

S E C T II.

A preferable creditor can do no voluntary deed to prefer one secondary creditor to another; and if he take payment out of one subject, he is bound to assign to postponed creditors.

1672. July 19.

CHIESLY *against* HAY.

MR William Chiesly and Mr Andrew Hay, having appraised the same lands within year and day, Mr William insisting for mails and duties, Mr Andrew craved to come in *pari passu*; Mr William craved satisfaction of the composition paid to the superior, conform to the act of parliament; Mr Andrew alleged that he had inhibition upon sums in his apprising, and reduction thereupon, of Mr William's right, as being upon sums after the inhibition: Mr William offered to purge and satisfy these sums now within the légal, which would evacuate the reduction; and craved that Mr Andrew might assign him to the inhibition, as is ordinary in such cases. It was *answered*, that he ought not to be décerned to assign his inhibition to his own lesion, for thereby Mr William would reduce his apprising, as to the other sums that were after the inhibition.

THE LORDS found Mr Andrew only obliged to assign the inhibition, so that it should have no effect against his own sums.

Fol. Dic. v. I. p. 222. Stair, v. 2. p. 108.

No 18.

In a competition an adjudger subjected to an inhibition offering to purge by payment of the debt, the creditor was found obliged to assign his inhibition, but not in so far as it might be prejudicial to other debts in his perform.

1676. February 11.

BRUCE *against* MITCHEL.

JOHN MITCHEL stabler having appraised the lands of Lethangie, pursues a reduction of the infestment of these lands granted to Jean Shaw by the common debtor, for security of a sum of money, *ex capite inhibitionis*, because there was inhibition upon one of the sums in the apprising, anterior to that disposition. In which process, Sir William Bruce having right from the defender, offered to purge the inhibition for payment of the sum, he always getting assignation to the sum and inhibition, which THE LORDS sustained. It is now *alleged* for Mitchel, that he was not obliged to grant an assignation, but only a discharge; for albeit the Lords do sometimes ordain creditors to assign diligences or securities to the cautioners whom they distress, for making of their relief against the principal debtor, or in other cases where the party can show no prejudice; yet that is never done where the party hath prejudice, as in this case; for if Mitchel assign the inhibition, it will be a ground to reduce his other bonds on which his apprising proceeds, being posterior to the inhibition, and likewise a disposition of the lands from the heir of the common author.

THE LORDS ordained the assignation with this provision, that it should not be made use of against his other rights.

Fol. Dic. v. I. p. 222. Stair, v. 2. p. 414.

No 19.

Found as above.