

purge his land, as he had done; and the sums assigned, would belong to the assignee; and the clause, suspending the payment thereof, if Jean married not, signified nothing; *sed verba sumenda sunt cum effectu*; and the meaning of the parties, and conception of the condition suspensive, must be preserved.—The charger answered, That he opposed the bond, wherein, without all question, Jean was fiar; and the substitutes, being the heirs of tailzie, cannot quarrel her deed, but are bound, as representing her, to fulfil the same; and, albeit Jean's assignees be not expressed, they are ever included, where they are not expressly excluded. Neither is this annualrent stated as a mere accessory; because the requisition of the principal sum may be discharged, or may become, by the suspensive clause, ineffectual, as now it does; and yet the obligation or investment of annualrent, remains a perpetual right, though redeemable at the debtor's option; neither is there, by law or custom, any difference or exception, whether the annualrent be gratuitous, or for a cause onerous: And for the meaning of the father, procurer of the bond, it must be understood as it is expressed, only to exclude the lifting of the principal sum by Jean, upon the clause of requisition, if she were not married; and, if his mind had been otherways, it had been easy to have adjoined a restrictive clause; or, instead of the substitution, to have set down a provision, that if Jean died unmarried, the annualrent should belong to her brothers and sisters nominate; but this being an ordinar, single substitution, hath neither expressly, nor implicitly, any condition or obligation upon the fiar, not to dispone.

THE LORDS repelled the reasons of suspension; and found Jean to be fiar of the annualrent; and that she might assign the same; and that the substitutes could not quarrel the same.

Fol. Dic. v. 1. p. 3. Stair, v. 1. p. 624.

1672. July 19.

RUTHVEN against GRAY.

ANNA RUTHVEN, having granted an assignation of a bond of 4000 merks, granted by her father, to Alexander Seaton; he thereupon, and upon several other debts, apprises the estate of her father, Sir Francis Ruthven; which right, came by progress, in the person of William Gray of Hayston; in satisfaction of which apprising, Sir Francis disposes a part of his lands, irredeemable, and Hayston renounces the rest. The said Anna Ruthven pursues a reduction of the assignation, granted by her to Seaton, now belonging to Hayston, upon minority and lesion; which reduction, contains a declarator, that Hayston ought to dispone to her a part of the lands whereto he had right, effecting to her sum; and having instructed her minority, she insists in the reduction.—The defender *alleged*, That the act of this process was extracted without his knowledge, otherways he would have alleged, as he now alleges, That the assignation having been made to Seaton, his author, who is liable in warrandice, there ought to have been no process sustained, till Seaton was called; who only knew, and might have alleged, that there was no

No 8.

No 9.

A minor assigns a bond gratuitously. The assignee leads an apprising. The assignation is quarrelled upon minority and lesion. The assignee offers to retrocess to the assignation, but not to the apprising.—Ordained to convey the apprising; which, being led upon the minor's debt,

No 9.
must follow
it, and ac-
crease to the
minor.

lesion; because the foresaid assignation was, for an equivalent cause, onerous. *2dly*, There is neither law nor obligation upon the defender, to assign his right to this pursuer, but only to repon her; for he might have torn, or burnt, his apprising, or discharged the debtor for nothing; which would not have hurt the pursuer; for the reduction would take off his discharge, as falling in consequence.—The pursuer *answered* to the *first*, That it was incompetent now, after liti-contestation, and that it was not relevant; for though, in reductions of heritable rights, authors, liable in warrandice, must be called, that holds not in personal rights; but the defender ought to have intimated the plea to his author. *2dly*, The assignee's right being a procuratory, *in rem suam*, the reduction doth only take away that member of it; that it is not *in rem suam*; but it remains still a procuratory; so that, what was done by the assignee, as procurator, accretes to the constituent, as if he had used inhibition, or interruption; and generally, the Lords have ever ordained parties to assign their rights, where the assignation is not hurtful to them, and profitable to the other party.

THE LORDS repelled the defences; and ordained the defender to dispone a proportionable part of the lands; but the defender having offered to prove, that there was no lesion, because there was an equivalent sum paid for the assignation: THE LORDS would not sustain the same, unless it were offered to be proven, that the sum was profitably employed for the minor's use.

Fol. Dic. v. 1. p. 2. Stair, v. 2. p. 107.

1684. February 15.

LORD PITSLIGO *against* HILSTONE and her HUSBAND.

No 10.

A bond is granted to a man and his wife, in conjunct fee, and to their children. An apprising is led on it, at the instance of the wife and her second husband.—Found effectual, and to accrete to the children of the first marriage.

IN a reduction, pursued at the instance of Lord Pitligo, and Robert Miln, his assignee, of a comprising, deduced at the instance of Isabel Hilstone, and Mr William Hog, her husband, for his interest, of the estate of Ludquhairn; upon this reason: That the comprising was null, being led upon a bond granted by Ludquhairn, to Patrick Hodge, and the said Isabel Hilstone, then his spouse, in conjunct fee, and the heirs to be procreate betwixt them; in which bond, the said Isabel Hilstone was only liferentrix, and so could not comprise for the fee of the sum: And *2dly*, That albeit she, and her husband, Mr William Hog, could have comprised for the sum; yet she behoved to comprise in terms of the bond, viz. In favours of the heirs of the marriage betwixt her and Patrick Hodge; but could not comprise for herself and her second husband:

It was answered: That she was conjunct fiar by the bond, and so had power to suit execution, and had *jus exigendi*; and albeit the comprising was not in terms of the bond, yet the bond did regulate the comprising, which did accrete to the heirs of the first marriage, mentioned in the bond: Likeas the defender had right from Mary Hodge, heir of the first marriage; and also my Lord Harcarfe was heir of the second marriage, between Isabel Hilstone and Mr William Hog, who compared and concurred in this process.