

No 114.
After the apprising was expired, it was found that the appriser was not bound to accept payment of his debt.

and reduction thereupon could work, was in so far as might extend to the satisfaction of the sum; and now they were willing to satisfy the whole sum, *cum omni causa*.—It was *answered*, That no satisfaction could be now accepted; because apprising having followed upon the same, and being expired, and no satisfaction being offered within the legal, or the time of the reduction, it cannot now be admitted.—It was *answered*, That the inhibition could not only work, that nothing done after the same should be prejudicial to the sum, but altered not the case as to the apprising led long thereafter; unless the inhibition had been raised upon the apprising.

THE LORDS found, That inhibition could not be taken away or satisfied by payment of the sums after the expiring of the apprising; wherein the President remembered of a former case, that even in the obtaining of the reduction *ex capite inhibitionis*, the offer to satisfy the sum whereon it proceeded was repelled, in respect an apprising thereupon was expired.

Fol. Dic. v. 1. p. 476. Stair, v. 1. p. 366.

1670. July 8. Lady LUCY HAMILTON *against* BOYD of Pitcon and Others.

No 115.
Found in conformity with the above.

THE Earl of Abercorn having sold the lands of Mountcastle to George Hay, he gave the Earl a bond of 4000 merks, bearing borrowed money, but being a part of the price, and bearing this provision, that it should not be payable till the Earl obtained George infest by his superior. The Earl assigns the bond to Lady Lucy his sister, who having raised inhibition upon the bond against George Hay, and having thereafter charged him, he suspended, *alleging* that the condition was not fulfilled, he not being infest; and the Lady offering a part of the sum to purge that condition, *pro damno et interesse*, and to procure his infestment, George accepted of the offer, and thereupon the letters were found orderly proceeded for 3000 merks of the sum, and suspended for the rest in place of the condition; upon this decret the Lady apprises the lands of Mountcastle, and now insists in a reduction of a disposition of the same lands, granted to Dunlap and Pitcon for themselves, and to the use and behoof of the disponder's other creditors underwritten, viz. where there was a blank of several lines, which is now filled up by another hand; and though this disposition was anterior to the inhibition, and did prefer Dunlap and Pitcon for any sums due to themselves, or for which they were cautioners the time of the disposition; yet the LORDS found by a former interlocutor, that as to the other creditors filled up in the blank, it should be reputed as posterior to the inhibition, and filled up after the same, unless the creditors prove by the witnesses insert, or other witnesses above exception, that they were filled up before the executing of the inhibition. The cause being called this day, the creditors repeated their former allegiance, and offered to prove that their debts were anterior to the inhibition, and also that at the subscribing thereof, it was communed and

agreed that Dunlap and Pitcon should undertake the remainder creditors debts ; at least they promised to give dispositions of parts of the estate effecting to their debts, and accordingly they had done the same after the inhibition ; but being upon a promise before the inhibition, they were valid, having *causam anteriorem* ; and they offered to prove the communing and promise by the writer and witnesses insert. *2do*, They offered to purge and satisfy the pursuer's interest. *3tio*, They *alleged* that their disposition from the common author of the property of the lands in question did comprehend all right the disponent had, and consequently the condition and provision in the bond, that before payment George Hay should be infest ; for the disposition would no doubt carry any obligation for infesting the common author. The pursuer opposed the former interlocutor, and *alleged* that she was not obliged to assign her right, seeing she had now apprised, and that her apprising was now expired ; and yet of consent she was content to renounce her right, but would not assign it to exclude other creditors, or to distress the cautioners ; and as for the condition of the bond, the defenders disposition gave them no right thereto, because there was no obligation in the bond to obtain the common author infest, but only a suspensive condition, that payment should not be made till he were procured to be infest ; for that the provision to obtain the infestment, being only an condition, and not an disposition, after the disposition to the defenders, the pursuer might have paid the bond, or transacted thereanent with George Hay, and was not obliged to know the defenders.

THE LORDS adhered to their former interlocutor, and found the offer not sufficient, and that the pursuer was not obliged to assign her right, though she had offered of her own accord to renounce it ; and found the persons intrusted their undertaking the creditors debts before the inhibition relevant only to be proved by writ, or by the Lady's oath of knowledge ; and would not make up such a material clause by the oaths of the witnesses insert, nor of the persons intrusted ; and if they had made any such promise it was their own fault, that they caused not to put it in writ, knowing that their oaths, albeit they might prove against them, yet that they would not prove for them ; for the LORDS thought if such blanks and clandestine promises were allowed, they might disappoint the diligences of all creditors.

Fol. Dic. v. 1. p. 476. Stair, v. 1. p. 690.

* * * Gosford reports this case :

In the reduction at Lady Lucy Hamilton's instance against the Creditors of _____, upon her inhibition prior to the filling up of a disposition made to the Laird of Dunlop, blank in the creditors names, which the LORDS found could not be filled up to her prejudice after the inhibition, it was *alleged* for Hay of Pitcon, one of the creditors, That he offered to prove by the oaths of the writer and witnesses, and those that communed, that it was

No 115. agreed that his name should have been filled up in the blank. THE LORDS did repel the allegiance unless he would offer to prove the same, *scripto vel juramento* of the pursuer, that he knew the same so be true. *2do*, It was *alleged*, That the pursuer offered to purge the inhibition and comprising, the pursuer disposing the right thereof to the defender. THE LORDS did find it sufficient that the pursuer had offered to renounce, and found that he was not obliged to dispose a comprising, of which the legal was expired. *3tio*, It was *alleged*, That the pursuer's bond was conditional, viz. that the common debtor should pay the sum of money therein contained, the Lady Lucy obtaining the common debtor infest in his lands by the Marquis of Hamilton his superior; which condition not being purified before the inhibition, it could not be any ground of reduction of the defender's right, which was for a debt prior to the inhibition; but could only take effect after the condition of the bond was purified. It was *replied*, That the condition of the bond was purified, in so far as the pursuer having charged the common debtor, who did suspend upon that same reason, that the bond was qualified as said is, there was an abatement given of 2500 merks of the sums contained in the bond as damage and interest for not fulfilling of that condition, which was *factum impræstabile*; and as the common debtor might have discharged that, it being satisfied by a judicial sentence, the LORDS found that it did purify the condition, and did make the inhibition to subsist as to any posterior heritable right, albeit for a debt prior thereto; upon this reason, that the bond was a personal bond, and that the debtor might discharge any part or condition thereof, he not being inhibited nor his right affected by any prior diligence at the instance of a prior creditor.

Gosford, MS. No 297. p. 128.

1683. February 9.

TROTTER against LUNDIE.

No 116.

In a reduction *ex capite inhibitionis* against real rights, found, the inhibition was purgeable upon payment of the principal annualrent and penalty, without respect to accumulations and Sheriff fees, contained in an apprising led on the inhibition.

IN the action of reduction, Trotter against Lundie, wherein Trotter having pursued a reduction upon an inhibition served against his debtor, before Lundie obtained his right of wadset from him, and Lundie having *alleged*, That he could not reduce his right, because he offered to purge by payment of the debt, which was the ground of the inhibition; and it being *replied*, That the same was not purgeable, in regard there was a comprising led thereupon, which was expired; and it being *duplied*, That the comprising could not be drawn back to the inhibition, so as to have the benefit of an expired legal, in regard the defender's wadset intervened betwixt the inhibition and comprising, and so was preferable to the comprising as a real right, and that the ground of the inhibition was always purgeable by payment; the LORDS found, that, notwithstanding the comprising was expired, yet, that the inhibition was always purgeable by payment of the principal and penalty contain-