covered payment of all that was due to him, John Vans and Hugh Crawford craved that he might be decerned to assign his bond to them, for recovering, off the other two co-principals therein, the superplus of what was paid out of David Ferguson's effects more than this third share; in respect Vans and Crawford, as come in David Ferguson their debtor's place, should have the same relief that was competent to him.

Alleged for Daljarroch: He is not bound to assign the relief competent to David Ferguson against these bound with him; in respect the competitors neither derive right thereto from David Ferguson, nor have affected the same by legal diligence? for their being frustrated of payment out of the equivalent by Daljarroch's preference, entitles them only to seek assignation of his debt and diligence for operating their payment out of other effects belonging to the common debtor; but Daljarroch is not obliged to assign his right and diligence in so far as concerns third parties to whom Vans and Crawford are not creditors.

Answered for Vans and Crawford: In all competitions of creditors, where one having double security for his money, restricts his payment to one subject, and thereby excludes a co-creditor who had affected that subject, the creditor preferred is obliged to assign what further security he had to the other, though that other had not affected that additional security by diligence.

THE LORDS found, That Daljarroch is not bound to assign; because, Vans and Crawford had not affected by diligence the clause of relief in the bond granted to him.

Fol. Dic. v. 1. *p.* 224. *Forbes, p.* 249.

No 24.
longing to of his debtors, was found not obliged to assign his bond to the other arresters, for recovering from the other two co-principals the superplus paid to him out of the common debtor's effects, more than his third share, altho' relief of two-thirds was competent to the common debtor himself against these co-principals.

1710. *December* 21.

JEAN PITCAIRN, Relict of MR JOHN AINSWORTH Merchant in Edinburgh, *against* THOMAS HALIDAY Bailie of Selkirk.

No 25.
The Lords found, where a posterior creditor pays a prior out of his own money, then he ought to assign simply; but if he has left him only to get his payment out of the debtor's means, he is not obliged to assign, except with a quality and

IN the poinding of the ground at the instance of Jean Pitcairn, as having right to an infeftment of annualrent effeiring to 1000 merks of principal, granted by James Mitchelhill in his lands of Kingscroft, dated and registered in the year 1704; Thomas Haliday, who had an infeftment of annualrent out of the same lands in anno 1701, and also out of James Mitchelhill's burrow-lands in Selkirk in the year 1700, for the principal sum of L. 1280, and another infeftment of annualrent out of the foresaid lands of Kingscroft, and burrow-lands in the year 1707, for the accumulate sum of L. 2000 compeared and claimed the whole annualrent of his L. 1280 out of the lands of Kingscroft, by virtue of his first and preferable infeftment.

Alleged for Jean Pitcairn: Seeing Haliday stands infeft both in the Kingscroft and burrow-lands, if he takes his whole annualrent out of Kingscroft, he

No 25.
reservation that it should not prejudice his other debts and rights, though posterior to those of the party craving the assignation.

must assign her to his infeftment out of the burrow-lands, to the end she may get payment of her annualrent.

Replied for Thomas Haliday: Seeing he hath another infeftment furth of both lands for the accumulate sum of L. 2000 posterior to Pitcairn's infeftment in Kingscroft, he may take his first infeftment subservient to the other, and cannot be obliged to assign it to her to affect the burrow lands till he get payment of both. For albeit a preferable creditor who having right to poind the ground of several lands for one and the same annualrent, maliciously, without any benefit arising to himself, exacts the whole out of one, to the prejudice of a posterior creditor infeft therein, may be ordained to assign the posterior creditor to his right upon the rest, in so far as may extend to the proportion of annualrent that fell to be taken furth thereof, had he poinded all equally; *cum jus civile non indulgeat malitiis*; yet when a person can shew any prejudice he may sustain by doing such a neighbourly office, he may very well say, *Egomet mihi proximus*, charity begins at home, and he cannot be obliged to assign to his own loss, *Nemini enim fraudem facit, qui jure suo utitur, l. 55. ff. de Reg. Jur.* And it was so decided in a parallel case, February 11th 1676, Bruce *contra* Mitchell, No 19. p 3365.

Duplied for Jean Pitcairn: One is not indeed obliged to assign a prior personal right, in prejudice of a posterior competent to him; there being no record of personal rights to certiorate creditors thereof; but since the real burdens upon heritage are patent upon record, a person having an universal infeftment cannot *bona fide* acquire any new right in prejudice of an anterior particular infeftment competent to another, and therefore if he draw his payment by virtue of the transcendent infeftment out of the particular subject affected by that other, *in æmulationem vicini*, he must assign to the party so excluded. Otherwise, a debtor granting a general infeftment to one creditor, would be obliged to grant general infeftments to all: whereas law hath rather encouraged the taking special rights, and therefore introduced special adjudications of lands equivalent to the sums.

THE LORDS were all clear that an annualrenter might take his payment out of any tenement in which he hath got infeftment from the debtor, and that if he get payment out of the debtor's effects, it extinguisheth the security; so as it cannot be assigned to another creditor. But found, That if Haliday receive payment from Pitcairn out of her own means, he is obliged to assign to Pitcairn for a proportionable relief, with this quality, That the same should not be made use of against Haliday's other infeftment.

Fol. Dic. v. 1. p. 223. Forbes, p. 458.

*** Fountainhall reports the same case:

JEAN PITCAIRN being infeft in an annualrent corresponding to the principal sum of 1000 merks out of the lands of Kingscrofts, belonging to Bailie Mit-

chell of Selkrig, and pursuing a poinding of the ground, compearance is made for Thomas Haliday, who produces two infeftments, both out of the Kingscrofts, and likewise some acres and tenements of land, the first for L. 1200 Scots prior to her's, and the second made up by accumulation of the annualrents of the first sum, and some accessions, for L. 2000, but posterior to her infeftment. The ranking of these rights were very plain, his first bond *primo loco ;* her infeftment *secundo loco ;* and his second bond *tertio loco.* But the difficulty arose, that she *contended* that he having two subjects for uplifting his first annualrent, he ought not to lay it all on the lands of Kingscrofts, wherein she was only infeft ; but, having likewise the burrow-acres and houses, whereto she had no right, he should take his annualrent out of both ; and if he would *ex æmulatione* and invidiously burden her lands by taking the whole out of them, then he ought in reason to assign her to a proportion, so far as she wanted, and was evicted to him, that she might be *indemnis* by getting it made up out of the other subject. *Answered,* No law obliged him to assign where he was paid by the debtor's own means, rents, and effects ; for that extinguished the debt *pro tanto,* and were to assign a *non-ens.* But much less when the assignation would be to his evident hurt ; for, he having a posterior infeftment out of both lands, he spared the burrow-acres as to his first debt, and affected them with the annualrents of his second bond, which she could neither hinder nor quarrel, not being infeft therein ; and if he did assign, it must be with this express quality and condition that she should not make use of his assignation to the prejudice of his other rights ; and this cannot be reckoned malice, seeing *nemini fraudem facit qui jure suo utitur,* and it was so decided 11th February 1676, Bruce *contra* Mitchell, No 19. p. 3365. She *alleged,* That in so far as his second bond was made up of the bygone annualrents of the first she allowed them to be privileged, but the *anatocismus,* making these to bear annualrent, was unfavourable in law. THE LORDS found where a posterior creditor pays a prior out of his own money, then he ought to assign simply ; but if he left him only to get his payment out of the debtor's means, he was not obliged to assign, but with a quality and reservation that it should not prejudge his other debts and rights, though posterior to the party craving the assignation.

Fountainhall, v. 2. *p.* 612.

No 25.

1714. *June* 29.

WILLIAM KER of Chatto *against* WALTER SCOT of Wool and other CREDITORS of Sir WILLIAM SCOT of Harden.

No 26.

A person served heir in general, and confirmed executor to another, executed a general disposition in favour of a

ROBERT SCOT of ———, who was served and retoured heir-general to his brother, Sir William Scot of Harden, but not served heir in special to him in his estates, having granted to William Ker of Chatto, his brother-in-law, a general disposition and assignation of his whole moveable goods and gear, debts