No 78. which stood in the Earl's person, and might be transferred by any writ *inter vivos* shewing his intention so to do. 2*do*, Brown the annualrenter's infeftment 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.

1733. *November* 20. SINCLAIR *against* SINCLAIR.

No 79.

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 disponee 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 infeftment 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 GARTHSHORE, Merchant in Glasgow.

No 80.
A personal conveyance of a personal right to land, does not denude the granter, or bar a second conveyance; the first infeftment in such a case being always preferable.

CHATTO having purchased an estate at a public sale, extracted his decree of sale; and, without infefting 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 infeft 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 infeftment, is transferred *funditus* from the disponer to the disponee, by a simple disposition, without other solemnity.

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

the feudal-right in him; and if his right, or the right of those who may purchase from him, can be defeated by a latent disposition granted by his author, purchases in Scotland will not be more secure than in a neighbouring country, where no records are kept of land-rights and conveyances. This case therefore deserves to be thoroughly weighed; and, to that end, the following observations are offered. No 80.

1mo, As consent alone transfers not property, delivery is a necessary solemnity for that end; actual delivery, where the subject is moveable; symbolical delivery, where it is immoveable.

2do, A disposition of land, with procuratory and precept, imports no more but the granter's consent in favour of the disponee, and a mandate or order to deliver the subject to him. Before sasine, which is the symbolical delivery, the disponee is not proprietor, nor is the disponer divested of his property.

3tio, Supposing the same land to be disponed, with procuratory and precept, to two or three different purchasers, an opportunity is given to each of them to acquire the property; but he only among them becomes proprietor who first obtains infeftment. This solemnity transfers the property, and of course extinguishes the disponer's property, with all the personal rights founded upon it.

4to, In this supposed case, the several purchasers have each of them the proprietor's consent to convey his property to him; and each is entitled to have the land delivered to him, which leaves it in the bailie's power to give delivery to any one of them he thinks proper.

5to, Of a disposition granted to a man and his assignees, the meaning is, that sasine may be given either to the man or his assignee. When, therefore, a disponee assigns his personal right, the assignee is entitled to demand delivery; which, at the same time, bars not the disponee himself to demand delivery; and he of the two who is first infeft becomes proprietor, precisely as in the former case of several dispositions granted by the same proprietor.

This evinces that a procuratory and a precept are in their nature alternative; being a mandate or order to give delivery to the disponee himself, or to any having his consent. And, when delivery is made to one or other, the property must of course be transferred to that person to whom delivery is made, because in him concur the consent of the proprietor with delivery, all that is necessary, by the principles of law, to transfer property.

The rule, that a personal conveyance denudes of a personal right, seems to proceed from an error in law, as if an assignment to a disposition, containing procuratory and precept, did necessarily denude the cedent, so as to make it no longer lawful to deliver the subject to him, but only to the assignee. And were this so, it behoved to support the doctrine in all its consequences; for if the disponee himself be no longer entitled to demand delivery, it must be yielded, that neither can he entitle any other to demand it: that no person can give what he has not, is a clear principle in philosophy as well as in law.

No 80.

But that a conveyance of a disposition, containing procuratory or precept, has no such effect, appears not only from what is said above, but is confirmed, past all doubt, from an established practice admitted by all to be effectual in law; which is, that after conveyance of a procuratory or precept, the assignee commonly infefts his author, and then infefts himself. Is this practice consistent with the rule, that a personal conveyance denudes of a personal right? Certainly not; for, if the disponee were *funditus* denuded of his personal right, by conveying it to another, his case would become the same as if the right never had been in him; and, consequently, sasine given to him would not be more effectual than if given to *John a Groat*. But, upon supposition that a procuratory or precept is a mandate or order in its nature alternative, impowering delivery to be made to the disponee, or to any other having his consent, the said practice is perfectly consistent; because delivery to either is good in law.

This acknowledged power, which an assignee has to infeft his author, puts an end to the dispute. If a disponee, even after assigning the procuratory and precept, can be legally infeft, it must follow, that the power to receive delivery continues still with him, which is all that is requisite to validate a second assignment; for, while the power of receiving delivery remains with the disponee, his consent to another's receiving it must be effectual. And, if he make twenty assignments, they are equivalent to so many dispositions granted by the proprietor himself; the person first infeft must carry the real right; for a plain reason, that the order is alternative to give infeftment to the disponee, or any other person having his consent.

And in this matter, the conveyance of real rights goes hand in hand with the conveyance of personal rights. An assignment to a bond, denudes not the cedent till the assignment be intimated; why then should an assignment to a disposition without any thing further, denude the cedent? Can it be thought that a disposition to land is transmissible with less solemnity, than a simple personal bond? But, to carry on the comparison, a case in personal rights shall be figured precisely similar to the present; an assignee to a bond, without intimating, makes two several conveyances; and the last conveyance is first intimated: it was never doubted, that the first intimation gives right to the bond. Here then we have it established, that a personal conveyance denudes not even of a personal assignment to a bond; and as litttle ought it to denude of a disposition to land. At the same time, the supposed case serves finely to illustrate the case in hand: An assignee to a bond, without intimating, conveys his right to several purchasers; each of them is equally entitled to take the proper steps for establishing the subject in his person; they are like so many creditors *in cursu diligentiæ;* the first completed diligence carries the subject.

Having made out, that Bell's ground of preference is not supported by the principles of law, the next step shall be to enquire into the consequences that may result from it, particularly with respect to the records.

Probably the rule of a personal conveyance denuding of a personal right, has been introduced with respect to those cases where the rights in competition remain personal; and has inadvertently been extended to infeftments proceeding from a common author not infeft. And, were it to have no further operation, the harm would not be great, however erroneous the rule may be; for men would be put on their guard, not to purchase but from one infeft. But the matter cannot rest here; for it shall be made evident, that, by this rule, there is as little security in purchasing from one infeft as from one not infeft. No 80.

The cases that hitherto have been brought before the Court are, all of them, like the present, between purchasers where the common author was not infeft. But let us suppose that Garthshore, after being infeft, had sold the land, and that the competition were between Bell and the purchaser; it is extremely obvious, that, if Chatto, the common author, was *funditus* denuded by his conveyance to Bell, the posterior conveyance from Chatto in favour of Garthshore, must be void, as flowing *a non habente potestatem;* that this void right cannot be validated merely by taking infeftment; and that a purchaser from Garthshore would be in no bester condition, *quia nemo dare potest quod ipse non habet.* The purchaser, therefore, in this supposed case, acquiring *a non domino*, could not be secure otherwise than by the positive prescription. Thus then it comes out clear, that, in making a purchase of a land estate, no man by this rule can have any security from the records, if there happen to be in the whole progress but a single author who was never infeft; for there may be a latent conveyance from this author, which cannot be discovered from the records.

But the mischief spreads still more wide; for, *esto* every one of the authors had been infeft, there remains the same uncertainty: one must have a disposition before he can be infeft; and who knows, whether, before his infeftment, he has not denuded himself by some latent conveyance: if so, his infeftment is void as well as the titles of those who purchase from him.

No answer can be made for obviating such pernicious consequences, if it be not this, 'That one who purchases from a person infeft, is secure, because he purchases upon the faith of the record.' But where is the law, that declares a purchaser to be secure against every latent claim which appears not upon the face of the records? We have no such law; and many cases may be figured where our records are defective, and give us no security. Our statutes have made a provision with respect to certain deeds, that they must be put upon record, under certification, that otherways they shall not be effectual against purchasers, such as sasines, reversions, &c. with respect to which, the records make us absolutely secure. But there are many deeds, in their nature good against purchasers, which are not appointed to be recorded; and there are others that admit not of being recorded.

And to show, that, by the legislature itself, the records are not held to be an absolute security, I appeal to the statutes concerning prescription. What

No 80.

use would there be for the viccennial prescription of retours, if a purchase from a younger brother served heir to his father were secure by the records, which cannot inform the purchaser that there is an elder brother existing? And, if such purchaser be not rendered secure till after the lapse of 20 years, is not this in effect saying, that the records give him no security in this case? There would be as little use for the positive prescription of 40 years; the obvious purpose of which is, to shut the door against every latent claim that otherways would affect the purchasers, though not appearing upon the face of the records. This makes it evident, that a purchaser from a person infeft, is secure against no grounds of challenge that are in their nature good against purchasers, but such only as are appointed to be recorded. A latent conveyance, by a person not infeft, is none of those grounds of challenge that are appointed to be recorded; and therefore, supposing such a latent conveyance to be good in its nature against a purchaser, the records will not secure him, nor any thing else, but the positive prescription of 40 years.

When thus stands the law, it is mere amusement to imagine, that in every case we have security from the records. Hitherto it has been reckoned, that if a purchaser search the records for 40 or 50 years backward, he is in safety to pay his money. But how lame must a purchaser's security now appear, when possibly the very day before infeftment, his author may have conveyed away his personal right? In vain, after this, will any person attempt to magnify the security of the records.

With respect to the many decisions urged on the other side, the following observations were made. The first of them, Rule, No 77. p. 2844. stands upon a sandy foundation: the decision Dewar *contra* French, was pleaded as a strong authority in that case; and yet when we look into the decision, Dewar *contra* French, as compiled by Lord Fountainhall, (No 12. p. 241.) it proves the direct contrary. The case was this: "In a competition betwixt two adjudgers, "the common debtor's right being a disposition with procuratory and precept, "but no infeftment, the first adjudger pleaded preference; his adjudication, "which denuded the debtor of his personal right, being the first complete or "effectual, and the other adjudger was not within year and day. It was urged "for the other adjudger, that his was the first complete and perfected right; "for, after having adjudged the dispositon, he proceeded to take infeftment upon the precept therein contained. The Lords brought them in *pari passu*." This was in effect finding the last adjudication the first effectual, upon this medium, that the common debtor was not denuded by the first legal conveyance without infeftment, but that the second legal conveyance, upon which the first infeftment followed, was preferable; which is the very point pleaded for Garthshore, and is directly contrary to the decision Rule *contra* Purdie. It comes out, then, that this decision, which is the first that tends to establish Bell's doctrine, is founded upon a mistaken authority. And the later decisions have

proceeded upon the same mistake, without adverting to the fatal consequences. At the same time, it must appear of great weight, that, from the first traces we have of our law down to the 1710, we find no support to this doctrine from any sort of precedent or authority: on the contrary, as the opportunities of pleading it must have been frequent, it is convincing evidence of its being disregarded by our judges and lawyers, that we find not any person putting in his claim upon it, save once in a decision compiled by the Lord Stair, Brown *contra* Smith, No 76. p. 2844.; where a purchaser of land, having a disposition with procuratory and precept, first gave an heritable bond for a sum of money, and then sold the land to a third party, assigning the procuratory upon which the purchaser was infeft. 'THE LORDS found the purchaser preferable to the creditor, upon this medium, that an assignment to an incomplete real right, though it had been directly done and intimate, could have no effect against a purchaser completing his right by infeftment.' This is the footing the Court went upon, if we can give faith to Lord Stair. No 80.

But, above all, we have the sense of the legislature itself against this doctrine. Had it ever been dreamed, that a latent disposition may be such an impediment in the commerce of land, or other heritable subject, as is pretended, it is not supposable that our legislature, in establishing the records, would have totally neglected this impediment. After appointing sasines and reversions to be put upon record, nay even the smallest ciks to reversions, discharges, renunciations, &c. it would have been great blindness to overlook latent dispositions, more dangerous to purchasers than all the former joined together. This may justly be held an authority against the rule, indirect indeed, but little less weighty than an express act of Parliament.

THE COURT, in this case, abstracting from all specialties, pronounced an interlocutor in favour of the personal right, led by the weight of former decisians. But, upon a reclaiming petition with answers, a hearing in presence, and informations, they 'preferred Garthshore's real right, and refused a petition against this interlocutor without answers.'

Fol. Dic. v. 1. *p.* 183. *Rem. Dec. v.* 2. *No* 8. *p.* 16.

*** Clerk Home reports the same case:

WILLIAM CHATTO, senior, having right to a tenement in Kelso, failed in his circumstances; whereupon it was brought to a sale by his creditors: And Alexander Oliphant having purchased the same, he disponed it to William Chatto younger; in which disposition he conveyed to him the decreet of sale, in order to his obtaining himself infeft; however, neither Oliphant nor Chatto junior, were infeft.

While young Chatto's right stood thus uncompleted, he granted an heritable bond thereon to Bell of Blackwoodhouse, upon which he entered to the possession: And, some time thereafter, John Garthshore, who was likewise creditor to

No 80. young Chatto, adjudged the tenement from him, and, having charged the superior, he obtained a charter, upon which he was infeft; whereupon a competition ensued betwixt them. And,

For Blackwoodhouse it was *argued;* That the right in young Chatto (the common author) being merely personal and incomplete, he was fully denuded thereof by the first conveyance; of course, the infeftment that followed on Garthshore's title behoved to fall; as the right on which it proceeded was void. It is true, that young Chatto might have been infeft; seeing the radical right still remained with him, notwithstanding the first conveyance; and, if that had happened, the first deed would have evanished in competition with a posterior disponee duly infeft; because, in conveyances from a person infeft, it is not the dates of the titles, but of the infeftments (whereby he is denuded), that is to be regarded. But, as that method was not followed, the first right here must be preferable to the subsequent one, notwithstanding the radical right remained with young Chatto, in the same manner as in a question betwixt assignees to bonds; the assignation first intimated is preferable to a prior one not intimated. Neither does this doctrine any ways tend to unhinge the securities arising from the records, as Garthshore did not contract upon the faith of them, his author not being infeft; and, any person who may purchase from him, must see, from the records, that his immediate author not being infeft, the personal right that was in him, might have been qualified or alienated by a personal deed.

Besides, the point now pleaded for, seems well founded in the act 1617; where it is declared, 'That it shall not be necessary to registrate any bonds and 'writs for making reversions, unless the sasine pass in favour of the parties ma-'kers of the said bonds or writs:' Consequently, if Chatto younger had granted a back-bond of reversion, or any other deed in favour of Bell, it would have been good against his competitor, notwithstanding his infeftment. And surely, it cannot be doubted, but a direct disposition or conveyance of an incomplete real right, must be equally available to affect it in prejudice of the granter's singular successors, who obtain themselves infeft, when their author was not infeft, as a latent back-bond. In point of justice, there is no difference; and, in a favourable view, the direct deed surely deserves more countenance.

On the other hand, it was *urged* for Garthshore; That, so long as the competing rights remained personal, the rule, *Prior tempore potior jure*, behoved to take place; but, as there was more in young Chatto than a mere personal right, to wit, a power and faculty in him to have made it real, by which only the *dominium* of the subject could be transferred; and this being carried, in virtue of the charter from the superior, whereby old Chatto was denuded, the real right was established in Garthshore's person. It is true, he might have infeft young Chatto, in order to have validated the purchase he should make from him; but the method here followed, of establishing a legal title to the decreet of sale, is the same thing with the resignation as flowing from old Chatto, whereby all intermediate personal rights came to be absorbed, and the real

right in old Chatto, by the act of the superior, vested in Garthshore; so that he alone, and no other, was liable for all the casualties arising from the fee; consequently, he must, from thenceforth, be entitled to the rents and profits thereof. The parallel brought from assignations to personal rights tends to support the contrary to what it is adduced to prove; for, as it is acknowledged, that, notwithstanding of a first assignation, the radical right remains with the cedent, in so much that an after-assignation first intimated will be preferred; so the radical right of the fee remaining with old Chatto, the decreet of sale and after-assignation, gave a power to the assignees to complete their real rights, and divest him; which being done, the radical right thereafter came to be vested in that party who completed the real right; as in assignations to personal rights, it is performed by the first intimation. Nor does the clause in the act referred to make any alteration in the present question; because it does not say, That the first latent bond of reversion, upon a personal right, must have preference to others, who having carried the same, have completed it, by establishing a real right thereupon; this being left to the disposition of the common law, as it stood before the act; and by that, Garthshore, as having the only complete real right in the subject, falls to be preferred to his competitor; who, suppose his titles were now lawfully made up, would have no manner of right in it at all. No 80.

THE LORDS preferred John Garthshore.

C. Home, No 59. p. 102.

*** *See* No 85. p. 2860.

SECT. XIV.

Betwixt Rights flowing from different Authors.—Husband with Wife's Assignees.—Between Real and Personal Creditors, where the Debtor's Infeftment Reduced.—Singular Successor of a Reverser, with the Heir of a Nominal Fiar.—Disponee in Security with a Personal Creditor.

1667. *February* 1. ANDREW SMEATON *against* TABBERT.

No 81.
In a competition of rights flowing from different authors, the eldest was preferred, tho' *in petitorio*, the other being in possession.

ANDREW SMEATON being infeft in an annualrent out of a tenement in the Canongate, pursues a poinding of the ground, and produces his own infeftment and his author's, but not the original infeftment of the annualrent. It was *alleged* no process, until the original infeftment were produced, constituting the annualrent, especially seeing the pursuit is for all bygones, since the date of the author's infeftment; so that neither the pursuer, nor his immediate author have been in possession. 2*dly*, If need be, it was offered to be proven, that before the rights produced, the authors were denuded. It was *answered*, That the