sir George and Sir Archibald, of and concerning the lands, baronies, &c.' above mentioned, ' and any annualrent or yearly duty to be uplifted forth of the same.' And Mr Blackwood *contended*, That the bond of relief adjudged from Sir Archibald is specially limited to be upon the lands of Tulliallan ; and that the general clause could not be so explained, as to carry subjects as belonging to Sir Archibald, which, by former clauses, were described as belonging to Sir George ; but must be explained *applicando singula singulis*, to adjudge from Sir George all right competent to him, of and concerning the subjects specially adjudged from him, and the same way with regard to Sir Archibald.

Answered for Mr Boyes, That, as he was not entitled to have possession of the disposition of relief ; so he could not describe it more particularly in his adjudication. But the description is sufficient, both to show the intention of the creditor to adjudge this right of relief, and also to distinguish it sufficiently from the other parts of Sir Archibald's estate ; and as the annualrent-right is mentioned in the libel, and all right competent to Sir George or to Sir Archibald, in the lands, &c. above mentioned, is adjudged, that was sufficient to carry the said annualrent-right either from Sir George or Sir Archibald.

' THE LORDS repelled the objection made by Mr Blackwood to Mr Boyes's adjudication ; and found that the said annualrent-right was thereby adjudged, as well from Sir Archibald Fleming as from Sir George Hamilton ; and sustained the objection made by Mr Boyes to Mr Blackwood's adjudication, and to the charter and sasine following thereon ; and found the said adjudication, charter and sasine, void and null.'

It was *objected* by some of Sir George Hamilton's Creditors to the preference claimed by Mr Blackwood, That the conveyance of the annualrent upon Didhope by Sir George Hamilton to Sir Archibald Fleming, was *spretæ inhibitione* ;

No 47. Robert Allan, Grizel Stewart, and Robert Haliburton, having, in February 1698, duly execute and registrate inhibitions against Sir George.

Mr Blackwood made *answer* to this, by objecting to the inhibitions. And, *1st*, he *objected*, That Allan's inhibition is executed upon the 5th February 1698, against Sir George at his dwelling-house in Edinburgh, by affixing a copy upon the most patent door, &c.; and Haliburton's inhibition is executed the same day against him, as forth of the kingdom, at the market-cross of Edinburgh, pier and shore of Leith; and as he could not be in the kingdom and out of it at the same time, one of the executions behoved to be null.

To this it was *answered*, *1st*, That he might, on the same day, be both in the kingdom and out of it; so that both executions might be good, supposing them to be executed at different times of the day.

2dly, The two executions cannot be set up in opposition to one another; each creditor stands on his own ground; and Mr Blackwood must choose which execution he will object to, and prove his objections.

'THE LORDS repelled this objection to the executions; but reserved to Mr Blackwood to disprove either of these executions as he should be advised.'

Mr Blackwood next *objected* to Grizel Stewart's and Robert Haliburton's inhibitions, That the executions were wrote upon a paper apart, and neither specified the debts upon which the inhibitions were raised, nor the date of the letters thereby intended to be executed; so that these executions would apply to any debt due by Sir George Hamilton to these creditors; and as inhibitions are intended to interpel the lieges from having any dealings with the debtor in prejudice of that particular debt, it ought therefore to appear with certainty, upon what debt the inhibition proceeded, and not to be in the power of a creditor to apply the execution of an inhibition to any debt, or any letters he shall think proper.

Answered for the inhibitors, That there was no law requiring the executions of inhibitions, to specify either the debt itself, or the date of the letters; and as these objections behoved to be registered within forty days, alongst with the letters, there was no hazard of applying the execution of one inhibition to another.

'THE LORDS repelled the objection.'

It was further *objected* to these two inhibitions, That the executions against the lieges were only at the market-cross of Edinburgh; whereas, supposing Sir George to have been out of the kingdom, they ought to have been at the market-cross of Edinburgh, pier and shore of Leith.

To this it was *answered*, That, as the lieges are considered to be in the kingdom, so there is no necessity to interpel them by any execution at the market-cross, pier, and shore; but the execution at the market-cross of the head-burgh of the jurisdiction where the debtor's principal dwelling-house is situate, is presumed sufficient notification to them.

'THE LORDS repelled the objection.'

It was further *objected* to the executions of all the inhibitions, That they did not bear that copies of the executions were left with, and for the party, and the lieges ; but only that copies of the letters were left.

‘ THE LORDS repelled the objection.’

Lastly, it was *objected*, That all action or ground of challenge upon the inhibitions for reducing the security granted by Sir George Hamilton to Sir Archibald Fleming in 1702, was barred by the negative prescription ; no such action having been intended, or challenge made within 40 years of the date of the deed, nor even within 40 years of the time when the creditors behoved to be in the full knowledge thereof ; for the deed, and infestment thereon, in the lands of Tulliallan, were produced in a ranking and sale of that estate in 1708 ; also Sir Archibald’s infestment in this annualrent, taken in 1706, being upon record, the inhibitors cannot plead ignorance in bar of the prescription, seeing they might have known of the infestment by searching the registers.

Answered for the Inhibitors, That only such deeds are reducible *ex capite inhibitionis* as are to the prejudice of the inhibitor ; and therefore, though a debtor inhibited should grant twenty personal bonds, and as many dispositions, yet the inhibitor is not supposed to know of them ; and though he should, he has no interest to reduce them, because they are not to his prejudice. Therefore, in this case, the prescription could only run from 1706, the date of the infestment ; and this action was commenced in 1744, *i. e.* two years within the years of prescription.

2dly, As Mr Blackwood was ignorant of the sasine, which was his own evident, and pleaded on it after the decret of ranking was extracted as *instrumentum noviter veniens ad notitiam*, surely the inhibitors are entitled to plead the same ignorance against this sasine, which now, for the first time, is founded on to their prejudice.

3dly, This process is a reduction brought by Mr Blackwood of the decret of ranking, and the interlocutors pronounced in favours of the defenders against the pursuer in the ranking and sale that was brought in 1734 ; and, as he is reponed against the judgment pronounced in that process, all things must be restored on both sides, and the present competition falls to be determined, as it ought to have been, in 1734 ; at which time, it was not 40 years from the date of the inhibitions themselves.

‘ THE LORDS repelled the objection of prescription.’

Reporter, *Lord Elchies.*

For the other Creditors, *Ro. Craigie.*

For Mr Blackwood, *Lockhart.*

Clerk, *Kirkpatrick.*

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Fac. Col. No 10. p. 14.