

No 94.

draw any share in the said competition, but could only draw such a share of the annualrents, or price, as he would have drawn, if there had been no posterior annualrent or voluntary right.

Dalrymple, No 89. p. 120.

1715. February 22.

ELISABETH GELLY, and Others *against* The Other CREDITORS of Monimusk, and their FACTOR.

No 95.

Personal creditors arrested in the hands of tenants. The debtor's factor, notwithstanding, uplifted the rents. Other creditors got the estate sequestrated, and a judicial factor appointed. These last creditors likewise adjudged. The arresters had the preferable right to the sum in the hands of the debtor's factor.

ELISABETH GELLY and Others, creditors of Monimusk, having arrested on their personal obligations in the tenant's hands, Alexander Pierie, Monimusk's chamberlain, does nevertheless take up the arrested money out of their hands; and the other creditors having thereafter got the estate sequestrated in the hands of James Man, as factor by the Lords, with power to him to uplift rents, &c. and call Pierie to an account; and going on also in adjudications, &c. the arresters raise a furthcoming, both against the tenants, and also call Pierie as he who uplifted the rents affected by them. Man also, the creditors' factor, insists against Pierie and their tenants for the bygone rents, and the sums uplifted by Pierie from them. This having occasioned a competition, the point in question was, whether these arresters have a point of preference to these rents, and to repeat the same from Pierie, though no arrestment was used against him? Or if Man, the other creditors' factor, have a preferable title to the balance in Pierie's hands, arising from his intromissions with the rents arrested?

It was *alleged* for Man; That, by his commission from the Lords, he was empowered to uplift, not only the rents from the tenants, but likewise to call Pierie, the common debtors' chamberlain, to account for his intromissions; and that the said arresters had not affected the balance in Pierie's hands; and therefore could not in an action of furthcoming obtain decret against Pierie.

Answered for the arresters; That the said balance belonged to them, because it proceeded from Pierie's intromissions with the rents which they had arrested in the tenants' hands; and his intromission being as Chamberlain to the common debtor, was obnoxious to their action of furthcoming in the same way with the tenants; since the arrestment was a *nexus realis*, affording an action of repetition against any intromitter; nor could a voluntary payment dissolve it; so that these rents could be only uplifted by Pierie *cum suo onere*, and consequently he liable here, though no new diligence was used against him.

Replied for the other Creditors; That they had raised summons of adjudication before the arrestments were used; now adjudications give right to the mails and duties before arrestments.

Duplied for the Arresters; That they were only seeking preference to bygone rents, and rents of the term current, before any adjudication was complete; for till then no adjudger could compete with an arrester for mails and duties, as was

found Lister *contra* Aiton and Sleich, No 13. p. 2765.; far less is a naked summons of adjudication to be noticed; for whatever that may operate against voluntary deeds of the debtor, yet it has no effect against a lawful creditor using arrestment.

No 95.

THE LORDS found, That Pierie the Chamberlain, having intromitted with what was arrested in the tenants' hands, he was liable to the arresters for the same; and therefore preferred the arresters to Man, the subsequent factor, as to the balance in Pierie's hands, in so far as their arrestments gave them interest therein, or extended to:

Act. Hay.

Alt. Horn.

Clerk, Robertson.

Bruce, No 87. p. 104.

February 1730.

CAMPBELL *against* DRUMMOND.

THE estate of Tofts being sold at a public auction, and the decret of ranking remitted to an accountant, to make out a scheme for dividing the price among the creditors; an objection was started against the scheme, to understand which, the following facts must be premised; *1mo*, Susanna Belshes had an inhibition in the 1672, and an adjudication in the 1685, both upon the same debt; *2do*, Kippenross had an inhibition in the 1673, and, upon the same debt, an heritable bond of corroboration *anno* 1679, with sasine upon it; which heritable bond consequently was struck at by the inhibition of Susanna Belshes; *3tio*, A number of annualrenters, some prior, some posterior to that of Kippenross, but all of them struck at by his inhibition; *4to*, A number of adjudgers in the 1685: coming in *pari passu* with the adjudication of Susanna Belshes, struck at by neither of the inhibitions. To reduce this case to its simplest terms with respect to Kippenross, the operation of his inhibition was first considered; which striking against the annualrenters, made his case the same as if these annualrenters were not in the field; and the inhibition itself was also laid aside, it having in this manner got its full effect. The case being reduced to its simplest terms, the ranking as to Kippenross comes out thus: Kippenross's infestment of annualrent obtains the *first* place; and in the *second* place come the adjudgers, one of whom, viz. Susanna Belshes, has an inhibition that strikes against the infestment of annualrent.

The question is, In what proportions is the price to be divided among these creditors? The annualrenter, in the first place, draws his whole sum; and the inhibitor draws from him, whatever she could draw were he not in the field. So far the matter is clear. But can the annualrenter recur against the adjudgers, for any share of what is thus drawn from him by the inhibition? The scheme says no; the objector says yes.

No 96.
A preferable annualrenter, from whom a part is drawn by an inhibition, cannot recur against the posterior annualrenter to make up his loss.