

the annualrents that had grown on the original bond after the date of the adjudication; and after that, had, in a ranking of the creditors, drawn a further sum upon his adjudication; and having not yet recovered his full payment, had discovered other moveable effects of the debtor, on which he used a new arrestment. In the furthcoming upon said last arrestment, a question arising between him and the other creditors as to the imputation of the sums recovered on his former furthcoming, and in the said ranking; and particularly, if the sum recovered in the ranking upon the adjudication could be applied to the penalty, in prejudice of the other creditors recovering their principals and annualrents; it was found, ' That the sums recovered by the furthcoming were to be imputed to the annualrents that grew upon the original bond, after the date of the adjudication; and that the sums recovered upon the adjudication were to be imputed in the first place to the remaining annualrents of the accumulate sum, as consisting of the penalty, as well as of the principal and annualrents due at the date of the adjudication, and, in the next place, to the said accumulate sum itself.

*Fol. Dic. v. 3. p. 314. Kilkerran, (INDEFINITE PAYMENT.) No 2. p. 284.*

No 5.

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S E C T. II.

Preferable right.—*Ubi est parata executio.—Jus nobilius.—Applicable in sortem ejusdem generis.*

1668. *January 24.*

The LADY WOLMET, and DANKIETH her Spouse, *against* MAJOR BIGGAR, and JAMES TODRIG.

THE Lady Wolmet, and Dankeith her spouse, pursue Major Biggar, and the tenants of Wolmet, for mails and duties. Compearance is made for James Todrig, who being assigned to an annualrent due out of the lands of Wolmet, to the old Lady Wolmet, by an infestment, long prior to this Lady's infestment; upon which right there was also raised an inhibition, whereupon Todrig (as assignee) pursues reduction of the pursuer's right, and several others, and obtained decret thereupon, and now alleges that the Lady can have no mails and duties, because her right stands reduced at the instance of the said James Todrig, who has also apprised upon his anterior annualrent. The pursuer *answered*, That the allegiance ought to be repelled, because the right of his annualrent, apprising, and reduction, has been several years in the person of Major Biggar, who has been all that time in possession of the lands, and therefore, by his in-

No 6.

A possessor, whose title was reduced at the instance of one having a preferable right, having afterwards purchased that right, was found to have ascribed his following possession to his new right.

No 6.

tromission, Todrig's apprising is satisfied within the legal. It was *answered* for Major Biggar, Albeit the right was and had been his, and he in possession, yet the apprising cannot be satisfied thereby, unless he had possessed by virtue of the apprising, which cannot be alleged, because he offers him to prove that he entered and continued in possession many years before he got this right, by virtue of other infestments. The pursuer *answered*, That, by the reduction at Todrig's instance, all Major Biggar's rights stand reduced, so that albeit by them he entered in possession, yet he cannot ascribe his possession to them after they were reduced. It was *answered*, That albeit his rights were reduced, there was no removing or action of mails and duties intented against him upon the prevailing right, and therefore his possession behoved to be ascribed to his prior right, though reduced. *2dly*, He having now divers rights in his person, may ascribe his possession to any of them he pleases against this pursuer, from whom he derived not his possession, nor the cause thereof. *3dly*, It was *answered*, That the pursuer might acquire this right *ad hunc effectum* to purge it, and the inhibition and reduction thereon, in so far as it might be prejudicial to his prior rights, and not to bruik by it. The pursuer *answered*, That albeit Biggar might have acquired this right to evacuate and purge the same, if that had been declared in his acquisition thereof, or otherwise legally, yet not having done it, he must be understood to bruik only by that right that was standing. *2dly*, If he should declare that he did acquire it to purge it, then as his own right revives, which was reduced, so must this pursuer's right, which was also reduced in that same reduction, revive, especially *in casu tam favorabili*, that the pursuer may not be excluded from her liferent, which is her aliment, and seeing the decreet of reduction was obtained by mere collusion, and is offered to be disclaimed upon oath, by the advocates marked compearing therein.

THE LORDS found, that Major Biggar behoved to ascribe his possession to Todrig's right, and to none of the reduced rights, all being jointly in his person, and not having declared *quo titulo possidebat*, and that he cannot now declare that he makes no use of Todrig's right, in so far as may be prejudicial to his own prior rights, and makes use of it as it is prejudicial to the pursuer's rights, which were reduced together, seeing the pursuer's rights would have excluded the Major's other rights, to which he would now ascribe his possession.

*Fol. Dic. v. 1. p. 459. Stair, v. 1. p. 512.*

No 7.

An appriser having purchased in a preferable right, the question occurred, whether his intromissions

1670. June 8. DR HAY against MARJORY JAMIESON.

DR HAY, as heir to his father, who was distressed as cautioner for Con of Artrachy, pursues a reduction and improbation of all rights of the lands of Artrachy, and others, proceeding from Con, in favours of John Stuart advocate, William Neilson, Mr John Alexander, and Marjory Jamieson his relict, or Andrew Alexander, brother to Mr John; wherein there was produced an appris-