

1714. November 19.

SOPHIA and MARY SHEARERS *against* GEORGE FLEMING and JANET KER his Spouse.

No 4.

In a competition betwixt real prior creditors of a defunct, and the second husband of a relict, liferentrix of houses, who was in possession, and who had adjudged for expenses of repairs allowed to him by a decree of the Dean of Guild, it was found, that his intromissions must be imputed in the first place in satisfaction of the decree, and adjudication following upon it.

JAMES HODGE having granted heritable securities upon some houses in Edinburgh, to some of his creditors, to which his wife expressly consented; after his decease, George Fleming marries the said relict and liferentrix, and enters to possession by virtue of her liferent-infestment; and, further, having applied to the Dean of Guild for a visit, he obtains from him a report, that the houses were become ruinous; and, in consequence thereof, a warrant to repair; and, after reparation, a decret of the Dean of Guild court for the expenses, whereupon he adjudges. Thereafter the pursuers, Shearers, raise a process of mails and duties against him, and the other possessors.

Alleged for Fleming, *imo*, That he having entered to the possession by virtue of his wife's liferent-infestment, was *bonæ fidei possessor, qui facit fructus perceptos et consumptos irrevocabiliter suos*.

Answered for the pursuers, That his wife having consented to their right, they were preferable to him.

Replied, That however the pursuers might be preferred to the rents in time coming, yet absolvitor from bygones, in respect of the wife's liferent-infestment, and his *bona fides*, which could not be interrupted before production of the pursuer's infestment, to which the wife is a consenter. *2do, Et separatim*, he ought to be preferred in time coming, by virtue of the Dean of Guild's decret and adjudication thereon; because the subject was preserved by the foresaid reparations.

Duplied, That he knowing the reparations were a privileged debt, to which all creditors must yield, was in *pessima fide* to impute his intromissions to the liferent infestment in the first place.

THE LORDS found, that Mr Fleming's intromissions are imputable in satisfaction and payment of the sums due for reparations contained in the Dean of Guild's decret, and adjudication following thereon.

Act. Spottiswood.

Alts Fleming.

Clerk, Gibson.

Fol. Dic. v. I. p. 459. Bruce, v. I. No 7. p. 11.

1741. July 23.

EARL of ABERDEEN *against* The CREDITORS of SCOT, and their Trustees.

No 5.

WHERE a creditor having led an adjudication of his debtor's estate, upon his bond containing annuairnt and penalty, had thereafter used arrestment upon the bond, and in a furthcoming drawn a certain sum, but which did not exceed

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.

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-

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No 5.

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.