

No 22.
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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. Fountainball, 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.

ing and caption, and within 60 days of his flying and absconding, he insisted in a furthcoming against Alexander Reid.

Alleged for the defender; That he could not be obliged to make furthcoming the goods disposed or value thereof to the pursuer, unless he would assign his debt and diligence *pro tanto*, as is ordinary in competition of creditors.

Replied for the pursuer; That he was only obliged to discharge, and not to assign; payment being required out of the common debtor's effects, which being made, extinguishes the debt, so as it cannot be assigned to fortify another creditor's debt against which there may be lawful objections. Nor is there here any competition of rights, the defender's disposition being reduced and declared null as a fraudulent deed. *2do*, The *beneficium cedendarum actionum* can neither take place where the person craving it is not prejudiced by a discharge of the diligence to be assigned, nor where the other party would suffer prejudice by the assignment. Now the pursuer's discharging his debt is no loss to the defender, since thereby the deed and diligence in his favours may revive; and the pursuer would be greatly hurt by conveying his debt and diligence to the defender, since he gets not complete payment. Whereas *beneficium cedendarum actionum sine dispendio creditoris futurum est, l. 38. ff. de evictionibus*; and a creditor is not bound to assign his right to a cautioner making payment *prius quam omne debitum exsolvatur, l. 2. C. de fidejussoribus*. Therefore the pursuer cannot be obliged to assign a part of his diligence to compete with himself. *3tio*, Who knows but the defender might accommodate a third party with the diligence assigned, and he a fourth, and so on, which would breed confusion.

Duplied for the defender: It is true if the debtor himself were pursued he behoved to hold himself content with a discharge; but the pursuer must transmit to a creditor making payment, since he gets his money rather out of the defender's effects than out of the common debtor's; for, in the civil law, 'Hy pothecarius posterior priori hypothecario solvens, ipso jure surrogatur in ejus locum, et privilegium.' And with us the pursuer of a reduction *ex capite inhibitionis* receiving payment from the defender, is bound to assign with this quality that the conveyance should not be made use of against his other rights. Bruce *contra* Mitchel, No 19. p. 3365. As creditors must assign to cautioners distressed upon payment made by them; a wadsetter must convey to a singular successor having right to a reversion, Stair, Instit. lib. 2. tit. 10. § 13. And a second appriser, by redeeming a first, comes *ipso facto* in his right, Gordon *contra* Watson, No 4. p. 318. *2do*, The pursuer can pretend no prejudice, since the defender is content that the assignation be burdened with the reservation of what more is due to the pursuer, and that it be not made use of against him.

THE LORDS found Bailie Mann the pursuer obliged to assign, with reservation and preference of what debt was yet then resting to himself.

Fol. Dic. v. 1. p. 223. Forbes p. 55.

19 K

No 23.

instance of another creditor, the assignee craved assignation from the pursuer of the reduction, that he might operate his relief out of the common debtor's funds. The Lords ordained the pursuer to assign, but with this quality, that the pursuer should be preferred *quoad* his debt, and the assignee should not compete with him for it.

No 23.

*** Fountainhall reports the same case :

BOTH Reid and Mann being creditors to Andrew Wall, (mentioned No 113. p. 1006), Bailie Reid offered to pay what he had confessed himself to be debtor by his oath in the furthcoming, but craved an assignation from James Mann to his cumulative security by adjudication, in so far as he should pay, that so he may recover his relief out of the common debtor's effects *pro tanto*. *Answered* for Mann, I cannot assign you to my adjudication, because that were to my own prejudice, seeing by all I recover from you I am not fully paid of my sum, but still want L. 300 of it, besides penalties and accumulations, which he extends no farther than to re-imburse his true expenses; and no man can be forced to assign *cum proprio dispendio*. *Replied*, The assigning is founded both on natural equity and common law, the *jus cedendarum actionum* being never denied, and *les loix civiles dans leur ordre naturelle*, speaking of creditors competing on hypothecs, says, ' Posterior hypothecarius solvens hypothecario priori, ' ipso jure surrogatur in ejus locum et privilegium.' And in a reduction *ex capite inhibitionis*, the pursuer was decerned to assign to the defender who paid him with this quality and provision, that the assignation should not be made use of against the cedent's other debts and rights, Bruce *contra* Mitchell, No 19. p. 3365.; 18th July 1676, Gordon *contra* Watson, No 4. p. 318. And Bailie Reid was content that the assignation he was craving should be clogged with that reservation, that it should never be made use of against the cedent, so that he, by virtue of that assignation, coming in *pari passu* with the other creditors, and drawing his share, he was willing that James Mann should, out of his share, be refunded of what was yet resting him, so as Reid might get what remained, which comes under the rule *vinco vincentem*. THE LORDS found the defence relevant, and ordained Mann to assign; but with this express burden and quality, that Mr Mann should be preferred *quoad* his debt, and Reid the assignee should not compete with him for the same.

Fountainhall, v. 2. p. 301.

1708. February 24.

WILLIAM KENNEDY of Daljarroch *against* JOHN VANS, and HUGH CRAWFORD,
Merchants in Ayr.

No 24.

A creditor, by bond, in which three persons were bound as co-principals, being the first arrester of a subject be-

IN the competition betwixt John Vans and Hugh Crawford, as arresters of a share in the African stock belonging to David Ferguson their debtor, and William Kennedy of Daljarroch, who had also arrested the same as creditor to David Ferguson per bond, wherein he, Thomas M'Jarow, and John Ferguson stood bound co-principals; Daljarroch being preferred, and thereby having re-