

1667. February 2.

POWRIE *against* DYKES.

No 319.

Heirs found to have right to annualrent, though the deed founded on did not mention heirs, and though it did not bear to be paid heritably.

UMQUHILE Dykes having subscribed a bond to Powrie of his tenor, that the acknowledged himself to be resting to Powrie L. 56 yearly, as the annualrent of 1400 merks; which sum of L. 56 he obliged himself to pay yearly; this was the tenor of the bond; whereupon Powrie pursued Dykes his successors, not only for the payment of the annualrent, but for payment of the principal sum of 1400 merks, alleging, that she being but a simple woman, had entrusted Dykes with the drawing of the bond, and he had deceived her, and not mentioned the payment of the principal, but that the acknowledgment that the annualrent was due, as the annualrent of 1400 merks, behoved to infer that the 1400 merks were also due; this ticket being holograph, without witness, there was no clearing of the meaning by the witnesses inserted.

Therefore, the LORDS allowed the pursuer to adduce such adminicles and witnesses as she would use for clearing of the same.

She adduced an instrument, bearing umquhile Dykes, upon his deathbed, to have acknowledged that he thought the principal sum had been contained in the obligatory clause, and that it was through his neglect, or unskilfulness, all the witnesses in the instrument being now dead, the notary, and he who is mentioned as procurator, to have taken instruments in the pursuer's name, were examined, both acknowledged that Dykes had expressed his mind in the matter before them; but they were contrary in the particular; the notary deponed conform to the instrument; but the procurator deponed contrary, that the woman had quite the principal sum, and had taken her to the annualrent.

THE LORDS having considered the whole matter; and first, whether the ticket could import that the principal sum was due; they found, neither by the ticket nor by the instrument, that that could be instructed: They considered next, whether the annualrent was due, during the woman's lifetime only, or as a perpetual annualrent to her, her heirs, or assignees. The difficulty was, that the obligation bore, that Dykes should pay the annualrent yearly, but did not express neither to her, her heirs, nor assignees, but simply in these terms, to pay the L. 56 yearly; which the LORDS found to carry a perpetual annualrent, though heirs and assignees were not expressed.

Fol. Dic. v. 2. p. 164. Stair, v. 1. p. 434.

1709. January 13.

The LAIRD and LADY AIRTH, and Sir GEORGE HAMILTON, their Assignee,
against HAMILTON of Grange and his TUTORs.

No 320.

An heritable bond was granted by an heiress, and

AN heritable bond, *in anno* 1672, for 22,000 merks, being granted to Douglas and Hunter, by Jean Bruce, Lady Airth, and John Hamilton of Grange,