

person of the rebel, or his trustee, before the rebellion: And found the donator had right to the annualrents of the sum, for which the adjudication was led; and consequently to the rents of the lands.

No 16.

*Fol. Dic. v. 1. p. 2. Forbes, p. 572.*

1713. July 23.

WILLIAM DUNCAN, Merchant in Edinburgh, *against* DAVID MILLER, Merchant there.

IN an action of declarator, at the instance of Jean Livingston, and her husband, against the creditors of John Robertson, (who, as heir to Gilbert Robertson, his father, sold the lands of Whitehouse to Jean Livingston) for purging the lands of all incumbrances, arising from their debts and diligences; there arose a competition betwixt William Duncan and David Miller. William Duncan pretended to be a real creditor for 6000 merks, the remains of the price of the lands owing by Gilbert Robertson to George Aikenhead, his author, per bond.

David Miller claimed preference for the half of the sum of 1400 merks, principal, and annualrents thereof, contained in a bond, granted by Gilbert Robertson to Helen Matthison, in Stirling, assigned by her to Robert Ranie and David Miller, upon this ground: That James Miller, writer in Edinburgh, to whom Helen Matthison had formerly disposed her debt, with a power to alter, did, upon a process for payment against John Robertson, use inhibition for security thereof; which inhibition, now that James Miller's right is reduced, accrues to David Miller, the second assignee; because the power to alter, reserved to Helen Matthison, in her assignation to James Miller, made his right to be of the nature of a factory, or trust, for the cedent; and any diligence done by factors, or trustees, accrues to the constituents, their heirs or assignees. July 14, 1667, Scot against Sir Laurence Scot. (Stair, vol. 1. p. 472. See TRUST.) And it has been frequently found, that diligence, used by donators of forfeitures, for securing the subject gifted to them, accrued to the forfeited persons and their heirs, restored *per modum justitiæ*, without necessity of assignation, or conveyance, by the donator.

*Answered* for William Duncan:—James Miller's inhibition cannot subsist in the person of David; because, *imo*, Though inhibition be, in some sense, a real burden upon the inhibited person's lands, at least becomes such by a posterior adjudication; yet, as to the inhibitor, it is a merely personal diligence, reaching only deeds done to his prejudice; and hath no effect in favours of third parties, not deriving right from him. *2do*, Inhibition is effectual to the inhibitor himself, only in so far as concerns the right on which it is founded: Therefore, this inhibition, founded on Helen Matthison's disposition, is without any foundation; now when that disposition is annulled and out of doors. *3tio*, James Miller's right was not of the nature of a factory, or trust, but was elicited from Helen Matthison,

No 17.

Found that an inhibition, used by an assignee, would accrete to a posterior assignee, after reduction of the first assignation; if not reduced *ex capite fraudis*.

No 17.

by fraud and circumvention; and reduced upon that head; so that as James Miller's right was null, *ab initio*, the inhibition, used by him, was null in consequence. *4to*, Granting that James Miller was a factor or trustee; yet the inhibition being used eleven years after that trust, or factory, was revoked by the second assignation, in favours of Ranie and David Miller, intimated by a summons of reduction of James' right, it was simply null, and cannot be effectual to any person.

THE LORDS found the inhibition accresced to David Miller, the second assignee, reducer of the disposition in favours of James, unless it be made appear that the said disposition was reduced *ex capite fraudis*; in which case, they remitted to the Ordinary to hear parties procurators.

*Fol. Dic. v. 1. p. 2. Forbes, p. 709.*

1751. February 28.

WILLIAM WILSON, against ALEXANDER BURREL.

No 18.  
The creditor, in a bond, secured over a house, adjudges the house, and disposes the annualrent only, without mentioning the adjudication. The adjudication found to accresce.

ROBERT BURREL granted an heritable bond, on a house in the Canongate, to Patrick Kinninmound, taylor there; on which he was infest; and adjudged the house; and disposed the annualrent to Alifon Algier; and she pursued a poinding of the ground. Alexander Alifon procured a gift of *ultimus hæres* to Alifon Algier; and obtained a charter of confirmation, of the right of annualrent, and upon the adjudication; and sold the subject to William Wilson, brewer in the Canongate. Robert Burrel, after inhibition on the bond, disposed the house to Alexander Burrel, his son, shoemaker in the Canongate, whereon he was infest and possessed.—William Wilson pursued Alexander Burrel to remove.

*Answered*:—The right of annualrent is no title of removing; and the pursuer has not in him the adjudication; the annualrent only having been disposed to Alifon Algier, without so much as a general clause of all that had or might follow upon it. The adjudication was for the annualrents bygone, and in time coming; but nothing is disposed except the right of annualrent, carrying only the growing annualrents; so that the adjudication cannot be held to be carried by implication. This is not a way of transferring heritable rights: And though there may be some decisions, whence it would seem, that a debt being transferred, the diligence goes alongst as accessory; these were in questions betwixt the cedent and assignee; and the determination was, that the intention being to convey the diligence, the cedent was still bound to do it; but not that it was virtually conveyed, so as to be a title in the assignee against third parties.

THE LORD ORDINARY, 5th February, ' Found that the adjudication, led by Patrick Kinninmound against Robert Burrel, on the heritable bond by Burrel to him, was carried by the disposition of the sums, in the said heritable bond, by Patrick Kinninmound to Alifon Algier; albeit the said adjudication was not therein specially conveyed: And therefore, in respect the pursuer stood infest in the subjects on the heritable bond and adjudication, sustained the title.'

THE LORDS refused a bill, and adhered.

For the Pet. Burrel, *J. Grant*.

*Fol. Dic. v. 3. p. 1. D. Falconer, v. 2. p. 248.*