1686. *March.* DAVID DEWAR *against* MARGARET WOOD.

No 18.

IN a competition between the wife of an appriser infeft by him in annualrent of the apprised lands, and a posterior adjudger of his right, it was *alleged* for the adjudger, That his adjudication was the first formal diligence, seeing the husband who was not infeft, could not infeft his wife.

Answered for the wife; That infeftment *ipso facto* carried all the personal right the husband had to the subject, and had the effect of an assignation; and the right of the apprising was transmissible by assignation.

THE LORDS sustained the answer, and preferred the wife.

Fol. Dic. v. 1. *p.* 423. *Harcarse*, (COMPRISINGS.) *No* 320. *p.* 78.

1710. *December* 19. ERSKINE *against* HAMILTON.

No 19.

AN infeftment of annualrent containing procuratory of resignation, and assignation to the mails and duties, granted by a debtor who had no more in his person but a disposition to an apprising of the lands, was found to be an implied conveyance of that disposition, so as to exclude a posterior formal conveyance of the same disposition.

Fol. Dic. v. 1. *p.* 423. *Forbes.*

*** See this case, No 78, p. 2846.

1726. *February* 1726.

Competition the NEW COLLEGE of St Andrew's, with SIR ALEXANDER ANSTRUTHER'S CREDITORS.

No 20.
Infeftment of annualrent, granted by one having a disposition to lands without infeftment, whether the disposition is thereby carried, debated, but not determined.

SIR ALEXANDER ANSTRUTHER having purchased the lands of Newgrange from his brother Sir Philip, obtained from him a disposition, containing procuratory of resignation, precept of sasine &c. Thereafter he sold the same lands to Mr Patrick Haldane, and conveyed to him Sir Philip's disposition, procuratory and precept, Sir Alexander himself never having been infeft. Before this sale to Mr Haldane, Sir Alexander being debtor to the New College of St Andrew's in the sum of 5000 merks, granted the College an heritable bond upon the said lands, upon which instrument of sasine followed, and decreet of poinding the ground, even before the minute of sale with Mr Haldane. Several of Sir Alexander's creditors, after the sale, having arrested the price in Mr Haldane's hands, he suspended upon double distress, upon which there arose a competition betwixt the College and the arresters.

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It was *pleaded* for the College, That their heritable bond with infeftment prior to Mr Haldane's minute of sale, is preferable thereto, and must continue a burden upon his right until redemption; in consequence whereof, the Collage ought to have preference upon the price, in opposition to the arresters; or Mr Haldane must be allowed to retain so much of the price from the arresters as will correspond to the heritable bond, and the College preferred to the mails and duties; which upon the matter is the same with respect to the arresters.

It was *answered* for the arresters, That Sir Alexander not being himself infeft, could not grant an infeftment; and therefore the infeftment of annualrent was void, so as in no shape to affect the price in Mr Haldane's hand; and the arresters who habily affected the price, fell to be preferred.

In support of the annualrent right, it was *pleaded*, 1*mo*, There is a rule in law, that the first disposition entirely denudes that disponer who has no more in him but a personal right; but the heritable bond granted to the College is the first disposition, preferable even to Mr Haldane the purchaser, in respect that Sir Alexander was so far denuded, and *a fortiori* preferable to the arresters. This must obtain, unless a difference be made betwixt a disposition of the property, and an heritable bond or disposition of an annualrent, which indeed is too thin; for a disposition of an annualrent, or heritable bond, is still a conveyance of the right that was in the person of the granter, in so far as the same may be available for the support of the heritable bond; and therefore, if a disposition of the property would totally have denuded Sir Alexander, who had but a personal right; upon the same principles, a disposition of the annualrent did denude, in so far as the annualrent extends, to that effect at least, to make the annualrent effectual against any other, competing upon a second personal right not completed by infeftment, such as Mr Haldane's and the arrester's rights are. And this is agreeable to another principle, *qui potest majus, potest et minus*; for is it not absurd that Sir Alexander, who by a disposition of property could totally denude himself, cannot do what is less, viz. grant an annualrent? 2*do*, Did this infeftment of annualrent need any support, and were it otherwise defective, that very defect would imply a conveyance of Sir Alexander's own right, in so far as necessary to support it. According to this principle, 'Whoso wills the end, is understood to will all the necessary means.' Nor are such implied conveyances without example. It is well known, that a disposition of lands will imply a disposition to a reversion; and a liferent-right of lands will imply a right to a tack of these lands subsisting in the granter of the liferent. And the LORDS found, that a liferent of certain lands granted to a wife, implied a right of reversion which the husband had reserved in the disposition of the same lands granted to his son, so as the wife might redeem *ad effectum* to enjoy her liferent, 5th December 1665, Begg *contra* Begg, No 9. p. 6304. 3*tio*, Were there nothing else in the right granted to the College, but the assignation to mails and duties contained in the heritable bond, that must found them in a preference; it having been duly intimated to the tenants, by the process of poinding the ground, before Mr Haldane's right. This is in-

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disputable, since Mr Haldane is not infeft; his disposition, while personal, in effect being no more but an assignation to mails and duties, which can never compete with the assignation granted to the College, having the first intimation. And now that the matter is rendered litigious, and brought into judgment, there arises a mid impediment, after which it is no longer in the power of Mr Haldane to infeft himself, to the prejudice of the College their right to the mails and duties.

To the *first* it was *answered*; That the argument is fallacious, as if the constitution of the annualrent were a conveyance of Sir Alexander's disposition, either total or partial. An heritable bond consists in an obligement to pay, and for security of that payment, an obligement to infeft in lands, with a precept of a seisin; which last is of good effect when the party is in a capacity to grant it, but when he has no real right himself, that part of the security stands for nothing; and indeed the College here give it up. All then that remains, is the obligement to pay, and the obligement to infeft, which the College may prosecute against Sir Alexander himself, in such methods as are devised by our forms; but they make not a conveyance, or a divesting Sir Alexander of his disposition totally or partially; an obligement denoting a creditor, not at all an assignee; and therefore can never found any preference against a singular successor of Sir Alexander. To the *second*, It is granted, that whoso wills the end, must be understood to will the necessary means; but, does it from thence follow, when one wills what is not in his power, that he must be presumed to will whatever is in his power that may be any way equivalent thereto? If one dispone lands, he is understood to dispone also the reversion; because his end and design being to convey a complete right to the lands, a conveyance of the reversion becomes a necessary mean for that end, and so of the other cases; but if one, having only a disposition and procuratory, go about to constitute an infeftment of annualrent, which is not in his power, he will be liable for damage and interest to the creditor, but the infeftment will be null; and though a conveyance of the disposition and procuratory, redeemable upon payment of the sum in the heritable bond, would be a right pretty much equivalent to the designed infeftment of annualrent, it will not follow, that therefore he has established such a right. Here the brocard would meet him, *Fecit quod non potuit, et quod potuit non fecit.* To the *third*, An assignation to mails and duties, is in itself no absolute right, good against singular successors in the lands; it depends upon the cedent's right to the property; whenever that falls, the assignation falls of consequence; neither is it any bar to the cedent's disposing of his property: All which flows from the nature of the right, which is not real in the lands, but barely a personal action against possessors, upon this medium, that they are liable to the proprietor from whom the assignation is derived. The cedent then, notwithstanding the assignation to mails and duties, continues absolute proprietor; so as the assignation can be no *mid impediment* to hinder his alienations, whatever personal action it may produce against him for

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damage and interest. From all which it follows, the College's right to the mails and duties of the lands of Newgrange, being a conveyance by progress from Sir Philip the proprietor to them, whenever Sir Philip's right ceases by Mr Haldane's infeftment, that the College's mails and duties must cease of course, which no mid impediment can prevent.

"THE LORDS preferred the College, assignee to the mails and duties; at least for the annualrents, ay and while the purchaser's right be complete by infeftment; and reserved to themselves afterwards to consider whether the assignee's preference shall continue after infeftment."

Fol. Dic. v. 1. *p.* 423. *Rem. Dec. v.* 1. *No* 81. *p.* 159.

SECT. III.

Conveyance of Superiority, does it carry casualties already fallen?

No 21.

A singular successor in the superiority cannot challenge the feu *propter non solutum canonem* of any years in his author's lifetime, but only since the conquest of his own right.

1612. *February* 14. WEDDERBURN *against* NISBET.

A FEU being sought to be reduced by the Laird of Wedderburn, against Nisbet of Swansfield, the LORDS found that he could not quarrel the feu *propter non solutum canonem* of any years in the pursuer's author's time, but only for the time of his conquest of his own right; that payment of three years together in an acquittance, inferred presumed liberation of the duties of all preceding years; that payment made to a Baron's chamberlain or factor, who was in use to uplift all his master's rents of the barony, and his acquittance given thereupon was sufficient to the vassal, and that factor's acquittance of three terms would save the vassal from danger of the clause irritant; that the superior's precept of *clare constat* given to the feuer voluntarily, relieved him of the danger of preceding years; and that the heir of the vassal being minor, and seeking entry to his lands by his superior, if at his lord's command, he delivered his predecessor's charter to any notary or writer being the superior's servant, to form to him a precept of *clare constat*, so long as that notary kept the minor's charter, and expede not his precept, the vassal could not forfeit his feu for not payment of the duty of these years; because the retaining from him of his charter, put him in *probabili ignorantia* of the feu-duty addebted by him, and of the clause irritant; especially if he, recovering his charter, made real offer of all feu-duties owing before the day of compearance in the cause of reduction.

Fol. Dic. v. 1. *p.* 423. *Haddington, MS. No* 2405.