

that the compensation meets the assignees, as [it] did Mitchel or Littlegil ; and, there being other grounds of compensation not liquid, the Lords allowed the defender a fortnight to liquidate these, superseding extracting in the meantime. Here the defender's case was favourable, to be free of cautionary paid by the sale of Binnie, the principal debtor's lands ; where Hugh St Clare, who, by virtue of a factory, sold the estate, and paid the debt, took assignation to the bonds, and transferred them to Littlegil.

Page 62, No. 162.

1685. *February* 13. JOHN JOLLY *against* The LAIRD of LAMINGTON.

IN a process of forthcoming, at the instance of one Jolly, against the Laird of Lamington, as debtor to Robert Baillie, the pursuer's debtor, compearance being made for Theodore Montgomery, who had right by assignation, intimated before the arrestment ; the pursuer proved, by the assignee's oath, that assignation was a trust for Robert Baillie's behoof ; after which Lamington, having taken a discharge from Theodore, and proponed upon the same, the Lords found, that Lamington was *in mala fide* to disappoint the arrester, by making voluntary payment to the assignee, after he knew the assignation to be trust, and after the matter was litigious betwixt the assignee and arrester ; and therefore decerned in the forthcoming.—*February* 1685.

It was afterwards alleged for Lamington, That the discharge was granted before Theodore gave his oath ; and Lamington protested against his deponing, as being denuded. Answered, The defender was *in mala fide*, after the arrestment, to take a discharge, and ought to have suspended upon multiplepoinding ; 2. The defender's oath of calumny is craved, that the discharge is not of the date it bears, and, being *falsum in data quam præ se fert*, must at best be looked upon but as blank in the date ; so that the defender must prove it was of a date anterior to Theodore's deponing. The Lords sustained both replies ; and found, that the defender could not take a discharge in prejudice of the pursuer, after the matter was litigious.—*February* 1685.

Page 16, No. 84.

1685. *February* 13. SIR GEORGE LOCKHART *against* SIR JOHN CLARK of PENNYCOOK.

JAMES Clark, having disponded his lands of Wrightshouses to his brothers, Sir John and William, some years ago, and thereafter, Sir John having taken an heritable bond of annual-rent out of these lands, for the sum contained in the disposition, and other sums then advanced ; they forbore to take infestment till James was broken, and then they infest themselves upon both rights ; and, the day after, Sir George Lockhart was infest in an annual-rent upon James Clark's bond. There arose a competition betwixt Sir George and the two brothers of the common debtor. Alleged for Sir George Lockhart, That he ought to be preferred, in respect the brothers' delay to infest themselves, to cover James's trade

in borrowing money, was fraudulent ; 2. The posterior right of annual-rent is incompatible with the first right of property, proceeding from the same author, seeing *res sua nemini servit*, and it imports a passing from the first ; 3. Sir George's infeftment, though a day posterior, was first made public by a summons of poinding the ground formally executed ; whereas Sir John Clark's right could not be habilely clothed with possession by his summons of mails and duties. Answered for Sir John Clark, That he might take infeftment when he pleased on his disposition for an onerous cause ; and his delay to take infeftment can infer no presumption of fraud, James Clark being a trading merchant, who had a considerable stock, and broke by reason of cautionary for John Muir and others, whose affairs went suddenly in disorder ; 2. The bond bears an express clause and provision, that the taking of annual-rent should not be understood a passing from the right of property ; but it might be lawful for him to use both, or either, as he thought fit ; 3. In defence of rights, one may use inconsistent titles ;—*December 22, 1674, in the case of Sommervell ; March 1684, Pitliver against Provost Miln ;* 4. The summonses are opposed, which are applicable to both rights. The Lords sustained the second and third allegiance proponed for Sir George Lockhart, and found, that the right of property was passed from by taking the posterior annual-rent, and that a summons of mails and duties did not clothe an infeftment of annual-rent with possession ; and therefore preferred Sir George.

Page 166, No. 598.

---

1685. *February 27.* AUCHINBRECK against ROBERT CAMPBELL.

IN the process of mails and duties, at the instance of Auchinbreck, as having acquired right to an apprising against his father, against the tenants, compearance was made for his father's creditors, who alleged, That the comprising was redeemable from the pursuer, the apparent heir, for the sums he paid for it. Answered for the pursuer, The act of Parliament about the redemption of apprisings acquired by apparent heirs, concerns only the taking right to expired apprisings, which is presumed to be done in defraud of creditors ; whereas the pursuer's apprising was acquired *in cursu* of the legal, and several years on't are yet [to] run. Now, there being in this case a *remedium ordinarium*, by using an order, there is no necessity to recur to the extraordinary remedy of the Act of Parliament ; and creditors have no more prejudice by the apparent heir's having the right, while it is redeemable, than if it were in the person of a stranger. Replied for the creditors, The presumption of a fraudulent contrivance, for the benefit of apparent heirs, holdeth in the case of current as well as in the case of expired apprisings ; for there might have been partial payments of the apprising acquired, the instructions whereof the apparent heir, being master of all the papers, may suppress ; and it will be difficult for creditors to prove that the apparent heir gave not the full value for the apprising, otherwise than by his own oath. It might also fall out, and be industriously ordered, that the apparent heir should not take right to an apprising, till it were near upon the expiring. Besides, the case of creditors, who are *in damno vitando*, is more favourable than that of an apparent heir, who is *in lucro captando*. And,—*July 21, 1671, Sir*