

1676. July. ANENT ALTERNATIVE OBLIGEMENTS.

In alternativis obligationibus electio est debitoris; sed si semel optaverit, consumitur optio, nec licet recurrere. Vide Tit. D. de Optione Legata; et Schotanium, in Examine Juridico, de Concursu et Cumulatione Actionum, pag. 187 et seq.; and Spotswood's Practiques, in Principio, (18th January, 1628, Halkerton;) yet if it be debitum annuum that has cursum futuri temporis, et ubi quolibet anno nascitur actio, it may seem probable the election binds only for that year, since the rest are not yet existent, nondum nata. Vide Titulos D. de Annuis Legatis, Quando dies ususfructus cedat, et de usucapionibus; upon which title Harprecht debates, Utrum annuis redivitis præscribi possit cum quotannis nascantur. For the Countess Dowager of Erroll's case against the Earl of Erroll, anent an alternative obligation in her contract matrimonial, providing her to 70 chalders of victual, or 100 merks for each chaldar; vide this determined, infra, 17th January, 1677, No. 533. Vide E. Brouchorstium, ad Legem, 75. D. de Regulis Juris.

Advocates' MS. No. 492, § 5, folio 258.

1676. July. ANENT ARRESTMENTS.

IN competition between two arrestments, the first arrestment is laid on by a bond and debt, whereof the term of payment was not as yet come; a second arrests after, and pretends preference, in regard his term of payment was come, and the other's diligence was nimious and preposterous; for I suppose them both equal as to the pursuing to make arrested goods forthcoming.

The Lords found, on the 3d of July, 1628, *Scot*, that arrestment might lawfully be used on a bond, whereof the term of payment was not come. But on the 19th of November, 1623, *Ker* contra *Colthird* and *Paterson*, they found the contrary, unless the negative particle, *Not*, be there redundant and wrong inserted. But a second question arises more knotty, where the term of payment of the debt that is arrested is not come the time of the first arrestment, and is past the time the second arrestment is laid on,—*Queritur*, If the second arrestment will be preferable to the first, since the law *non amat nimium diligentes*? *Dury*, 20th March, 1633, *Sympson* contra *Whyte*, tells, the Lords found that *pæcunia debita ad diem* might be arrested before the day of payment of it came, for here the obligation is presently effectual, albeit the solution be superseded to a day: *cessit dies, licet nondum venit solutionis exactio*, L. 213. *D. de Verborum Signif. sup.* No. 48, February, 1671. (Vide *parag. secundum*, *ibique Vinnium in Commentario, Institut. de Verborum Obligationibus. Vide 17th July, 1678, Pitmedden and Paterson.*) It seems debts *ad diem* may either be the foundation of an arrestment *activè*, or the subject of an arrestment *passivè*, before the terms of payment come, because *debitum vere subest*; but where the debt is conditional, during the dependence or not existence of the condition, no arrestment or other diligence can validly affect these debts *passivè*, or be done upon them *activè*, if any middle diligence depending on a debt not conditional intervene, or arrest a debt after the condition of the debt arrested exists; for if no impediment interpose, it is reasonable that the diligence convalesce and

turn effectual, when the condition either of the debt arrested or arresting is purified: *ex lege 14, D. de Pignoribus, quis potest persequi pignus, licet dies debiti sui nondum venerit*. Upon thir principles is also grounded that disparity of transmission by succession, where the creditor in an heritable bond dies before the term of payment, for then the debt falls to his executors and not to the heir, because the heritable destination had not as yet taken effect. *Vide Dury*, 10th March, 1630, D. Lindsay *contra* Town of Edinburgh; see 51 act, Parliament 1661.

Here arises a third question,—A creditor by an obligation under his hand, supersedes execution upon such a bond for a certain space, within which time he finds it necessary for him to inhibit his debtor; the inhibition is quarrelled, as contrary to the paction. It is ANSWERED,—Inhibition is not an execution, but merely a diligence for security of his sum. The Lords found it so on the 15th of June, 1669; (see it *supra*, between Brown of Gorgiemilne and Kinloch.) *Vide supra*, June, 1673, No. 399. [Birnie *against* Crawford.]

Advocates' MS. No. 492, § 6, folio 258.

1676. *July*. ANDERSONE *against* ANDERSONES, HER STEP-SISTERS.

JAMES ANDERSONE, a merchant in Edinburgh, provides, in his first contract of marriage, a tenement of land he had, to the children of that marriage; he has only one daughter by this marriage; her he bestows in marriage to a mason, and gives him 7000 or 8000 merks of tocher, but takes a renunciation from him and her, she being past 21 years of her age, as to the tenement provided to the bairns of the marriage by her mother's contract-matrimonial, and a full discharge of her right thereto; and then he marries a second wife, by which bed he had two daughters; he dies without disposing that tenement to any. The daughter of the first marriage claims it as being in fee of it, at least pretends to be an heir-portioner as to a third part of it. The two other oppone her renunciation. She answers, she did only that in favours of her father, to give him a power to do with it what he pleased, and not in favours of them, who were not then in being, and he not having used it, her right convalesced, recurred, and accresced. The case seemed so dubious, and the conception of the renunciation so scrimp and narrow, that the daughters of the second marriage were, by their lawyers, advised to give the first somewhat for a composition.

Vide M'Keinzie's Observes on the act 1621, p. 75 *et seq.* See *Codex Fabricianus ad Titulum de Pactis Conventis, tam super dote, &c. definit. 10 et 12, pag. 562.*

See the learned Franciscus Corvanus, *Commentariorum juris Civilis libro 5, cap. 5*, where he proves that pactions renouncing their future paternal inheritance are reprobated in law, even though they be confirmed by an oath, which the canon law maintains, the iniquity whereof he there demonstrates; see the Baron D'Isola's Buckler of State and Justice, where he argues the validity of the Queen of France's renunciation to all succession, paternal, maternal, fraternal, sovereignal, against the French lawyers, Aubrey and others, who impugn it.

Advocates' MS. No. 492, § 7, folio 258.