

S E C T. XIII.

Betwixt Singular Successors, where the Common Author is not Infest.

1676. June 20.

BROWN against SMITH.

No 76.

An assignation to an incomplete real right, though directly done and intimated, has no effect against another singular successor completing his right by infestment.

ANDREW SUTOR having disposed the equal half of the east side of Letsie to Ronald Brown, with power of resignation; the said Ronald grants an infestment of annualrent to James Brown, and thereafter disposes the land irredeemably to David Smith in liferent, and John Smith in fee, and assigns the disposition and procuratory therein granted to him by Andrew Sutor, whereupon the Smiths are infest as assignees to the disposition and procuratory, but Ronald Brown the cedent was never infest. James Brown the annualrenter pursues pointing of the ground, wherein the Smiths compear and *allege*, That the pursuer's infestment is null, neither being clad with possession, nor given by one who was infest, or had power to give infestment, but by Ronald Brown, who was never infest.—It was *answered*, *imo*, That Ronald Brown's disposition (before any infestment) was transmissible by assignation, and the consitution of this annualrent imported an assignation, and the registrate sasine was equivalent to an intimation; *2do*, Infestment having followed upon Ronald Brown's disposition, albeit in the person of his assignee, yet it compleats his right, and makes it a real right, and as supervening accesseth to the annualrenter.

THE LORDS sustained the defence, and repelled both the replies, and found, That an assignation to an incomplete real right, though it had been directly done and intimate, had no effect against a singular successor compleating his right by infestment; and found, That the real right did never access to the annualrenter's author Brown, who was never infest, but only to Smith, the author's assignee.

Fol. Dic. v. 1. p. 183. Stair, v. 2. p. 428.

1710. December 8.

JOHN RULE, Son to the deceased JOHN RULE, Chirurgion in Dumfries, against ANDREW PURDIE Merchant in Edinburgh.

No 77.

A naked disposition of lands was found to denude the

MARTIN NEWAL, merchant in Dumfries, made a disposition, containing a procuratory of resignation of a tenement of land in that burgh, to James Robson merchant there; who, without being legally infest, disposed it to John Rob-

son his brother, Andrew Purdie's author, with a procuratory to resign, precept of sasine, and assignation to all writs in his person; and John Robson was infeft in *anno* 1693; thereafter John Rule, chirurgion in Dumfries, as creditor to James Robson, adjudged from him Martin Newal's disposition, and upon the procuratory therein, John Rule, as heir to the adjudger his father, being infeft, raised a process of mails and duties against the tenants. Andrew Purdie, who derived right from John Robson, appearing for his interest, craved preference; in respect the disposition to his author was anterior to John Rule's adjudication, and did totally denude James Robson.

Replied for John Rule; The disposition to John Robson, Purdie's author, never having been intimated till the present competition, after that John Rule, by adjudging the procuratory in the disposition granted by Newal to James Robson, and infefting himself thereon, acquired the real right, which till then continued in the person of Newal; he, Mr Rule, as having the first complete right, is clearly preferable: For albeit adjudications, which are legal assignations, require no intimation to complete them; yet naked dispositions, as other personal assignations, transmit not effectual rights to the receivers, without intimation, and are preferable according to the date of the intimation.

Duplied for Purdie; A disposition of an heritable right whereon no infeftment hath followed, doth fully denude the disponent, without necessity of infeftment or intimation, The Laird of Anstruther *contra* Black, No 13. p. 829; and in the late case Dewar against French, No 12. p. 241. it was found, That Mr David Dewar's first adjudication of lands, to which his debtor had only right by disposition, without infeftment, did quite denude the debtor; and he was preferred to David French, a posterior adjudger, who stood infeft by virtue of the procuratory of resignation contained in the common debtor's disposition. The reason of the disparity betwixt a disposition of land, and an assignation to a moveable bond, is, because the land is properly debtor to one that hath a disposition thereof, and so that disposition wants no intimation to perfect it; whereas, an assignation of a bond must be intimated to the granter, who is debtor, to put him *in mala fide* to pay the cedent. It is in vain for Rule to plead upon Martin Newal's not being divested by the disposition to James Robson; seeing the question is not betwixt persons deriving right from Newal, who was last infeft, but only betwixt those whose common author James Robson, being never infeft, was sufficiently denuded by his disposing the procuratory to John Robson, before John Rule adjudged; *2do*, *Esto*, that intimation had been necessary to perfect the disposition in favours of John Robson; yet that, being an heritable right, was sufficiently intimated by his public infeftment, and the long debate in the present competition, and several years possession before John Rule's infeftment as heir to his father.

Triplid for John Rule; John Robson's infeftment cannot supply the want of intimation of the disposition in his favours; because sasines are not properly intimations, but only publications of real rights; and though John Robson

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granter *funditus*, having himself only a disposition with procuratory and precept; so that nothing remained for him to dispo-
ne, by legal or voluntary conveyance; consequently the disponent was preferred to a posterior appriser, who had attempted to complete his right by obtaining infeftment, on the debtor's original procuratory.

No 77.

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.