

ng, preferred the prior arresters, being of opinion, That the supervening interlocutor was but declaratory.

No 12.

Fol. Dic. v. 2. p. 354.

** Lord Kilkerran's report of this case is No. 2 p. 3077., *voce* CONSIGNATION.

1745. June 19.

CAMPBELL OF BALERNO *against* The CREDITORS of Auchinbreck.

SIR JAMES CAMPBELL of Auchinbreck was debtor to Ronald Campbell of Balerno, by an heritable bond for L. 7000 Scots; but 4000 merks thereof being paid, a discharge and renunciation was granted, effeiring to that sum, with a procuratory of resignation *ad remanentiam*.

Sixteen years after this, at an accounting between Sir James and Mr Ronald Campbell, advocate, son and heir of the original creditor, it appearing that the debt had, by posterior contractions, again swelled to the first sum, the discharge, which had never been registrated, was given up.

Mr Campbell produced his interest in a ranking of Sir James's Creditors, when it was *objected*, That his bond was in so far paid and given up, and the discharge was not a habile way to create to him an heritable security for a new sum.

Pleaded for Mr Campbell, This was a fair transaction; Sir James was then in good credit; and none of the competing creditors had, at that time, any infestments. His infestment could not be taken away by the discharge, which was a personal deed, 23d November 1627, Dunbar *contra* Williamson, No 9. p. 570. This obtains, with two exceptions, *imo*, If the renunciation be registrated, act 16. Par. 1617: *2do*, If there be intromission, by virtue of legal diligence, which extinguishes the right; but there is a difference betwixt that and voluntary payment, in which last case the debtor has it in his power, and ought to take a renunciation.

Granting the principal sum to have been diminished, it does not follow that the heritable right was so; and thus an adjudger, who had received a partial payment, was ranked for the whole sum in the adjudication, that he might draw effeiring thereto, so long as his draught was within the sum still due, 16th February 1734, Earls of Loudon and Glasgow *against* Lord Ross, No 23. p. 1414.; Mr Campbell must therefore prevail, if a personal obligation can be renewed by consent; and this is no more than is done every day in eiks to reversions; and a parallel case to this was decided, 21st December 1675, Clark *contra* Robertson, No 4. p. 9979.

VOL. XXXII.

76 Y

No 13.

A creditor, by an heritable bond, granted a partial discharge and renunciation, which he afterwards retired on a further advance which he made of money. It having never been registrated, and there being no intervening real rights, the infestment was found to subsist for the whole annualrent.

No. 13.

Pleaded for the Creditors, All debts are extinguished by payment; and when the debt is extinguished, the creditor has no further right to the pledge. It is denied that any debt once extinguished can be raised up again, to the prejudice of a third party, though an exception might lie against the debtor himself making the objection. A creditor in an heritable bond has only a servitude on the land which is diminished by payment; and there is no arguing from the example of eiks to reversions of wadset rights, which, no doubt, may be made in the same manner as the original reversion.

THE LORDS repelled the objection to the bond.

Reporter, *Lord Kilkerran.*

For Mr Campbell, *H. Home,*
Clerk, *Kilpatrick.*

Att. *J. Macleod.*

Fol. Dic. v. 4. p. 238. D. Falconer, v. 1. p. 103.

* * * Lord Kames reports this case :

1745. *June 26.*—In the month of March 1710, Sir James Campbell of Auchinbreck granted an heritable bond over his whole estate to Ronald Campbell writer to the signet, for the sum of L. 7000 Scots; upon which the creditor was infeft in September 1710, and the sasine duly recorded. Upon the 24th of May 1711, Sir James having paid the arrears of interest, and 4000 merks of the principal sum, Ronald Campbell, of that date, granted a discharge and renunciation of the annualrent-right, to the extent of the sums received, and also granted a procuratory for resigning, so far, the annualrent-right in the hands of Sir James Campbell, in *perpetuam remanentiam*. In the year 1727, a transaction was executed betwixt Sir James Campbell and Ronald Campbell's son, who was his heir and executor. After stating accounts, a balance was found due by Sir James of 5300 merks, besides the remainder of the heritable bond; and, as the creditor wanted security, a method was proposed to save the expense of a new infeftment, which was thought equally effectual in law. The discharge and renunciation, above mentioned, was given back; Sir James subscribed a declaration, that the L. 7000 Scots was wholly resting by him, "notwithstanding of any writings preceding this date, which may import the same, or any part paid." And, of the same date, he granted a moveable bond to Mr Campbell for L. 1000 Scots, being the balance that remained due after what was necessary to redintegrate the heritable bond.

At this period, Sir James was in good credit, and his estate clear of infeftments. But, thereafter, having contracted great debts, upon which infeftments followed, the Creditors, in a ranking, opposed Mr Campbell's preference, for the whole sums in his heritable bond, *insisting*, That he could only be ranked for the balance, deducting the 4000 merks which was paid in May 1711, and which extinguished the infeftment *pro tanto*.

On the other hand, it was *pleaded* for Mr Campbell, That *unum quodque dissolvitur eodem modo quo colligatur*; that infeftments are not taken away by per-

sonal deeds; that there must either be a new infeftment, or a resignation *ad remanentiam*. There are but two exceptions from this rule which require attention, as they give light to the argument. Since the act 16th Par. 1617, a renunciation recorded has ever been held effectual against a singular successor in an infeftment of annualrent, though there be neither a procuratory nor instrument of resignation. The reason is, that the renunciation of a wadset is, when recorded, declared to be good against purchasers; and the argument proceeds *a pari* to the renunciation of an annualrent-right; for the purchaser who sees on record a renunciation of the right, cannot be *in bona fide*. This was found, 7th January 1680, M'Lellan against Mushet, No 10. p. 571.; 2d January 1705, Heirs of Learmont against Gordon, No 12. p. 574. A second exception is, that intromission, by virtue of legal execution, extinguishes the annualrent-right *pro tanto*, so as to be effectual against a purchaser, 8th July 1680, Ranken against Arnot, No 11. p. 572. And here is to be noticed a remarkable difference betwixt a voluntary payment, and a payment recovered out of the ground by virtue of legal execution. A debtor, who makes voluntary payment, has it in his power to take a resignation *ad remanentiam*, and to see the same executed, or at least to record the renunciation; and *sibi imputet* if he neglect the forms required by law to make him secure. He has not the same opportunity when payment is recovered by pointing the ground; and yet it would be hard in this case, if he were not made secure. Here strict principles yield to utility, or rather necessity, as they ought to do in every case. For securing the debtor, the annualrent-right is extinguished by intromission, upon pointing the ground, as much as by a resignation *ad remanentiam*, or by a registered renunciation.

From these premises it was urged, That the consent of parties, vouched by a proper writing, was sufficient to restore the debt to its original sum; and, as to the infeftment, that the same was never extinguished, either in whole or in part, which could only be done by an actual resignation *ad remanentiam*. The renunciation and procuratory of resignation not being upon record, would afford no defence against a purchaser from Campbell, which demonstrates, that the infeftment was not extinguished; for an infeftment extinguished in the person of an author, revives not in that of a singular successor; and therefore, this objection cannot more avail the creditors than it can avail Sir James himself; especially when these creditors lent their money after the infeftment was redintegrated.

“ THE LORDS repelled the objection, and preferred Campbell for his whole original sum.”

Rem. Dec. v. 2. No 68. p. 105.