

thereof, and Sir William Bruce, his assignee, used no diligence thereupon, but suffered Sir David, the rebel, to possess his lands of Pitlethy for several years.

THE LORDS repelled the qualification of simulation; in respect Sir William Bruce, the assignee, did prosecute his right, so far as to obtain possession of the great part of the rebel's estate, by virtue of the gift and other rights in his person; and found the rebel's continuing to possess a small part of the estate at a distance from the rest of it, is not relevant to infer simulation.

Fol. Dic. v. 2. p. 158. Forbes, p. 673.

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tain possession of the great part of the estate, by virtue of the gift and other rights in his person.

DIVISION. X.

Mandate when presumed.

SECT. I.

Where a factor has paid Annualrent for a course of Years altho' none stipulated.

1671. November 17. HEPBURN of Beinstoun *against* LAIRD of CONGILTON.

HEPBURN of Beinstoun having married Congilton's sister, was provided by his contract of marriage to 4000 merks of tocher, and Congilton, who is obliged therefor, by a fall from his horse became weak, and for 20 years kept his chamber; during all which time, his mother meddled with his rents, and paid Beinstoun the annualrent of his tocher, till the year 1662. And now Beinstoun pursues Congilton's son and heir for payment of the annualrent since the year 1662, who *alleged*, Absolvitor from the annualrent, because the contract of marriage bears none, *et usura non debentur nisi ex facto*. The pursuer *replied*, That use of payment of annualrent constitutes annualrent, so that Congilton's mother having paid annualrent till the year 1662, it was due thereafter. It was *answered*, That use of payment of annualrent by the creditor himself may constitute the same thereafter; but payment thereof by his mother cannot constitute the same, unless her warrant were proved, which neither can be proved nor presumed, Congilton being weak, and incapable by his fall; and as his

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It being held that the use of paying annualrent, where none has been stipulated, constitutes a right to demand it in future, it was found that where a mother acting for her son paid such annualrent, a mandate was to be presumed and he was bound for the future.

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mother's obligation to pay it could not oblige him, much less her use of payment in favour of her daughter, without her son's warrant. It was *answered*, Albeit the obligation or payment of a third party could not constitute annualrent; yet where it was paid by a party who had a presumed warrant as a factor or servant, their payment was sufficient, and their warrant presumed, unless the contrary were proved; much more payment by a mother who meddled with her son's whole estate, and paid the same by her son's means, and not by her own, which the LORDS found relevant, and sustained the annualrent. It was also *alleged*, That the defender, in his father's life, paid a year's annualrent. But the LORDS decided upon the first ground only.

Fol. Dic. v. 2. p. 158. Stair, v. 2. p. 2.

. Gosford's report of this case is No 9. p. 483, *voce* ANNUALRENT.

S E C T. II.

Acts by Wives or Servants.

No 270.

Presumption of a wife's warrant to borrow a small sum, inferred from having in her custody the bond which she impledged for it.

1665. February 4.

PATERSON *against* PRINGLE.

ISOBEL PATERSON having lent to Pringle's wife L. 100 Scots, and having received a bond of Pringle's in paund thereof, he thereafter seeking a sight of the bond, took it away without warrant, whereupon she obtained decret against him before the Commissaries, which he and his wife suspended, on this reason, that he never borrowed any sum from the charger; and if his wife did borrow the same, he knew nothing thereof, or that it was applied to his use, and that she impignorated his bond without his knowledge, or warrant.

THE LORDS found, That her having of the bond in her hand did infer a warrant to borrow the money, and oblige her husband, being a matter of small importance.

Fol. Dic. v. 2. p. 158. Stair, v. 1. p. 264.

No 271.

A servant took off goods from a merchant in his master's name. He was found not

1665. November 17. HOWISON *against* COCKBURN.

THE EXECUTORS of David Howison pursue James Cockburn, for the price of several ells of cloth, which the said James, by his ticket, produced, granted him to have received, in name, and for the use of the Laird of Langtoun, his master. It was *alleged*, Absolvitor, because, by the ticket, the defender is not