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might, by virtue of the general clause in the disposition to him assigning to all writs, have been infest upon the procuratory in Newal's disposition; yet he not having taken infestment upon that, but only upon the procuratory in the disposition, granted by James Robson, (who, being never duly infest, could give no effectual precept for infesting another,) John Robson's sasine is null, as granted *a non habente potestatem*; and so cannot be sustained as an intimation of the procuratory in Newal's disposition. Nor can the decision betwixt Dewar and French influence the present case; in respect both Dewar and French were adjudgers; and the first adjudication, being a legal assignation, was a complete assignation without intimation; whereas a simple disposition affords no *jus in re*, but only *jus ad rem*, which, though effectual against the granter and his heirs, or against tenants, where no person competes upon a better right, is never complete against singular successors, till sasine follow thereon.

THE LORDS found, That James Robson, having only a personal right by disposition without infestment, the disposition made by him to John Robson, Andrew Purdie's author, did fully denude him, without necessity of intimation; so that the subject could not be thereafter adjudged from him; and therefore preferred Andrew Purdie.

Fol. Dic. v. 1. p. 183. Forbes, p. 445.

1710. December 19. COLONEL ERSKINE *against* SIR GEORGE HAMILTON.

No 78.

A party who had acquired right to an apprising, without taking infestment, granted an infestment of annualrent out of the lands. He afterwards disposed the lands to another party. The prior right was preferred.

AN apprising being led of the lands of Tulliallan, at the instance of James Henderson, son to John Henderson of Fordel, against Sir John Blackadder in *anno* 1633, upon which infestment followed in the 1634; in the year 1670, Alexander Earl of Kincardine (who acquired right to this apprising without taking infestment) did, in the 1673, grant an infestment of annualrent out of these lands to the Lord Cardross for 50,000 merks, and in the year 1676 granted an heritable bond of relief to him of several debts and engagements, upon which the Lord Cardross was infest. In the year 1678, the Earl disposed the lands in favours of Sir Robert Milne, Sir George Hamilton's author, who was publicly infest in the year 1680. Colonel Erskine, having the Lord Cardross's right in his person, craved to be preferred to the lands of Tulliallan, upon the disposition of Henderson's apprising in favours of the Earl of Kincardine.

Answered for Sir George Hamilton; He had best right to the disposition of the apprising made to the Earl of Kincardine; in respect it was directly conveyed to Sir Robert Milne by the foresaid disposition from the Earl, containing a general assignation to all dispositions and other rights he had to the lands; and the infestments of annualrent and relief, in favours of the Lord Cardross, were void and null as to the lands of Tulliallan, the Earl having no real right thereof in his person, but a simple disposition, never completed by infestment, which could not entitle him to pass a real right to the Lord Cardross.

Replied for Colonel Erskine ; Sir George Hamilton, by virtue of the disposition made by the Earl to Sir Robert Milne, of the lands, writs, and evidents, cannot exclude Cardross's anterior infeftment of relief ; for the assignation to mails and duties in Cardross's bond of relief, upon which a decret of mails and duties followed, did effectually denude the Earl of the disposition to Henderson's apprising ; which hath no further effect in law than an assignation to mails and duties ; as a translation denudes an assignee in any other case. *2do*, A right to the property of lands doth tacitly convey any lesser right that stood in the granter's person, according to the rule, *majori inest minus* ; therefore the obligation to infeft, with the procuratory of resignation contained in Cardross's bond, which was a qualified right of property, did certainly convey to him any inferior right to these lands, and consequently the disposition to Henderson's apprising ; and a procuratory of resignation, as my Lord Stair, III. 2. 8. says, hath the effect of a disposition. So the common way of tailzieing estates is not by a formal disposition, but by a bond obliging to infeft the heirs of tailzie, containing procuratory of resignation, or by a procuratory of resignation in their favours, without either bond or disposition ; which tailzies could not be disappointed by a creditor of the maker adjudging some old apprising to which his debtor had acquired right without infeftment ; for otherwise the rights of many of the best estates in Scotland might be called in question, and laid open, it being ordinary for persons once infeft to acquire other rights without expeding infeftment thereon, or being nicely cautious to infeft upon the most preferable. *3tio*, An apprising, disposed to one already infeft, is so far extinguished and renounced, that it cannot thereafter be made use of against the acquirer or his successors ; though they may use it as a standing right against any third party pretending a better right to the lands upon which they were infeft.

Duplied for Sir George Hamilton ; Any pretended implied disposition in the obligation to infeft, did not enable the Lord Cardross to resign by virtue of the procuratory, or take infeftment by virtue of the precept in the disposition granted by Sir John Henderson to the Earl. And albeit, a subsequent infeftment in the Earl's person might have accrued to the Lord Cardross ; yet the Earl's right having continued ever in the terms of a simple disposition, Cardross's infeftment from him is null, as flowing *a non habente potestatem*. *2do*, As the foresaid obligation to infeft could convey no real right, neither could it hinder the Earl to grant a direct disposition and assignation to Sir Robert Milne ; for, even a second disposition completed by infeftment would have carried the Earl's right away in prejudice of the receiver of a prior disposition, as was decided 20th June 1676, *Brown contra Smith*, No 76. p. 2844.

Triplied for Colonel Erskine ; The decision betwixt Brown and Smith makes nothing for Sir George ; because, *1mo*, The question there was with an infeftment of annualrent, which is not a right of property, and could not be understood a conveyance of the property that stood in Brown's person ; whereas the infeftment of relief given to Cardross was a right of the same nature with that

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which stood in the Earl's person, and might be transferred by any writ *inter vivos* shewing his intention so to do. *2do*, Brown the annualrenter's infestment was never clothed with possession, and therefore it seemed just to prefer Smith, a singular successor, who first perfected his right.

THE LORDS found, That Cardross's right of relief, containing a procuratory of resignation and assignation to the mails and duties, conveyed all rights personal as well as real that were in the Earl's person, for security and relief of the debts therein contained; and therefore found, that the Colonel's right being prior to Sir Robert Milne's right, is preferable.

Fol. Dic. v. 1. p. 183. Forbes, p. 455.

No 79.

1733. November 20. SINCLAIR *against* SINCLAIR.

A NAKED disposition of lands was found to denude the granter *funditus*, who had no more himself than a disposition with procuratory and precept, so that nothing remained with him thereafter to be carried by a legal or voluntary conveyance; upon which footing the disponent was preferred to a posterior appriser, whose apprising was led against the common author, though the appriser had gone on to complete his right by obtaining infestment upon the procuratory contained in his debtor's disposition. See APPENDIX.

Fol. Dic. v. 1. p. 183.

1737. June 22.

BELL of Blackwoodhouse *against* JOHN GARTSHORE, Merchant in Glasgow.

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A personal conveyance of a personal right to land, does not denude the granter, or bar a second conveyance; the first infestment in such a case being always preferable.

CHATTO having purchased an estate at a public sale, extracted his decree of sale; and, without infesting himself, he conveyed the same to Bell of Blackwoodhouse. Thereafter, John Gartshore, creditor to the said Chatto, adjudged from him the decree of sale with the lands; and being infest upon his adjudication, his was the first completed real right.

In a competition between them about the mails and duties, it was *pleaded* for Bell, That, by the conveyance to him, Chatto was *funditus* denuded of his personal right; and that nothing was left with Chatto to be carried by Gartshore's adjudication. And to show that this is law, the decision, Rule, No 77. p. 2844. was cited, with many of a later date, all combining to support a proposition that has governed our practice many years as an indisputable rule of law, viz. that a disposition to land without infestment, is transferred *funditus* from the disponent to the disponent, by a simple disposition, without other solemnity.

It was *pleaded* for Gartshore; That he stands infest in the subject, having followed out the whole solemnities of the law of Scotland, necessary to establish