1712. *January* 10.

JOHN WHITE, late Bailie of Kirkcaldy, *against* DANIEL REID.

No 16.
A creditor in a bond, bearing annual-rent, falls under civil rebellion. After year and day, and after his liferent eſcheat had been gifted, he leads an adjudication. The donator having right to the annual-rents, the adjudication, in ſo far as led, for ſecurity of them, accreſces to him.

IN a competition for the mails and duties of the lands of Birkhill, betwixt Daniel Reid, as having right, by progreſs, to Sir David Arnot's ſingle and liferent eſcheat, obtained by Sir Patrick Scot of Ancrum, in anno 1691, and aſſigned to Sir William Bruce, Daniel Reid's author, in the year 1704; and Bailie White, as having right, by diſpoſition and aſſignation, from Sir David, to an adjudication of the eſtate, after the gift was declared:

Alleged for Bailie White:—The gift of eſcheat was ſimulate, and null by the act 145. Par. 12. Ja. VI. in ſo far as, though the gift was obtained in anno 1691, and declared in the 1693, Sir David is ſuffered to remain in the peaceable poſſeſſion of his lands of Pitlethies, till this day. Which nullity is competent to be proponed by the rebel's creditors, and others deriving right from him; [March 28, 1637, Hamilton againſt Tenants, (Durie, p. 843. *See* ESCHEAT.) January 6, 1666, Oliphant againſt Drummond, (Dirleton, p. 7. *See* ESCHEAT.) December 20, 1676, Pallat againſt Vetch, (Dirleton, p. 123. *See* ESCHEAT.) December 17, 1670, Langton againſt Scot, (Stair, v. 1. p. 703. *See* ESCHEAT.) June 19, 1669, Scot againſt Langton, (Stair, v. 1. p. 620. *See* ESCHEAT.)]—nothing being more contrary to law and reaſon, than to cover a rebel by a colluſive gift of eſcheat, and maintain him in the peaceable poſſeſſion of his lands, to the loſs and ruin of his creditors, and purchaſers from him.—2*do*, Sir David acquired not the foreſaid adjudication till after the gift; and gifts of eſcheat extend not *ad acquirenda:* Therefore the rents of the lands adjudged can never fall under the

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greſſes to the ſame land, with different holdings, reddendos, and immunities; as oft falls out, in the caſe of ſeveral adjudgers from a ward vaſſal, whereof one procures a charter, taxing the ward, and other caſualities; while another's charter continues in the terms of ſimple ward: So the latter could not claim the privileges granted to the former, without deriving right from him.

Duplied for the defender: Though none can plead right to the lands, by virtue of any charter granted to a perſon he does not ſucceed to; the freedom and immunity of lands from thirlage, or any other ſervitude, may be conveyed without a connected progreſs: Becauſe, liberty is preſumed, and ſervitude muſt be proved, and cannot be inferred without a poſitive deed conſtituting the ſame; yea, even when conſtituted, is taken off and extinguiſhed, by any diſcharge or renunciation, without farther ſolemnity, *Stair's Inſtit. Tit. Servitudes Real, §.* 24. So that the lands becoming free thereby, are tranſmitted, with that freedom, to any ſucceeding heritor, without neceſſity of an expreſs proviſion thereanent in his right. Nor can they ever be brought under the ſervitude again, but by the deed of the proprietor for the time. The parallel adduced, of a ſuperior's taxing the ward-duties, in favours of one of ſeveral competing vaſſals, is no ways applicable to this caſe: For the caſualities of ſuperiority, remain with the ſuperior; whoſe granting a taxing charter, can only be profitable to the perſon who has right to that charter; whereas a ſervitude being renounced or extinguiſhed by the ſuperior's deed, nothing remains with him to be given to any perſon by a ſubſequent grant; and the lands become and remain free for ever, unleſs a new ſervitude be impoſed by the proprietor.

THE LORDS found, That the defender had the benefit of immunity from the thirlage, by the charter granted to Kincaid, of the lands of Over Carloury; albeit he inſtructed not a connection of his title from Kincaid; and therefore declared theſe lands free of the aſtriction. (*See* THIRLAGE.) *Forbes, p.* 120.

No 16. gift. Hope Pract. 25th & 28th June 1622, Clapperton agſt Inglis. (*See* ESCHEAT.) So gifts of ſingle eſcheat, extend only to goods pertaining to the rebel, at the time of the gift, and a year thereafter; 23d June 1684, Wilſon agſt Kennedy. (*See* ESCHEAT.) And there is more reaſon, for ſo reſtricting gifts of liferent eſcheat, granted by the Sovereign (as this is), that there may be place for other donators *quoad* lands acquired thereafter; for no gift may be granted by the Queen, or her officers, except where ſome knowledge may be had of the value and extent of the ſubject falling under the gift.—3*tio*, Rents of lands adjudged, can never fall under liferent eſcheat, till the adjudication be expired; becauſe the rebel cannot be ſaid to have right to theſe, during his lifetime; and one or two years rent may perhaps ſatisfy his debt, and extinguiſh his adjudication. Now this adjudication was not expired, when diſponed to Bailie White. And, however the donator might have pretended to the rents of the lands, had the adjudication expired in the perſon of Sir David; yet he being denuded before expiration, the donator's pretence is excluded.—Again, as when infeftments are granted for payment or ſecurity of a ſum, neither the rents of the lands, in the firſt caſe, nor the ſum burdening, in the ſecond, can fall under the liferent eſcheat; ſo neither do the rents of lands adjudged before expiration of the legal.

Replied for Daniel Reid:—1*mo*, The act of Parliament 145, being conceived only in favours of the Sovereign, and her Majeſty's donator, cannot be founded on againſt them by the rebel's voluntary aſſignee. All the deciſions cited, proceed upon poſitive proof of ſimulation, by the rebel's acquiring the gift with his own means; and not upon the preſumptive ſimulation, by allowing him to continue in poſſeſſion. No doubt the rebel's creditor, before the gift, may competently inſiſt upon the ground of ſimulation; but an aſſignee, after the gift, as here, cannot propone that allegeance.—2*do*, By the terms of this gift, the Sovereign has aſſigned all the mails and duties, annualrents, &c. that belonged to the rebel, at the time of the rebellion, or ſhould belong to him at any time during his life. It is ſingular, that the rebel himſelf, or any claiming under him, after the rebellion, ſhould compete, for the mails and duties of his lands, with the donator. But the adjudication being led upon a bond, bearing annualrent, that ſtood in the perſon of Sir David, at the time of the denunciation and gift, his liferent eſcheat muſt carry either the annualrent of the money, or rents of the lands adjudged during Sir David's lifetime.—3*tio*, The annualrent of the ſums, for which the adjudication was led, fell under the liferent eſcheat; and conſequently, the rents of the lands, during the not-redemption, and, upon expiring of the legal of the adjudication, belonged to the donator during the rebel's lifetime; for there could be no redemption after expiring of the legal.

THE LORDS repelled the allegeance, founded upon ſimulation of the gift, by the rebel's poſſeſſing the lands after the gift, as not competent to the rebel's aſſignee: And repelled the ground of Bailie White's preference, founded on the adjudication, in reſpect the bond whereon that diligence followed, was in the

perſon of the rebel, or his truſtee, before the rebellion: And found the donator had right to the annualrents of the ſum, for which the adjudication was led; and conſequently to the rents of the lands. No 16.

Fol. Dic. v. 1. *p.* 2. *Forbes, p.* 572.

1713. *July* 23.

WILLIAM DUNCAN, Merchant in Edinburgh, *againſt* DAVID MILLER, Merchant there.

No 17.
Found that an inhibition, uſed by an aſſignee, would accreſce to a poſterior aſſignee, after reduction of the firſt aſſignation; if not reduced *ex capite fraudis.*

IN an action of declarator, at the inſtance of Jean Livingſton, and her huſband, againſt the creditors of John Robertſon, (who, as heir to Gilbert Robertſon, his father, ſold the lands of Whitehouſe to Jean Livingſton) for purging the lands of all incumbrances, ariſing from their debts and diligences; there aroſe a competition betwixt William Duncan and David Miller. William Duncan pretended to be a real creditor for 6000 merks, the remains of the price of the lands owing by Gilbert Robertſon to George Aikenhead, his author, per bond.

David Miller claimed preference for the half of the ſum of 1400 merks, principal, and annualrents thereof, contained in a bond, granted by Gilbert Robertſon to Helen Matthiſon, in Stirling, aſſigned by her to Robert Ranie and David Miller, upon this ground: That James Miller, writer in Edinburgh, to whom Helen Matthiſon had formerly diſponed her debt, with a power to alter, did, upon a proceſs for payment againſt John Robertſon, uſe inhibition for ſecurity thereof; which inhibition, now that James Miller's right is reduced, accrues to David Miller, the ſecond aſſignee; becauſe the power to alter, reſerved to Helen Matthiſon, in her aſſignation to James Miller, made his right to be of the nature of a factory, or truſt, for the cedent; and any diligence done by factors, or truſtees, accrues to the conſtituents, their heirs or aſſignees. July 14, 1667, Scot againſt Sir Laurence Scot. (Stair, vol. 1. p. 472. *See* TRUST.) And it has been frequently found, that diligence, uſed by donators of forfeitures, for ſecuring the ſubject gifted to them, accrued to the forfeited perſons and their heirs, reſtored *per modum juſtitiæ*, without neceſſity of aſſignation, or conveyance, by the donator.

Anſwered for William Duncan:—James Miller's inhibition cannot ſubſiſt in the perſon of David; becauſe, 1*mo*, Though inhibition be, in ſome ſenſe, a real burden upon the inhibited perſon's lands, at leaſt becomes ſuch by a poſterior adjudication; yet, as to the inhibiter, it is a merely perſonal diligence, reaching only deeds done to his prejudice; and hath no effect in favours of third parties, not deriving right from him. 2*do*, Inhibition is effectual to the inhibiter himſelf, only in ſo far as concerns the right on which it is founded: Therefore, this inhibition, founded on Helen Matthiſon's diſpoſition, is without any foundation; now when that diſpoſition is annulled and out of doors. 3*tio*, James Miller's right was not of the nature of a factory, or truſt, but was elicited from Helen Matthiſon,