

No 89.
contained in
the dis-
position, to
grant procu-
ratory and
precept, the
defence that
the deed was
granted on
death bed,
was found not
competent *in
hoc statu*, but
reserved till
reduction.

of the reasons must abide probation ; as in the case of an adjudication upon the late act of Parliament, which will not be stopt upon any defence consisting *in facto*, that abides probation, unless the same be instantly verified ; but all other defences are reserved *contra executionem*, and the defenders have no prejudice ; for, if they prevail in the reduction, then the pursuer's diligence falls in consequence. THE LORDS repelled the defence, and decerned the defender to fulfil the disposition. But declared the obedience to the sentence should not prejudice the defenders in case they prevail in their reduction.

Fol. Dic. v. 1. p. 177. Sir P. Home, v. 2. No 725.

S E C T. XXI.

In Competition, Pleas are receiveable by Exception, which otherwise would be Competent only by Reduction.

No 90.
The Lords
preferred a
public infest-
ment, though
posterior, to
a private one
clothed with
possession,
because that
which was
public pro-
ceeded on a
contract of
marriage,
and inhibition
executed
thereupon,
before the
other party
was infest and
had obtained
possession ;
and this was
sustained by
way of excep-
tion, in a
pointing of
the ground
at the in-
stance of the
private in-
fefter, with-
out any ne-
cessity found
for the inhi-
biter to re-
duce.

1626. March 3.

LAW against LA. BALGONY.

LAW in Kirkaldy pursuing the Lady Balgony for pointing of the ground for an annualrent, wherein the pursuer was infest, to be holden of the L. Balgony, and which infestment was clad with possession diverse years, before the year for which the action was pursued ; the defender *alleged*, That he was infest by a public infestment, following upon a comprising ; which infestment and comprising, albeit it was posterior to the pursuer's right, yet the same depended upon a contract of marriage, whereby the author of the pursuer's right was obliged to provide the bairns of that marriage to a certain sum of money ; upon the which contract, inhibition was served at the instance of the Laird of Dury, father to the Lady Balgony, who was a special contractor with the L. of Balgony in that contract of marriage, and which inhibition was executed before the granting of the infestment by the L. of Balgony to the pursuer ; for not fulfilling of the which condition of the said contract by the L. Balgony, he being now deceased, the lands controverted desired to be pointed, were comprised by the eldest son of that marriage, in whose favours the said contract, anent the provision of the sums therein contained, was conceived, and upon which comprising he was publicly infest ; so the said comprising and infestment public, albeit posterior to the pursuer's right, ought to be drawn back to the said contract of marriage, in respect of the nature thereof, and favour by the law due to the same ; and in respect of the said inhibition before the pursuer's right, especially seeing now by virtue of the said public infestment the defender was in posses-

sion.—THE LORDS found this exception relevant, and preferred the public infestment posterior to the pursuer's prior infestment, in respect of the preceding contract of marriage, and inhibition executed before the pursuer's right and possession had, conform to the public right; which exception, founded upon the prior inhibition, was received in this same judgment: And the LORDS found no necessity that the defender should be put to reduce the pursuer's right, upon the ground of that anterior inhibition, but received the same in this action; albeit the pursuer replied, that his infestment, clad with possession, could not be so summarily taken away by the said inhibition; neither could the possession alleged by the defender be respected; because the lands falling in ward by the decease of his author, and the ward being only expired this year controverted, whatever possession was acquired from the donatar of the ward, who was conjunct person, friend, and kinsman to the defenders, ought not to be respected in the pursuer's prejudice; but the matter ought to be handled as if the parties were disputing before the ward fell; at which time the pursuer was in actual possession of his annualrent; which answer was not respected, but the public infestment, contract, and inhibition, and possession, and exception proponed thereupon, were admitted, as said is.

Act. *Hep & Baird.*

Act. *Aiton.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 177. Durie, p. 188.

1628. July 29.

MITCHELSON against KER.

In this action, two comprisers, who were both infest in the lands, contending for the mails and duties thereof; and having convened the tenant therefor, and the last compriser proponing nullity of the other party's comprising and infestment, albeit prior to his; which nullity, the LORDS finding was receiveable, *etiam hoc ordine*, without reduction, where none of the parties alleged possession, thereby to claim the benefit of a possessory judgment, but were in present dispute for the possession, that by virtue of their rights, he having the best right, might be authorised to possess, whereby the party against whom the nullity was proponed, was forced to allege possession by virtue of his right, and consequently that the nullity could not be received but by way of action, which possession he qualified, in so far as the tenant convened bruiked the land by his tolerance; *2do*, That the tenant and the said compriser verbally agreed together, to pay to the said compriser 20 shillings yearly for the said lands, and which duty the tenant had paid diverse years since his right; neither of these qualifications was found relevant, viz. tolerance to bruik, which the LORDS found no possession in the compriser's person, neither verbal setting, for 20 shillings each year, of land estimate yearly at 500 merks, which was to be suspected in a compriser, who is presumed in law, if he had not intended fraud and prejudice to other

No 90.

No 91.

In an action for mails and duties, two comprisers competing, who were both infest, but neither had obtained possession, the Lords sustained a nullity proponed by the one against the other's comprising, by way of exception.