

statute posterior adjudgers, if within year and day, are conjoined, and make a part of the first effectual adjudication.

No 35.

*Fountainhall, v. 1. p. 800.*

1702. *January 15.*

M'CARTNEY of Blaiket *against* IRVING of Drumcoltran.

JOHN MAXWELL, heritor of the lands of Cocklike, disposes the same to Jean Guthrie, in *anno* 1636, from whom Blaiket has right by progress, and pursues mails and duties.

Compearance is made for Drumcoltran, who *alleges*, He has a preferable right, in so far as the said John Maxwell stood inhibited, at the instance of James Maxwell his brother, for 4000 merks, before the said disposition to Guthrie; and having granted a bond of corroboration of the ground of inhibition, restricting the same to 2000 merks, there was an apprising led upon that corroboration, which was conveyed to Drumcoltran, and he thereupon in possession.

It was *answered*, No regard to the apprising, posterior to his (Guthrie's) right; because it proceeded upon a voluntary bond of corroboration, and so could not be drawn back to the date of the inhibition.

“THE LORDS found, That Drumcoltran, as appriser, upon the bond of corroboration could not quarrel deeds as posterior to inhibition used upon the debt corroborated.”

It was farther *alleged*, That Drumcoltran had also right to the debt corroborated, and to the inhibition, and repeated his reduction *ex capite inhibitionis*.

It was *answered*, A reduction *ex capite inhibitionis* is not competent in a competition for mails and duties, unless the inhibitor had also apprised or adjudged the mails and duties; because inhibition is merely a prohibitory diligence, annulling posterior voluntary deeds in prejudice of the inhibitor; so that, unless the inhibitor could affect the mails and duties by his diligence, he cannot pretend he is any way prejudged by the deeds in favours of the pursuer, in respect that, if Maxwell, the common author, were pursuing, he could not be excluded upon the bond and inhibition; and the pursuer is found preferable to the apprising and corroboration.

It was *replied*, That reductions are daily sustained upon inhibitions, without adjudging, and particularly in rankings in order to sale, which have their rises from suspensions, or actions of multiple-poining at tenants instance, from whence arises a competition, for mails and duties; and, for the same reason, Drumcoltran should be admitted to repeat his reduction in this competition.

No 36.

An inhibitor cannot compete for mails and duties, unless he has also adjudged.

No 36.

It was *duplied*, Rankings in order to a sale are not so much considered for affecting the mails and duties, as for distributing the price; and, it being the common interest of the creditors to expedite such processes, they are not in use to object the want of formalities, which a little time can supply; but it was never found, upon any debate or decision of the Lords, that, even in these rankings, the inhibitor could draw a share, unless he did compleat his diligence by adjudging; and, in this case, the question being only for the current mails and duties, to which the inhibition can give Drumcoltran no right, he cannot compete.

“THE LORDS preferred M’Cartney to the mails and duties, reserving to Drumcoltran to adjudge, and thereafter to pursue reduction as accords.”

*Dalrymple, No 34. p. 42.*

No 37.

An inhibition being served upon a general charge to enter heir, it was found, that the debt must be specially mentioned in the charge.

1706. June 25: DAVIDSON *against* RANDEL and ROBERTSON.

HARY DAVIDSON, taylor in the Canongate, in his second contract of marriage, provides 1000 merks to the children of that marriage; and Agnes being the only bairn procreated thereof, her father, by a separate bond of provision, gives her a thousand merks more; but it makes no mention of, nor has any relation to the contract of marriage. On these rights, she adjudges some lands from Robert Davidson, her brother of the first marriage, and that for both the sums in the contract, as well as the separate bond. Thomas Randel, and Margaret Robertson, as deriving right from the said Robert, compete with his sister Agnes, and repeat a reduction of her rights on these reasons; *imo*, That she cannot claim both the 1000 merks, but must content herself with one of them; for the father being debtor to his bairns of the second marriage in 1000 merks by the contract, the posterior bond being for that same individual sum, must be presumed to be in implement thereof, seeing *debitor non presumitur donare quamdiu debet*; and so the first provision is satisfied and absorbed by the last, which comes in the place thereof, and both cannot subsist together; and the current of decisions has run this way lately. In the famous debate betwixt Yester and Lauderdale, 2d Feb. 1688, *voce* PRESUMPTION, the LORDS found the Lady Yester could not both seek the provision in her mother’s contract of marriage, and her bond of provision likewise; and that the second was no augmentation of the first, unless it had expressly borne, that it was over and above what was contained in the contract of marriage, but they behoved to coincide and compensate one another as but one debt, especially where the sums exactly quadrate together, as they do here, and was so found, 29th June 1680, Young *contra* Paip, *voce* PRESUMPTION. *Answered*, The brocard cited does not answer between parents and children; for their bonds of provision are not to be interpreted in satisfaction of former provisions, but rather to be additions thereto; and Justinian calls these donations *distinc-*