

1678. November 6. MILN against HAY.

A CREDITOR being preferable over two tenements, and a secondary creditor having right only over one of them, in that situation, the preferable creditor for a separate debt, adjudged both tenements. It was FOUND, that the catholic creditor was not obliged to dispoise to the secondary creditor in prejudice of his adjudication, existing before the date of the process.

*Fol. Dic. v. 1. p. 222.*

\* \* \* See this case, *voce* BASE INFESTMENT, No 62. p. 1341.

1693. February 1.

The LADY GUNSGREEN against HELEN LAUDER, and MR JAMES LAUDER, Provost of Haddington, her Husband.

THE LORDS would not force the Lady, in this case, to assign upon payment, having sundry rights in her person, unless all were satisfied; and thought it not sufficient to declare, in the assignation, that it should not prejudice the other rights; but they found, that the Lady having two subjects out of which she could lift her annualrent, in the one of which Helen Lauder was infest, and in the other not; though *regulariter* the liferentrix could not be restricted to one of the lands more than to the other, yet the LORDS declared they would ordain her to assign her right on payment; or else to distress and do diligence first against that land wherein Helen Lauder had no right; with this quality, that what after diligence, she could not recover out of that land, she might recue *pro tanto* against the other; and where there is a concurrence of creditors, the LORDS use to allow the first annualrenter to poind within 20 days of the term, and the second not to have access till that space be expired.

*Fol. Dic. v. 1. p. 222. Fountainball, v. 1. p. 552.*

1696. January 3. SCOTLAND against BAIRDNER.

PHILIPHAUGH reported Mr William Scotland, the chancellor's chaplain, against Thomas Bairdner of Cultmilne. The pursuer, as assignee by a liferentrix, convenes this defender for his possession of the liferented lands; who *alleges*, he has right to two infestments of annualrent, which being preferable to the widow, exhaust the subject. *Objected*, These annualrents were universal over the whole; whereas the widow's liferent was only out of a half; and the other being sufficient to pay it, they ought to restrict thereto, at least to assign

No 20.

No 21.

A liferentrix, by annuity, was infest in two separate subjects, one of which was also affected by a second infestment. The Lords declared they would ordain her either to assign her right on payment, or to do diligence first against that subject, in which the secondary creditor had no interest.

No 22.

A person had an infestment affecting a whole subject. A liferentrix had an infestment affecting the half, but posterior. The

No 22.  
first had also  
an assigna-  
tion, but pos-  
terior to the  
liferenter's  
right. In these  
circumstan-  
ces, he was  
not bound to  
assign in pre-  
judice of his  
adjudication.

the relict to the other half seeing *nemo debet uti jure suo in æmulationem alterius*.  
*Answered*, In all infeftments of annualrent, *unaquæque gleba servit*, and the creditor may distress any part of the tenement wherein he stands infeft; yet he acknowledges this is not to be used with rigour and judaically, and that the Lords, in such a case, would ordain the annualrenter to assign where he has no prejudice. But if he have another right upon the rest, law will not oblige him to assign to the prejudice of his separate right; and this defender has right to an adjudication on the other half of these lands, and which being posterior to her liferent infeftment, it would wrong his own right to cause him assign, and involve him in a plea. *Replied*, If both the debts were originally his own, he might, in that case, protect, cover and defend his lamer right, by extending the preferable one over the whole subject; but if he has acquired and purchased in rights, which of themselves are not preferable, it should be in the power of a creditor, at this rate, by an unlawful gratification, to prefer one creditor to another, who would otherwise be clearly preferable to him, conform to the brocard, *si vinco vincentem tunc te vinco*, as was determined in the competition among the creditors of Lanton\* and Nicolson†. THE LORDS thought, if he acquired in any such right less preferable *post litem motam*, after a citation in the multiple-poining, or after the competition was started, he might be reputed *in mala fide* to make use of such a right, to impede his assigning to the liferentrix; but, if he had got it before, there was no law hindering him to do the same, and to cover it by his better right; and therefore the LORDS would not discern him to assign the relict against the other half in prejudice of his adjudication. Then it was *contended* for the relict, That her liferent was not out of a precise and definitive half, but was general, *unius dimidietatis terrarum et molendini*; and so not being restricted to an east or west half, but to an half *pro indiviso* over the whole, and the one half being able to pay this defender the preferable annualrents, she may, without any assignation, recur upon the other half; in which case, he cannot obtrude his adjudication against her, in regard it is long posterior to her right. The LORDS thought this a relevant ground to prefer her to the superplus rent after the annualrents were first paid, if her infeftment run in these indefinite terms.

*Fol. Dic. v. 1. p. 223. Fountainhall, v. 1. p. 696.*

1755. December 19.

JAMES MANN, late Bailie in Dundee, *against* ALEXANDER REID, Bailie there.

No 23.  
An assigna-  
tion by a  
bankrupt to  
his creditor  
being reduced  
on the act  
1696, at the

ALEXANDER REID having gotten from Andrew Wales merchant in Dundee a disposition to, and delivery of some goods in security of a debt; James Mann, another creditor to Alexander Wales, arrested in Alexander Reid's hand, and having obtained reduction of the disposition as made after Wales was under horn-

\* No 94. p. 2877.

† No 92. p. 2876.