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tory and valid, though there was but one of the Lairds of Arbuthnot subscribing; and it must be presumed to be the son who was in fee, seeing *verba sunt interpretanda contra proferentem, et ea est interpretatio sumenda quæ facit ut actus valeat potius quam pereat; et in re antiqua omnia præsumuntur solenniter acta*; and whether it was the fiar or liferenter that subscribed, *non refert*, for this Viscount represents both, and so is liable in warrandice. And as to the third, the obligation is so comprehensive, that it will extend to all rights coming *provisione legis*, as well as *hominis*; and even *quoad* this given to him as patron by the act of Parliament 1690, he had a *jus fundatum* before; and to evade his contract by this were *fraudem facere legi*; and not only tacks, but all rights he should acquire, are declared to accresce to Allardyce; and it cannot be denied, but the title my Lord Arbuthnot has now to the teinds of the parish by that act is a right, and so falls under the contract. THE LORDS repelled the reasons of reduction, and sustained Allardyce's declarator, and found this right now in Arbuthnot's person, by the late act 1690, accresced to him, and so decerned; but, in case the Viscount of Arbuthnot denied his representing these contractors, then the Lords assigned a term to Allardyce to prove the same.

Fol. Dic. v. 1. p. 513. Fountainhall, v. 2. p. 22.

1746. December 5.

GRAHAM, and the other TRUSTEES of Sir ALEXANDER WEDDERBURN, and other Creditors of TRAIL, Competing.

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Debts were acquired by a party who had disposed lands with absolute warrandice to the purchaser, against all incumbrances. These debts were not found to accresce to the purchaser, as *jus superveniens*; but to the extent of the part of the price remaining due, the disponent was found preferable on these debts, and ranked accordingly, in competition with other creditors of the same purchaser.

MARGARET BONNAR, after she had acquired right by disposition to the lands of Blebohole, having intermarried with Thomas Graham of Greigston, did, with consent of her husband, dispone the lands to Thomas Trail, writer in Dundee; and, in respect she was not infest, the disposition contained an assignation to the procuratory of resignation contained in the disposition to her from her author, and the husband and wife became bound conjunctly and severally in absolute warrandice; and of the same date, Thomas Trail gave bond for the sum of L. 6283, bearing the same to be the price of the lands of Blebohole disposed to him of that date.

While about L. 2000 remained due of the price, Thomas Trail's affairs going into disorder, his creditors adjudged the lands of Blebohole; and Sir Alexander Wedderburn, one of the adjudgers, took out a charter, and infest himself upon the procuratory contained in the disposition to Margaret Bonnar.

Thomas Graham having, in order to put himself in condition to implement his obligation of warrandice, acquired two debts, which were secured by infestments of annualrent on the lands of Blebohole, prior to Margaret Bonnar's own right; James Graham, his son, compeared in the ranking of the creditors of Thomas Trail, and craved to be preferred upon these two debts to the extent of the sum still remaining due by Thomas Trail of the price.

Objected for the creditors, That these debts having been acquired by Thomas Graham, who had concurred with his wife in disposing the lands to Thomas Trail, with absolute warrandice against all incumbrances, they accresced to Thomas Trail his successor as *jus superveniens auctori*; which the LORDS “repelled, and found Graham preferable upon the debts to the extent of the sum remaining due of the price, and that he was to be ranked accordingly.”

This judgment was equitable, that the accretion should only take place upon Trail's paying the sum in the bond, which bore it to be for the price of the land.

Fol. Dic. v. 3. p. 366. Kilkerran, No 2. p. 322.

* * * D. Falconer reports this case :

THOMAS GRAHAM of Greigston married Margaret Bonnar, who had right to the lands of Blebohole by disposition, but was not infeft therein; and they disposed them to Thomas Trail writer in Dundee, viz. the said Thomas Graham, for all right he may have *jure mariti*, or otherwise taking burden upon him for his wife, and they both disposing with all right, ‘which I or my predecessors, authors or successors, had, have, or any ways hereafter may have,’ binding themselves conjunctly and severally in absolute warrandice; and in respect Margaret Bonnar was not infeft, assigning the disposition and procurasory of resignation in her favours, and discharging the price; for which at the same time a bond was granted to Thomas Graham. Thomas Trail never paid up the full price; and his creditors adjudged from him, and were infeft in the estate.

Thomas Graham purchased in two infeftments of annualrent, which were incumbrances on the subject, and which by the obligation of warrandice, he was obliged to purge; and he, or John his son and heir, having adjudged for the price, appeared in the ranking of Trail's creditors, craving to be preferred upon his infeftments, to the extent of the price yet due; for he acknowledged his obligation of warrandice debarred him from insisting for the surplus. To which it was answered, That *jus superveniens auctori accrescit successori*; and for what remained due of the price, he could only be ranked on his adjudication.

THE LORD ORDINARY, 7th December 1744, “Sustained the objection to the two interests, now produced for John Graham, son and heir to the said Thomas, and found that he could not be ranked thereupon.”

Pleaded in a reclaiming bill, That John Graham was desiring nothing but a fair execution of his father's bargain, and that as he had disposed the lands, the price might be paid; that if he had not acquired these infeftments, it would have been so far from an advantage to the creditors, that in the person of any other than him, they would have been preferable to their full extent.

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It is *objected* to him, That he is liable in absolute warrandice, and therefore obliged to purge these incumbrances : But to this he *answers*, That he is willing to fulfil his obligation upon the mutual cause being implemented to him; this would be good against Thomas Trail the disponee, and must be so against his creditors, who claim as his assignees, since it is a rule, except in matters of probation, that all objections competent against a cedent, are likewise competent against an assignee, Stair, B. 3. t. 1. § 20, especially when the cedent is bankrupt; and *a fortiori*, if it is not the case of a voluntary assignation, but of diligence done by creditors who affect the right, such as it was in their debtor's person, 24th December 1679, Creditors of Gordon against Captain Binning, No 70. p. 2617.; 14th February 1735, Stevens against the Creditors of the York Buildings Company.—See APPENDIX.

It is *alleged* for the Creditors, That the price was discharged; but this is insisting on a clause of stile, contrary to what was *actum et tractatum*; for of the same date the bond was ganted, bearing to be for the price of the lands, which is sufficient to make it a counterpart to the obligation to dispone, 14th November 1628, Cuming against Cuming; besides, it contains a provision that the sums may be retained by the purchaser, till incumbrances are purged; and Stair affirms, tit. Coventional Obligations, § *ult.* that mutual obligations, though in different securities, make one contract.

The maxim of *jus superveniens* applies only to those who, under the character of proprietors, convey, but not to consenters to a disposition by another, as a liferenter consenting to an alienation by the fiar, Forbes against Innes and Dalgardno, No 81. p. 6524.; Earl of Errol against Hay, No 80. p. 6523.; Stewart against Hutchison, No 15. p. 7762. Margaret Bonnar here is designed heritable proprietrix of the lands; she disposes with consent of her husband, and he only for what right he had *jure mariti*, or otherwise; the disposition is with all right which she had or might have, in which clause he is of purpose left out; as with regard to the property, he is only consenter to his wife's disposition; and therefore he is not to be considered as author to Thomas Trail; and the maxim of *jus superveniens* does not apply.

Answered, The Creditors have no interest to dispute, but that in mutual contracts, implement cannot be demanded of one part, without offering implement of the other; they are asking no implement of Thomas Graham; he has already fulfilled his bargain; he has disposed the lands, and purged incumbrances, and they only ask that he or his heir should not contravene his own deed; he was obliged to have taken discharges; and if he has taken assignations, he cannot use them to keep up these debts which he was bound to purge. What the Creditors chiefly insist on is, that he is their author; he was to receive the price; and therefore not only disposes for what right he had *jure mariti* or otherwise, but takes burden for his wife. No disponent can afterwards use an acquired right, to evacuate his own disposition, Stair, b. 3. tit. 2. § 2, for this would be contrary to the *bona fides* of the contract, which is a sufficient

foundation for the rule, without recurring to the obligation of warrandice. The decisions cited for the petitioner, therefore, rather favour the respondent's claim, since they all regard simple consenters to the deeds of others.

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The petitioner has not the equity on his side; for he has relied on the purchaser's personal security for the price; and if he had taken real security, this probably might have prevented the other creditors from contracting.

In the argument on the Bench, a distinction was made betwixt the disposing a complete or a personal right, which was said to be only an assignation of the procuratory. It is also said, that an author acquiring subsequently any title, this did not accresce to the purchaser, that is, he was not obliged to cede it to the purchaser, but could hold it for his own security, until payment of the price; and upon this it is apprehended the decision went.

"THE LORDS found that the petitioner ought to be ranked on the infestments of annualrent, to the extent of the sums yet remaining due of the price."

Act. *Ferguson*.Alt. *L. Craigie*.Clerk, *Gibson*.*D. Falconer, v. I. No 145. p. 183.*

S E C T. II.

Where the Author is not liable in Warrandice.

1581. *June*.ARNOT *against* TENANTS:

JEAN ARNOT, and her daughter Spence, warned certain tenants to flit and remove from the lands of K, they having tack and assedation of the said lands of the L. of Glamis, to whom the lands pertained heritably. It was *alleged* for the Tenant, That they ought not to flit and remove, because the lands were fallen in ward, by reason the L. of Glamis is pupil and his lands warded; and during the time of the ward, the tacks were suspended, and so the pursuers had no title to warn them to flit and remove. It was *answered*, That albeit the lands were fallen in ward, yet nevertheless the ward being disposed to the said Lord, and he being the setter of the said tacks, behoved to warrant as many years' tacks after the out-running of the same the time of the ward, and so all being consolidated in his person, could not hurt the Tenants, *quia quem de evictione tenet actio eundem ab agendo repellit exceptio*. It was *answered*, That the consuetude and practise of Scotland was ay, that during the time of the ward, all tenants were removable, and their tacks ceased, *et dominus*

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A ward vassal getting the gift of his own ward, must continue the tenants in possession even during the ward.