

valent to an infestment in the competition with a voluntary right, such as this is, especially the disposition, which is the ground of the voluntary right, being before the denunciation of the apprising; and the nature of voluntary rights being such as cannot be completed by diligence without a superior's consent, the superior at any time may confirm them, even after a charge upon a comprising, and that, if it were otherwise, it would tend to un hinge a purchaser's securities, there being no record of charges upon comprising against superiors. — THE LORDS, in respect that the disposition was prior to the denunciation of the apprising, preferred the voluntary right completed by confirmation of the superior, albeit posterior to the charge upon the comprising, in regard they found, That the charge was only to be considered in the competition of diligences among themselves, but not with voluntary rights.

*Fol. Dic. v. 1. p. 182. Pres. Falconer, No 58. p. 38.*

No 66.

1707. July 15.

MR JOHN STEUART of Blackhill, *against* The ADJUDGERS of the Estate of Corshill.

IN the competition betwixt the Adjudgers of the estate of Corshill and Mr John Steuart of Blackhill, who craved preference upon a disposition of relief granted to him by Corshill, clothed with infestment before the leading of their adjudications; it was *alleged* for the Adjudgers, That the disposition of relief could be no ground of preference; because it bears this clause, ' That the granting thereof shall be nowise prejudicial to any former right granted by Corshill to his lawful creditors, of their just and true debts owing by him to them; whereby their anterior debts, though only personal were salved; because, *imo*, The exception is of any former right of their just and true debts owing by him to them, and not for their just and true debts; and the word *of* made the clause respect personal bonds, whereas the word *for* would more properly have related to real securities; *2do*, The clause had been useless, had it reserved only prior real rights; for these could not be prejudicial thereby, and so needed not to be reserved; and *verba debent aliquid operari*; *3tio*, Blackhill has looked upon that clause to be a reservation in favours of all the prior creditors, or else he would never have been at the trouble and expence to lead so many adjudications as he has done, for the very debts contained in the disposition; *4to*, The words are to be interpreted *contra proferentem*, *i. e.* the party who ought to have cleared the meaning of them, and that is Blackhill; the clause being ingrossed in favours of creditors in a right granted to Blackhill, who may blame himself that real were not distinguished from personal creditors.

No 67.

In a competition betwixt adjudgers and a disponee in relief, infest; the disponee found preferable to personal creditors, whose adjudications were posterior, notwithstanding of a reserving clause in his disposition, in favour of prior creditors.

No 67.

*Answered* for Blackhall; The clause can only operate in favours of anterior real creditors; for, *1mo*, The distinction betwixt *of* and *for*, which in that clause would signify one and the same thing, is frivolous; *2do*, Though the words be not extended to personal creditors, they will operate very much; for there might have been many objections against the former voluntary real securities; yea, if they be extended to personal creditors, the disposition to Blackhall was to no purpose; seeing Corshill, at the granting thereof, had more debt than his estate was worth. It were absurd, that under the notion of *verba debent aliquid operari*, we should make them *operari quidlibet*, and that which overthrows the very design of the disposition; *3tio*, The accumulating securities *ex superabundante non nocet*; and besides, Blackhall had good reason to adjudge notwithstanding his infestment of relief, that thereby he might have a more direct security, which at length might become a sovereign irredeemable right; *4to*, Any thing the creditors can draw from a contract where they were not parties, is rather strictly to be interpreted, considering that voluntary grants in favours of others, are not to be drawn too much in prejudice of the granters; *5to*, It cannot be thought that by the foresaid clause, personal creditors were meant; because the design of the disposition and infestment of relief, was to give Blackhall real security, beyond the personal security of relief that formerly he had, and consequently to put him in a better condition than other personal creditors; for the clause aforesaid was of the nature of an exception, the same upon the matter, as if it had been worded thus, 'Excepting from this disposition any former right granted by Corshill to his creditors, of their just and true debts.' Now, by the rule of interpretation, *exceptio* must be *de regula*; consequently this exception in a disposition for real security, must necessarily be understood of real rights; *6to*, The clause cannot operate in favours of personal creditors; for, had these never adjudged, they could not by virtue thereof effectually disappoint a process of mails and duties at Blackhall's instance, founded upon his real right of relief; nor can it be any more effectual to them, now that they have adjudged; because the meaning of the provision was to secure the former rights of creditors in the state they then were, and not to fortify adjudications that then were not, and possibly would never exist; *7to*, To show that by the disposition to Blackhall, a preference to personal creditors was designed, by another clause therein it is provided, That after his own payment by intromission, he should be comptable for the superplus intromission to Corshill's other creditors; which argues plainly, that Blackhall was to be first paid, and that these other creditors were the personal creditors; the real creditors being saved by the other clause preferring them to Blackhall himself.

*Replied*; To interpret the clause in Blackhall's sense, would make it altogether elusory; for the interest of prior real creditors would have been entire however; seeing, if their infestments were valid, they were certainly secure; and though there had been nullities therein, they would have proved such diligences as might be a ground to reduce the posterior voluntary right in favours

of Blackhall, upon the act of Parliament 1621; therefore the uselessness of the clause, if not extended to personal creditors, is a greater argument it should be extended to them, than it is to say, That the disposition to Blackhall would be to no purpose, if the clause were to be extended to personal creditors; for the disposition being his own evident, he who is *in lucro captanto*, and took it with a reservation in favours of creditors, ought not to be allowed to explain that reservation, so as they who are *in damno vitando* shall have no advantage by it; *2do*, As to the clause whereby Blackhall, after relieving of himself, was to hold compt to the other creditors for the superplus rent, conform to his intromissions; that was upon supposition that he did intromit, and that the rents were sufficient to both; in which case, being only liable for actual intromissions, he might retain for his own satisfaction in the first place, and leave the rest to the other creditors. But that event of his intromission did not exist.

THE LORDS found, That the disposition by Corshill in favours of Blackhall, operates in his favour a preference to the personal creditors, who had not secured themselves by anterior preferable diligence.

*Forbes, p. 182.*

1709. February 8.

COLONEL JOHN ERSKINE of Carnock *against* SIR GEORGE HAMILTON.

IN the competition betwixt Colonel John Erskine, and Sir George Hamilton, (mentioned *supra*, December 18. 1708, *voce* CITATION, No 88. p. 2225.) for the right of the lands of Tulliallan, the Colonel founded on an apprising led at the instance of Duncan Lindsay, against Sir John Blackadder the heritor, and an infeftment thereon under the Great Seal, *anno* 1633, conveyed by Duncan Lindsay's heir to the Earl of Kincardine, the Colonel's author, in the year 1676, who, upon the heir's resignation, obtained that same year a charter under the Great Seal. Sir George Hamilton produced an apprising led by Patrick Wood in *anno* 1637, on a contract of salt, betwixt Sir John Blackadder, Patrick Wood, James Loch, and other six merchants, who, for the price thereof, were all infeft in March 1634, and assigned their rights, with some other debts, in trust to Patrick Wood, that he might lead an apprising for their respective behoof; to James Loch's eighth share of which apprising, Sir George Hamilton derives right from Sir Robert Miln, to whom James Loch disposed it.

Sir George Hamilton pleaded his preference to Colonel Erskine thus, Duncan Lindsay disposed his apprising in the year 1634 to Patrick Wood, who had a partial right to the reversion; which disposition, containing procuratory of resignation, and precept of sasine, being registered in the register of reversions, was, 14th January 1704, found to have the effect of a redemption and renunciation of the apprising, for securing Wood the reverser's right, against all poste-

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A party had conveyed an apprising to one person, and his heir afterwards conveyed it to another. The first having been recorded in the registers of sasines and reversions, the second was null.