No 20.

ment; and, therefore, that behoved to accresce to all real rights granted by the common author.

Gosford, MS. No. 354. p. 171.

No 21.
An adjudication led without a special charge, was not rendered effectual by the subsequent infeftment of the apparent heir.

1699. *January* 11. WILLIAM DUNCAN *against* JAMES NICOLSON.

PHESDO reported William Duncan, and James Nicolson, late Dean of Guild in Edinburgh. It was a competition, as creditors to John Aikenhead; and it was *objected*, That Mr William Walker's adjudication, to which the Dean of Guild had right, was null, wanting a special charge. *Answered*, A special charge being only a fiction, introduced by law, to supply the want of an infeftment, it was sufficient that Aikenhead, the apparent heir, was afterwards served heir and infeft, (as *de facto* he was,) which must accresce to validate the said adjudication, and to supply the want of a special charge, seeing *jus superveniens auctori accrescit successori*. *Replied*, Whatever this right of accrescing might do in the case of two voluntary dispositions, granted by an apparent heir, yet that does not hold in the case of a legal diligence by adjudication, which being once null, can never be supplied, according to *l.* 29. *D. De reg. jur. Quod ab initio non valet, id tractu temporis convalescere non debet*; 2*do*, The serving and infefting the heir was done by Duncan, to complete his own security; and it were absurd, that his infefting Aikenhead, to validate and perfect the disposition he had got from him, should accresce to a third party, to be detorted to his prejudice; for, *actus agentium non operantur ultra eorum intentionem*, much less *contra eorum intentionem*. *Duplied*, Duncan's right was a gratuitous disposition *omnium bonorum*, and ought not to compete with a lawful creditor; and the rule, *quod ab initio vitiosum est*, has many exceptions, as *l.* 85. § 1. and *l.* 201. *D. De reg. jur. Non est novum ut ea durent, licet ille casus extiterit a quo initium capere non potuerunt*; 2*do*, Seeing it is acknowledged, that the subsequent infeftment would complete a prior voluntary right, why not also a legal one, there being no disparity, and diligences being more favourable than conventional rights. See Stair, 21st July 1671, Neilson against Menzies, No 20. p. 7768.; and in his Institutes, tit. Dispositions. And the intention of law is more to be regarded here than the intention of parties. THE LORDS thought the case new; and ordained it to be debated in their own presence.

This subtile point being advised by the Lords, 7th February 1699, they found the adjudger, having omitted to charge the apparent heir to enter, he cannot, on his own neglect, plead the benefit of the subsequent service and infeftment; and, therefore, preferred the disposition. Sundry of the Lords thought the service so far retrotracted, as to make the adjudication subsist for

principal and annualrents, and only to cut off the accumulations. But this was not decided. No 21.

Fol. Dic. v. 1. *p.* 515. *Fountainhall, v.* 2. *p.* 33.

1708. *February* 28.

ALEXANDER ALISON, Writer to the Signet, *against* Mr JAMES CHALMERS, Son to William Chalmers, Notary in Kinrossie.

No 22.

PATRICK PATULLO having disponed to Mr James Chalmers an heritable bond upon the lands of Glencorse, belonging to George Patullo, to whom the disponer was apparent heir, and, after intimation of that disposition to the debtor in the bond, having re-disponed the same to Alexander Alison; the LORDS preferred Mr James Chalmers, who received the first disposition; albeit Patrick Patullo, the common granter, was served heir upon the procuratory contained in the second, in order to perfect and validate that right; for the service was found to accresce to the first right, which contained also a procuratory, and warrandice from fact and deed.

Fol. Dic. v. 1. *p.* 515. *Forbes, p.* 250.

1738. *December* 22.

Competition JOHN NEILSON, *&c.* with MURRAY of Broughton, *&c.* Creditors of JOHN GORDON of Kirkonnel.

No 23.
If a common debtor grants several infeftments on his estate before he be infeft, and thereafter take infeftment, his creditors must be ranked thereon according to the priority of the dates of their infeftments.

IN the ranking of the Creditors of Kirkonnel, Gordon, the common debtor, having granted several infeftments before he was infeft, the question occurred, Whether his infeftment would bring them in all *pari passu*; or, if it would accresce to prefer the creditors according to the dates of their infeftments?

For John Neilson, and those who had the first infeftments upon the estate, it was *argued*, That, so soon as the common debtor was infeft, the same behoved to accresce to them, each in their order, in the same way as if he had been infeft before granting any of the precepts; to make out this, it was necessary to examine the nature of the *jus superveniens*, and what effect is given to it in law. One dispones an estate, of which he is not proprietor, and the purchaser stands infeft; thereafter, the seller acquires a complete title to the subject; our law says, that there is no necessity for a second disposition; nor, indeed, seems there to be, from the nature of the thing; the purchaser has the consent of the proprietor formally interposed; the subject is delivered to him, and this is all that is necessary to transfer dominion. If, then, there is no necessity of a second disposition and infeftment, after the common author has