

in borrowing money, was fraudulent ; 2. The posterior right of annual-rent is incompatible with the first right of property, proceeding from the same author, seeing *res sua nemini servit*, and it imports a passing from the first ; 3. Sir George's infeftment, though a day posterior, was first made public by a summons of poinding the ground formally executed ; whereas Sir John Clark's right could not be habilely clothed with possession by his summons of mails and duties. Answered for Sir John Clark, That he might take infeftment when he pleased on his disposition for an onerous cause ; and his delay to take infeftment can infer no presumption of fraud, James Clark being a trading merchant, who had a considerable stock, and broke by reason of cautionary for John Muir and others, whose affairs went suddenly in disorder ; 2. The bond bears an express clause and provision, that the taking of annual-rent should not be understood a passing from the right of property ; but it might be lawful for him to use both, or either, as he thought fit ; 3. In defence of rights, one may use inconsistent titles ;—*December 22, 1674, in the case of Sommervell ; March 1684, Pitliver against Provost Miln ;* 4. The summonses are opposed, which are applicable to both rights. The Lords sustained the second and third allegiance proponed for Sir George Lockhart, and found, that the right of property was passed from by taking the posterior annual-rent, and that a summons of mails and duties did not clothe an infeftment of annual-rent with possession ; and therefore preferred Sir George.

Page 166, No. 598.

1685. *February 27.* AUCHINBRECK *against* ROBERT CAMPBELL.

IN the process of mails and duties, at the instance of Auchinbreck, as having acquired right to an apprising against his father, against the tenants, compearance was made for his father's creditors, who alleged, That the comprising was redeemable from the pursuer, the apparent heir, for the sums he paid for it. Answered for the pursuer, The act of Parliament about the redemption of apprisings acquired by apparent heirs, concerns only the taking right to expired apprisings, which is presumed to be done in defraud of creditors ; whereas the pursuer's apprising was acquired *in cursu* of the legal, and several years on't are yet [to] run. Now, there being in this case a *remedium ordinarium*, by using an order, there is no necessity to recur to the extraordinary remedy of the Act of Parliament ; and creditors have no more prejudice by the apparent heir's having the right, while it is redeemable, than if it were in the person of a stranger. Replied for the creditors, The presumption of a fraudulent contrivance, for the benefit of apparent heirs, holdeth in the case of current as well as in the case of expired apprisings ; for there might have been partial payments of the apprising acquired, the instructions whereof the apparent heir, being master of all the papers, may suppress ; and it will be difficult for creditors to prove that the apparent heir gave not the full value for the apprising, otherwise than by his own oath. It might also fall out, and be industriously ordered, that the apparent heir should not take right to an apprising, till it were near upon the expiring. Besides, the case of creditors, who are *in damno vitando*, is more favourable than that of an apparent heir, who is *in lucro captando*. And,—*July 21, 1671, Sir*

George Maxwell of Pollock against Kirkonnel,—the Lords found an apprising acquired by an apparent heir, during the legal, redeemable, within ten years from the time of acquiring, for what was truly paid for it, if it stood in his person till the legal were expired. The Lords found the apprising redeemable from this apparent heir, upon payment of the sums he truly gave for it.

Page 11, No. 49.

1685. *February 28.* SINCLAIR *against* SINCLAIR.

FOUND that payment of a debt by a debtor, or uplifting of mails and duties, in satisfaction of back tack-duties of an improper wadset, by virtue of an assignation from the debtor, after diligence was done against him by another creditor, did clothe a base right with possession, although the duties might be repeated upon the Act of Parliament 1621, as gratifications after diligence.

Page 166, No. 599.

1685. *March.* PATRICK HOUSTOUN *against* WILLIAM M'KIE.

ONE being pursued as *se gerens pro hærede* by intromission with the pursuer's deceased debtor's rents, he alleged, That he was but a second brother, and so could not be heir. Answered for the pursuer, The elder brother having been eighteen years abroad, without any account of him, is reputed to be dead; and so the defender is now apparent heir. The Lords sustained the defence, and found the pursuer could not, *hoc ordine*, call for the defender's intromissions, but ought to adjudge the lands, or arrest the rents.

Page 11, No. 50.

1685. *March.* WILLIAM BOGLE *against* BAILIE HALL and MR BOWDEN,
LONDONER.

IN the process of forthcoming, at the instance of one Bogle, who had arrested some tobacco in the hands of Bailie Hall, as belonging to William Johnston, the pursuer's debtor, compearance was made for Mr Bowden, who alleged, That the tobacco was his, and only consigned in the hands of William Johnston, as his factor and correspondent, and so could not be carried by an arrestment at the instance of Johnston's creditors. Answered, Possession in moveables imports a right; and it is three years since the tobacco came into Johnston's possession. The Lords sustained the allegiance made for Bowden as relevant.

Page 16, No. 85.
