

## No 8.

A principal sum was not exigible till after the marriage of the creditor. She died unmarried. Argued, The annual rent must cease, *quia sublato principali tollitur accessorium*. The annual rent found to subsist until redemption by the debtor, being constituted pure and as a principal right.

1669. June 24.

STEUART of Gairntilly against SIR WILLIAM STEUART.

SIR WILLIAM STEUART having granted a bond upon these terms: That whereas he had obtained disposition of the lands of Innernytie, partly by his father's means, and partly by his own, and partly for granting the bond underwritten; and therefore he obliges himself to infest Jean Steuart, his sifter, and the heirs of her body; whom failing, certain persons substitute, his brethren and nephews, and part of it to return to himself; and obliges himself to pay the annualrent yearly to the said Jean, and the heirs of her body, and other heirs of tailzie foresaid, during the not redemption of the said annualrent; then there is insert a reversion of the annualrent, from the said Jean, and her foresaids, by the said Sir William, upon the payment of 20,000 merks; and then a clause of requisition, that if Jean, after her marriage, desire the money, she, or her foresaids, might require the same to be paid, after her father's death; and then a clause, that the said sum of 20,000 should not be payable till five years after her father's death, and after her own marriage. The said Jean, assigns this bond to her brother, Sir Thomas; and he charges Sir William; who, and some of the other substitutes, suspend on these reasons: *First*, That by the conception of the bond, it was clear, the principal sum was not payable till Jean's marriage; and she being dead, unmarried, is not now payable at all: whereupon the charger insisted for the bygone annualrents, and for granting an infestment of annualrent to him, as assignee, conform to the bond. The suspender's reasons against the annualrent, were *first*, That this being an annualrent, accessory to a principal sum, *ablato principali tollitur accessorium*, so that the principal sum being not now due to any by Jean's death, dying unmarried; the annualrent also must cease from her death. *Secondly*, The annualrent is conceived payable to Jean, and her heirs; but no mention of assignees. *Thirdly*, Albeit ordinarily, in such obligations, or infestments following thereon, the first person is fiar, and the substitutes are but heirs; who cannot come against the fiar's deed, by assignation, or otherways; yet, where the obligation is gratuitous, and proceeds, not upon sums of money belonging to the creditor, but upon the free gift of a parent, bestowing the sum; there the substitution, implies a substitution and obligation upon the first person, and the heirs of their body, to do no voluntary deed to evacuate the substitution; so that, albeit a creditor or successor, for a cause onerous, might exclude the substitutes; yet another heir, appointed by the first person, or a donator, or gratuitous assignee, cannot evacuate the tailzie, and exclude the substitutes; because in such contracts, *uberrimæ fidei*, the mind of the party who gifted, and freely granted the sum, is chiefly to be considered; so that it cannot be thought to be old Gairntilly's mind, that his daughter might change the substitution, and elude the conditions of the bond; for the suspending of the requisition of the principal sum, till Jean were married, must import, that his meaning was, to give her the annualrent only till that time, and the principal sum to be a tocher if she married; which was to no purpose, if the annualrent remained perpetual; for then the heritor would certainly redeem, to

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 fumenda 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 adjected 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 wastrandice, there ought to have been no process sustained, till Seaton was called; who only knew, and might have alleged, that there was no

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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,