1676. *June.* PATRICK WISEHEART *against* the COMMISSARIES of EDINBURGH.

PATRICK WISEHEART, as son and executor confirmed to George, late Bishop of Edinburgh, pursues the Commissaries of Edinburgh, and their collector, for payment of the quot of the testaments of all persons who deceased within the diocess of Edinburgh before the death of his father; they suspend on double-poinding, against him and Mr Alexander Young, present Bishop of Edinburgh, who acclaimed them as truly belonging to him, in regard they were not confirmed till his entry to the said office, and so the consummation, and not the inchoation of the act, must be considered. In this competition, the Lords FOUND these quots fell under the last Bishop's anne, and so prefer'd Mr Wiseheart therein.—In which the present Bishop had small loss, since at his decease the like will befall to his executors, as a part of his anne. See for annates, my observes on the act of Parliament in 1672.

This decision differs from the arrest of the Parliament of Savoy in a parallel case, observed by Gothofredus, a Bavo, *in praxi sua criminali, pag.* 86 *et* 87: A lord of a manor farms his lands, together with the jurisdiction of holding courts and reaping the emolument and obventions thereof; one commits a delict, and is processed for it; during the dependance, the tenant's right expires, and the land is of new farmed to another; he resumes the dittay, judges, condemns, and amerciates. *Quæritur,* To whom the mulct belongs, whether to him in whose time of his right the crime was perpetrated, or to him who pronounced sentence? That senate determined in favours of the second.

Advocates' MS. No. 477. *folio* 246.

1673 and 1676. *July.* ANDREW CRAWFURD *against* JANET SAVAGE.

1673. *July.* IN the double-poinding pursued by the tenants of Bathgate against Andrew Crawfurd in Lithgow, on the one part, and Janet Savage on the other;

ALLEGED for Savage,—She must be preferred to Crawfurd, whose title was as donatar to the liferent escheat of Hamilton of Bathgate; because she stood infeft in annualrent furth of these lands, not only prior to his gift, but to the completing of the rebellion, by out-running of year and day, whereupon his gift proceeded.

ANSWERED,—He must be preferred, notwithstanding her infeftment is before year and day was run, and his gift; because the same is posterior to the denunciation, by which *regi fuit jus quæsitum,* and which is the true ground of his gift.

REPLIED,—Though her infeftment be posterior, yet the heritable bond containing a precept of seasine, and whereon the same was taken within four days after the denunciation, being prior to the said denunciation, it is sufficient to sustain the said infeftment of annualrent; which must be drawn back *ad suam causam, videlicet* the bond. And though the rebel cannot, indeed, while the rebellion is *in cursu,* make any voluntary rights, whereby to prejudge the fisk, or his superior, of their casualty of the escheat and liferent, yet it were against all sense to extend and stretch this so far as to think a supervenient denunciation could hinder a third party, not con-

cerned, or ignorant, to perfect and complete a right legally granted and constituted to him, *ab initio*, and before he became rebel.

DUPLIED,—As he could make no valid right after his denunciation in prejudice of his superior, so the middle impediment and superveniency of the rebellion hinders the two extremes to be conjoined. Likeas, a precept of seasine, being a mandate, it requires a hability in the granter at two times, both when he gives it and when the same is put to execution; but here the party granter was not *habilis persona* the time of taking the said seasine, because rendered incapable by the horning executed against him; and therefore this seasine must be null, in respect of the superior and his donatar.

TRIPLIED,—That of hability is a mere sophism, holding only in revocable mandates. 2*do*, A horning ought to be of no more force than an inhibition; but if an inhibition had intervened between the granting of the bond bearing a precept and the taking of seasine thereon, the same could never reach that right: so neither ought a horning, unless it were before the bond and right which is the ground of the seasine.

Upon this debate, having got the Lords' answer, they preferred the annualrenter to the donatar, because his seasine, though posterior to the denunciation, yet depended on a specific obligement and destination and cause antecedent to the same.

Then they began to allege upon a decreet, wherein Robert Milne, mason, being donatar to this same escheat on this same horning, was preferred, not only, after debate, to this Savage, who now competes, but also to one Clerkson, whose right is incontrovertibly preferable to Savage's; and so by the rule, *Si vinco vincentem te, tunc te vinco*, he must yet be preferred, because the said first donatar being satisfied by his intromission, he was now come in his place as second donatar, and behoved to have his right. *Vide l.* 14, *D. de Diversis et Tempo. Prescriptionibus.*

To which it was answered, that this point was not then debated, nor the grounds now insisted on then represented to the Lords to move them; that their present decision is opponed as much more just and consonant to the principles of law and their own daily practique; that if they found ought contrary there, they have recalled and altered it here, upon very solid and rational grounds; and that in the competition for multiplepoinding pursued by Hugh Sinclair's tenants of Inglismachan and Blackburne against his creditors, apprisers, on the one hand, and the Earl of Annandale, donatar to his escheat and liferent, on the other, the Lords have this very same Session preferred the apprisers to the donatar, though both their apprisings and infeftments were after the denunciation, but within the year only, because there was no deed of the vassal here prejudging his superior after the rebellion, but the said diligences were led on bonds prior to the denunciation; yea, some of the apprisers were preferred, though not infeft within the year, because they had given in their signatures to the Exchequer before the year, and were there delayed, and so *per eos non stetit;* and yet this decision, though most just too, is not so favourable by far as ours. See the creditors their information against Annandale beside me.

The practique observed by Dury at the 16th February, 1631, Cranston and Scot, would be marked, and which Balmanno hath also, *verbo* Declarators, as also the places there cited.

This decision seems very inconsistent with the *ratio dubitandi* we have noticed in the question set down *supra*, at No. 279, viz. whether or no a base infeftment, though clad with possession before the denunciation of the granter, could sustain against the superior and his donatar to the escheat of the granter; for if the superior was not

bound to acknowledge such a right because unconfirmed, then much less this, which had not only the defect and want of confirmation, but also seasine taken after denunciation, and no possession attained before the annual rebellion was elapsed. But the Lords at last found such a base infeftment preferable.*

See the informations of that case beside me, where the case of Milne and Clerkson is cited.

They urged always, I might add to my allegeance, that the said right was clad with possession before year and day was outrun to make it relevant; but I contended I was not bound to that, but that my allegeance as it stood simply conceived, was most relevant, *videlicet*, that she was infeft within the year upon a bond granted before the denunciation. And Dury has a practique of it at the 23d of January, 1627, between Wallace and Porteous, where this may clearly be found by consequence; for there though a rebel may not dispone *currente rebellione*, not even to satisfy a personal debt prior to the horning, yet he may, if it be for implement of a specific obligement to dispone and infeft prior to the horning, which is the very case in hand.—[See the Case below.]

Advocates' MS. No. 413, *folio* 223.

1676. *June.* COCHRANE of Babachlaw *against* JANET SAVAGE.
[See the Case above.]

IN the action mentioned, *supra*, at No. 413, in July, 1673, between the tenants of Bathgate, Janet Savage and Andrew Crawfurd, donatar to the laird of Bathgate's escheat and liferent, the Lords there found Savage her base infeftment (though taken posterior to the denunciation of the horning,) preferable to the gift of escheat; both because it was within four days after the denunciation, and so far within year and day, as also because it depended upon a precept of seasine contained in an heritable bond long prior to the charge of horning. (*Vide infra*, November, 1676, Mr William Weir, No. 509.) Of this decreet, Cochrane of Babachlaw, assignee by Crawfurd the donatar, raises reduction and suspension, upon this reason, that the decreet was wrongously and surreptitiously extracted, against a stop by deliverance upon a bill referring the matter of new to my Lord Strathuird, who heard the clause formerly; the bill craved a farther hearing upon that ground, set down *ubi supra*, that the donatar by a decreet *in foro contentioso, in anno* 1667, was already preferred to this annualrenter, and to one Clerkson, who was in a stronger case than this Savage, in so far as he was infeft base before the denunciation, *et si vinco vincentem te, tunc te vinco.* See M'Keinzie's Observations on the act 1621, p. 165. Now this allegeance was proponed, discussed, and repelled in Savage her decreet of preference, in 1673, only it made no mention of the bill and stop and second reference. Craigie, before whom the case fell, was much scandalized; his titubancy was, how to reconcile two of the Lords their decreets *in foro in terminis*

* But suspension and reduction being raised of this decreet, the Lords, *in June*, 1676, preferred the donatar, albeit seasine had been taken before denunciation, as it was not, unless it had been confirmed and acknowledged by the superior, or made public by possession, not civil, but natural or legal. See more in June, 1676, *numero* 479