

1629. *March 10.* SHAW *against* KINROSS.

## No 30.

A dispoone to an infeftment of annualrent granted a back-bond to the dispooner, retrocessing the liferent of it. Thereafter he infeft himself in the annualrent right, upon the procuratory of resignation in the disposition. A singular successor was found not obliged to implement the back-bond.

ONE being infeft in an annualrent out of some lands, who disposing that annualrent to another; after which disposition (which contained a procuratory of resignation therein), the acquirer of the disposition, before he was infeft conform thereto, by the superior of the annualrent, who was heritor of the land out of which it was disposed, gives a bond to the dispooner, reponing her to her liferent thereof; after which bond, he immediately uses the procuratory of resignation, and was infeft by the superior in the said annualrent, the dispooner nevertheless retains the possession; after which, the acquirer of the infeftment, upon the said resignation, resigns the said infeftment, and right of annualrent, in the hands of the heir of the superior and heritor of the lands, who, notwithstanding thereof, is still decerned to pay the annualrent to the said first resignant, conform to the foresaid back-bond made to her; thereafter the right of the land being comprised from the said heritor, and it being questioned, if the land was affected with the burden of that annualrent, and that really the compriser was holden to pay the same as the author was, conform to the foresaid bond; it was found, that the compriser might bruik that land without that burden, which the singular successor was not holden to pay, albeit his debtor, from whom he comprised the land, might be personally, and his heirs subject therein; yet seeing the real right was resigned in the superior's hands, no bond given by the resigner, or acknowledged thereafter by the superior, would affect the land against a singular successor; and, therefore, the person first heritor of the annualrent, by the right of the said back-bond, with continual retention of possession conform thereto, was not found to have any right against the land, or against the singular successor, but only against the heirs of the makers of the bond, and others whom she might personally convene.

Act. Rollock.

Alt. Burnet.

Clerk, Gibson.

*Fol. Dic. v. 2. p. 64. Durie, p. 435.*1632. *July 17.* LA. BORTHWICK *against* SCOT.

## No 31.

A factory granted to intromit with rents for payment of certain debts, was found no real right.

THE Lady pursuing for the mails and duties of the lands of Cathcum, conform to her conjunct infeftment, after the decease of the Lord Borthwick, her husband; and the defender *alleging*, That her umquhile husband had, for causes most onerous, viz. for satisfying of a debt owing by him to the excipient, granted a power and letters of commission to him, to intromit with the duty of these lands, for payment of these debts, ay and while he were satisfied thereof; and that they were not yet satisfied, and therefore the duties ought to per-

tain to him, and not to the Lady;—in this process, it being questioned, if this factory could be obtruded against the Lady, who *alleged* the factory not to be a real right, and that it could not be obtruded against her, no more than a right to bruik lands, made to a creditor, to be possessed for payment of an annualrent of money lent, ay and while the money were repaid, could be admitted against a singular successor, as she alleged herself ought to be considered, seeing she alleged that her right flowed not from her husband, but proceeded upon the Earl of Lothian her brother's resignation, who was heritor of the lands, and resigned the same for infestment alike principally, to be given to my Lord her husband, and to her, and to the longest liver of them;—and the other party *answering*, that the factory was real; being for a cause so onerous, specially against the Lady, who could not be reputed a stranger, nor singular successor, seeing her infestment behoved to be reputed to flow from her husband, seeing the Earl of Lothian was obliged to resign in his favours and his heirs, and not in her favours, so that her infestment behoved to be reputed her husband's deed:—THE LORDS repelled the allegiance; and found, that this factory was not real, and could not be respected against the Lady, nor her infestment, which the Lords found ought not to be respected as an infestment or donation flowing from her husband, seeing she was equally infest with him, and that he could not revoke the same, not being his own deed.

No 31.

Act. Nicolson.

Alt. Stuart.

Clerk, Hay.

*Durie, p. 647.*1639. January 30. COCKBURN *against* TROTTERS.

No 32.

A MILL being feued, and the author having given a bond apart at the constitution of the feu, binding him to lead the mills-stones when required, on pain of losing a year's feu-duty; and the singular successor being required, and failing; the LORDS assoilzied him, because this was a bond *extra corpus juris*, and so could not bind a singular successor in the right of the feu.

*Fol. Dic. v. 2. p. 65. Durie.*\*\* This case is No 4. p. 4187. *voce* FEU-DUTIES.1661. July 6. TELFER *against* MAXTON.

No 33.

AN appriser infest having obliged himself to communicate whatever profit should arise to him by his apprising, out of the common debtor's estate, this paction was found not good against a singular successor in the apprising.

*Fol. Dic. v. 2. p. 64. Stair.*\*\* This case is No 18. p. 5631. *voce* HOMOLOGATION.