

In no case is one entitled to an assignation to a diligence affecting a subject which he has not himself affected.

No 98.

Kilkerran, (COMPETITION.) No 2. p. 136.

1739. December. CREDITORS of KIRKCONNEL Competing.

JOHN GORDON purchased the lands of Kirkconnel at a public sale; and, before he himself was infeft upon his decret of sale, granted several heritable bonds, upon which the creditors took infeftment at different times. In a competition of his creditors, it was *pleaded* for the latest annualrenters, That the annualrent-rights, being originally ineffectual as to any real right upon the land, were validated by the common debtor's infeftment, and no sooner; and therefore, that they ought all to be ranked *pari passu*; as no creditor can maintain that his real right is of an earlier date than that of his competitor.

'THE COURT, notwithstanding, preferred the creditors according to the dates of their infeftments, in the same manner as when granted by a debtor infeft.'

Rem. Dec. v. 2. No 11. p. 24.

No 99.
Annualrent rights, granted by a debtor before his infeftment, are ranked according to their dates, as if the debtor had been first infeft.

1745. February 21. ARCHIBALD BONTEIN *against* BONTEIN of Mildovan.

ROBERT BONTEIN of Mildovan, by an agreement with Archibald, his eldest son, settled upon him L. 20 Sterling yearly in name of aliment.

Afterwards, falling into bad circumstances, and being incarcerated for debt, he *pleaded* against his son, who was in a good way, the *beneficium competentiae*; the LORD ORDINARY, 14th January 1744, found that the father was entitled to the *beneficium competentiae*?

Pleaded in a reclaiming bill, That this benefit was no part of our law, William Dick against Sir Andrew Dick, No 40. p. 409.; 24th February 1669, between the same parties, No 1. p. 1389.; and Harcarse, title SUMMONS, July 1687, Cairns against Cairns of Bellamore, No 2. p. 1389.

2dly, The present aliment was not *in constituendo*, but was already constitute.

And, 3dly, The action was founded on a contract, not solely on the *pietas paterna*.

Answered, Wherever an action for aliment would be competent, there this defence behoved to be sustained. There could be few decisions of aliments decreed to parents, because few children would stand pursuits of this sort; but one was condescended on, viz. Brown of Thornydykes against his two Sons, No 82. p. 448. though here, out of regard to the sons, it behoved to be noticed, that the dispute was rather, which of them should be charged with their father's aliment, than if he should be alimented.

THE LORDS adhered.

No 100.
A father, debtor to his son, having been freed of the debt on account of the *beneficium competentiae*; it was made a question, but not decided, whether the son might charge his claim on his father's estate, so as to compete with his other creditors.

No 100.

There being other points in the petition, particularly how far the son might be allowed to charge his claim on the estate, to enable him to compete with other creditors, though it should be found he could not insist personally against his father. It was remitted to the Lord Ordinary to hear parties thereon. See No 3. p. 1390.

Act. Graham, sen,

Alt. Haldane.

Clerk, Murray,

D. Falconer, v. 1. p. 80.

No 101.

In a competition among annualrenters, in a case where an inhibition was prior in date to them all, it was found, that the deficiency of funds did not affect equally, or *pro rata*, all the annualrenters, who stood preferred the one to the other, but affected only the last.

1747. January 10. LITHGOW against The other Creditors of ARMSTRONG.

In the ranking of the creditors of Francis Armstrong of Whitehaugh, there were three infestments, and an inhibition prior to all the infestments, with an adjudication on the ground of the inhibition, and which debts did more than exhaust the subject. John Lithgow had the first and preferable infestment over the whole subjects belonging to the debtor, next to him, William and Henry Elliots had infestment on the lands of Whitehaugh, and after them, William Elliot of Bradly; and, upon the other tenement of Snobberty, John Elliot of Binks had an infestment after John Lithgow. But then the Earl of Leven had the inhibition prior to all the infestments; which, how soon it appeared in the ranking, the other creditors, whose infestments were posterior to John Lithgow's, purchased at L. 175 Sterling; and, by the scheme of division, this sum was allocated proportionally upon the shares drawn by each of the infesters, who were all struck at by the inhibition.

Of this allocation, John Lithgow the first infester complained, insisting, that he ought to bear no burden of any part of the sum drawn by the inhibitor, but that the same ought to be laid wholly upon the last infestment; and that upon these principles, that an inhibition has no operation for the benefit of any person whatever, other than the person at whose instance it is served, and that even in his favour it has no operation against any debt, though contracted after the inhibition, further than in so far as that debt prevents the inhibitor from drawing what he would have drawn if it had not been contracted, and that no infester can be prejudiced by the contraction of debts after his infestment.

Answered for John Elliot of Binks the last infester, That the scheme is in this case made out in the very same way that all schemes have been made, as far back as there is record of the practice of the Court: There is first a general ranking of the several debts according to the dates of the infestments; but when the creditor has drawn in this general ranking, and that an inhibitor is to be satisfied of his debt, there is a second ranking or draught whereby he, the inhibitor, takes back proportionally from each creditor in the general ranking struck at by the inhibition, without distinction of the priority of the infestments among themselves: And the reason is, that an inhibition is a legal prohibition issued out against the debtor, discharging him to do any deed whereby