No 13. presume that he hath lifted from all, by his decreet, and that he was not impeded; and if, by fraud or colluſion, he hath neglected ſome of the tenants, or ſuffered the common debtor to lift the rents, *ſibi imputet*, he muſt account for them as if he had lifted them.

Which the LORDS found relevant, and found the defender liable to account for all the tenants contained in his decreet, unleſs he inſtruct how he was excluded; but as for the common debtor's poſſeſſion by his own labourage, which the poſterior appriſers might viſibly know, there was nothing alleged to be in the decreet concerning the common debtor, and ſo nothing was determined as to that point, but that the defender was to be accountable for all the tenants contained in his decreet, lying contiguous in one tenement, whereof the poſſeſſion of the greateſt part was acknowledged.

Stair, v. 2. p. 833.

1720. *January.* WALKER *againſt* MACPHERSON and FORRESTER.

No 14.
An adjudication, through informalities, being reduced to a ſecurity, the intromiſſions had, *medio tempore*, are imputed in extinction thereof.

AN adjudication of a tenement, by progreſs in the perſons of Macpherſon and Forreſter, having been reſtricted to a ſecurity, at the inſtance of John Walker, merchant in Edinburgh, becauſe more was adjudged for than was due; the purſuer *contended*, That the adjudication was extinguiſhed by the defenders and their authors intromiſſions, even thoſe had after the legal reverſion of ten years; becauſe the adjudication having been found only a right in ſecurity, and the legal ſtill open, it muſt be extinguiſhable by intromiſſion, whether the original creditor intromit, or his ſingular ſucceſſor; for ſuch is the nature of rights in ſecurity and payment.

The defenders *pled*, That poſſeſſion having been attained after the legal was expired, the *fructus bona fide precepti et conſumpti*, while they had reaſon to believe themſelves proprietors *unaccountable*, could not be imputed to extinguiſh the principal ſums in their adjudication; which, in this caſe, would be particularly hard, becauſe if they be bound to account, it muſt be by a rental; and, mean time, poſſeſſing *tanquam domini*, they have neither preſerved vouchers nor documents of public burdens, reparations, waſtes, bankrupt tenants, &c. to diminiſh the ſame. If, then, the purſuer's plea obtain, no man ſhall ever poſſeſs quietly or ſecurely upon an adjudication; for it will not be ſaid, that the law ties an adjudger to keep accounts of his actual intromiſſions, dead, waſte and poor for ever; and yet no man can be ſecure, but minorities may interrupt for a long time beyond the courſe of preſcription, during which, an adjudger, or purchaſer of an eſtate from an adjudger, (and many eſtates in Scotland, have no other foundation,) ſhall not know whether he is maſter of an opulent eſtate, or if he is not worth a ſhilling in the world.

(EXTINCTION.)

No 14.

To which it was *anſwered*, That while the purſuer pleads *extinction* only, and not *repetition*, he pleads nothing inconſiſtent with the *bona fides* of the defenders; which will be plain, by taking a view of the effect of *bonæ fidei* poſſeſſion in voluntary rights. Where one purchaſes a voluntary irredeemable right, and upon the faith of its being an effectual purchaſe, pays the price; another appearing, and excluding him with a better right, his *bona fide* poſſeſſion can have no other effect, but to exclude repetition of what he has uplifted and conſumed: His price is loſt, unleſs he can recover it off his author upon the warrandice; and all he can plead, is, to retain what he hath *bona fide* intromitted with: It is the ſame when an adjudication is purchaſed, which is afterwards excluded by preferable diligence. If then this be the only effect of *bona fides*, when the right acquired is excluded by preferable right: For what reaſon ſhould it have a further effect, when one has laid out his money upon the purchaſe of a right that of its own nature is extinguiſhable, and is by intromiſſion actually extinguiſhed? When it is found extinguiſhed, he is in the ſame caſe that the *bonæ fidei* poſſeſſor is, whoſe right is excluded by one preferable; he loſes his price, and is only ſaved from repetition of what he has intromitted with and conſumed. Hence, it is evident, that the benefit pleaded by the purſuer, of having his debt extinguiſhed by intromiſſion, which ariſes from the nature of the right, does noways leſſen or encroach upon the favour allowed to *bonæ fidei* poſſeſſion: For ſtill the *bonæ fidei* poſſeſſor is in the ſame ſtate he would be, had he been excluded by another right; and conſequently has all the benefit of his *bona fides*, though his intromiſſions be imputed in extinction of his adjudication, that *bona fides* gives in any other caſe.

It was *replied* for the defenders, They lay not their defence here ſimply upon their *bona fides* but upon the nature of their intromiſſion: When one intromits by virtue of a right in ſecurity, which he *bona fide* conſiders as a right of property, the intromiſſions cannot *impute* in *extinction* of the right, for theſe reaſons, That it is not the *fact* of intromitting in any caſe that extinguiſhes the right, but the creditor's intromitting in virtue of that right; and as having ſuch a right, his *application* of the intromiſſions thereto: Juſt as in the common caſe of payment, it is not the debtor's telling over the money that extinguiſhes the obligation, but the creditor's acceptance *in ſolutum*. Thus one having a right in ſecurity, which leads him to intromit, if he intromit not as in that right, but as in ſome other right, or perhaps as doer for another, or as *prædo* without any right at all; however he may be accountable for his intromiſſions, they cannot directly *impute* to the *extinction* of the right upon which he did not intromit. In this caſe, indeed, the intromiſſion was had in virtue of that right itſelf, which is craved to be extinguiſhed by the intromiſſion; but ſtill, ſince the intromitter took himſelf to be proprietor, and never conſidered his right as in ſecurity only, and therefore never once dreamed to make the *application* of his intromiſions to the *extinction* of that right, either *animo*, or by any other external deed; it may be thought that it comes to the ſame, as if he had intromitted by any ſeparate right; the bare *fact* of intromit-

No 14. ting, ſignifying nothing, the *animus*, the deſign of the intromiſſion being neceſſary to be conſidered, without which there is no *application*, and conſequently no *extinction*.

'THE LORDS found the intromiſſions imputable.'

Rem. Dec. v. 1. No 18. p. 38.

1752. *January* 14. DALRYMPLE *againſt* LYON.

No 15.
In accounting for intromiſſions, in conſequence of an adjudication on a bond, which contained a penalty exceeding the fifth part of the principal ſum, the exceſs was diſallowed.

JOHN LYON and Robert Dalrymple having ſeverally obtained adjudications within year and day of each other, of certain houſes in Port-Glaſgow, againſt their debtors Alexander Watſons, elder and younger; Lyon obtained a decree of mails and duties, and thereupon entered to the poſſeſſion of the whole ſubjects contained in his adjudication.

When Robert Dalrymple underſtood him to be paid by his intromiſſions, he brought a proceſs of reduction and declarator of extinction againſt Lyon, wherein the following queſtions *inter alia* occurred.

It was *objected* by the purſuer to one of the grounds of the defender's adjudication, being a bond for 200 merks, That it contained a penalty of L. 40 Scots, and that the ſame ought to be reſtricted to a fifth part of the principal ſum.

Anſwered for the defender, That though the Lords may in ſome caſes have reſtricted exorbitant penalties to a fifth part, yet that is not on account of any law that penalties ſhall not exceed a fifth part, but from an equitable conſideration of the intereſt of parties, that the penalty may not exceed the neceſſary expence in recovering payment; and as for that reaſon, where the ſum is great, it might not be wrong, even to reſtrict the penalty to a leſs ſum, ſo where the ſum is ſmall, as in this caſe, and that the penalty of a fifth part cannot defray the neceſſary expence, there is no equity in reſtricting the penalty, which has, by conſent of parties, been agreed on.

THE ORDINARY 'reſtricted the penalty to a fifth part of the principal ſum, and found, That L. 13 : 6 : 8 Scots, in which it excceeded the ſaid fifth part, was to be deduced from the accumulate ſum in the adjudication.' And the LORDS 'adhered.'

In what caſe an adjudger accounts by a rental, and from what period his intromiſſion imputes.

A more material queſtion was determined concerning the method of the defender's accounting for the rents, Whether he was to account by a rental, and from what time he was to be charged with the year's rent?

With reſpect to which the ORDINARY 'found, That the defender having entered to the total poſſeſſion of the ſubjects adjudged, upon a decree of mails and duties, he was not only accountable by a rental, but was obliged to have done exact diligence for recovering the rents from the tenants, and to have let the