

S E C T II.

A preferable creditor can do no voluntary deed to prefer one secondary creditor to another; and if he take payment out of one subject, he is bound to assign to postponed creditors.

1672. July 19.

CHIESLY *against* HAY.

MR William Chiesly and Mr Andrew Hay, having appraised the same lands within year and day, Mr William insisting for mails and duties, Mr Andrew craved to come in *pari passu*; Mr William craved satisfaction of the composition paid to the superior, conform to the act of parliament; Mr Andrew alleged that he had inhibition upon sums in his apprising, and reduction thereupon, of Mr William's right, as being upon sums after the inhibition: Mr William offered to purge and satisfy these sums now within the légal, which would evacuate the reduction; and craved that Mr Andrew might assign him to the inhibition, as is ordinary in such cases. It was *answered*, that he ought not to be décerned to assign his inhibition to his own lesion, for thereby Mr William would reduce his apprising, as to the other sums that were after the inhibition.

THE LORDS found Mr Andrew only obliged to assign the inhibition, so that it should have no effect against his own sums.

Fol. Dic. v. I. p. 222. Stair, v. 2. p. 108.

No 18.

In a competition an adjudger subjected to an inhibition offering to purge by payment of the debt, the creditor was found obliged to assign his inhibition, but not in so far as it might be prejudicial to other debts in his perform.

1676. February 11.

BRUCE *against* MITCHEL.

JOHN MITCHEL stabler having appraised the lands of Lethangie, pursues a reduction of the infestment of these lands granted to Jean Shaw by the common debtor, for security of a sum of money, *ex capite inhibitionis*, because there was inhibition upon one of the sums in the apprising, anterior to that disposition. In which process, Sir William Bruce having right from the defender, offered to purge the inhibition for payment of the sum, he always getting assignation to the sum and inhibition, which THE LORDS sustained. It is now *alleged* for Mitchel, that he was not obliged to grant an assignation, but only a discharge; for albeit the Lords do sometimes ordain creditors to assign diligences or securities to the cautioners whom they distress, for making of their relief against the principal debtor, or in other cases where the party can show no prejudice; yet that is never done where the party hath prejudice, as in this case; for if Mitchel assign the inhibition, it will be a ground to reduce his other bonds on which his apprising proceeds, being posterior to the inhibition, and likewise a disposition of the lands from the heir of the common author.

THE LORDS ordained the assignation with this provision, that it should not be made use of against his other rights.

Fol. Dic. v. I. p. 222. Stair, v. 2. p. 414.

No 19.

Found as above.

No 19.

* * Gosford reports the same case.

In a double poinding, raised by the tenants of Lethangie, against the creditors of William and Robert Shaws, Patrick Tullos being preferred, as having the first infeftment, John Mitchel as assignee by one Mercer who had served inhibition before Tullos's right, did insist in his reduction *ex capite inhibitionis*. It was *answered* for Patrick Tullos and Sir William Bruce, who was content to advance the money as being cousin-german to Robert Shaw of Lethangie, that they were instantly content to purge the inhibition by payment of the debt which was the ground thereof, Mitchel assigning them to his right; whereupon the money being consigned by the Lord Ordinary in the clerk's hand, until a disposition should be drawn and subscribed by John Mitchel,—it was *alleged* for Mitchel, who was again admitted to be heard, *first*, that he was content to pass from that reason of reduction *ex capite inhibitionis*, and to insist upon other reasons libelled; viz. that Tullos's right was a right of trust made to a confident person; *2do*, Albeit a con-creditor may purge a prior inhibition, yet the server of the inhibition is not obliged to dispone his right, seeing he might have other rights besides, which was Mitchel's case, who had led a comprising at his own instance, and if he should dispone his right flowing from Mercer, with the inhibition, whensoever he should insist in his other right and comprising, then they should reduce his right upon the said inhibition, and force him of new to purge, and upon the reason now urged he would be forced to dispone back again that inhibition, *et sic infinitum*. It was *answered*, that by the daily practice cautioners being distrest at the instance of creditors, upon offers to satisfy and purge the debt, the creditor is always decerned to dispone his right, to the effect they may recover relief from the common debtor, like as Sir William Bruce and Patrick Tullos were content to take it with that quality, that it should only affect the common debtors's estate, and should not prejudge Mitchel of any other right of comprising, as accords; neither could he now refuse to take up the consigned money and grant the disposition, nor pass from his reason of reduction, *ex capite inhibitionis*, because he had insisted thereupon by the space of two years; and after a full debate *in presentia*, interlocutor was given and pronounced. THE LORDS did find that Mitchel should grant a disposition, but affected with that quality, that it should be without prejudice of any other right, which was fully reserved, as accords, and that he should assign to the inhibition, *ad hunc effectum*, that Tullos might recover payment against the common debtor out of his estate, so that all other rights posterior to the inhibition should come in and be preferred according to their priority, and public infeftment.

Gosford, MS. No 850. p. 538.