vourable, there being no less than 30 years since the building of the said manse, and that if he was not paid, it was more just that he being *in mora et supina negligentia*, should pursue the former heritor or his successor, than a singular successor who was no ways obliged. No 9.

Gosford, MS. No 874. *p.* 555.

*** A similar decision was pronounced, 2d February 1672, Guthrie against Laird of Mackerston, No 74. p. 10137, *voce* PERICULUM.

1687. *December* 3. EARL of SOUTHESK *against* MAXWELL.

No 10.

THE Earl of Southesk pursuing Maxwell of Hills for a dry multure, payable out of his lands to a mill belonging to Southesk in Annandale, which he had apprised for cautionry, he declared on oath, that he had possessed only 12 years, and had left it in the tenant's hands; yet the LORDS advising this oath, found it *debitum fundi*, and decerned against him.

Fol. Dic. v. 2. *p.* 62. *Fountainhall, v.* 1. *p.* 487.

1694.

Mr JAMES MOIR, Minister at Frasersburgh, *against* LORD SALTON, LAIRD of TECHMUIRY, and his Other Parishioners.

No 11.

THE LORDS found, that the expense bestowed by the minister in repairing his manse was not *debitum fundi*, and affected none but the heritors and possessors at that time, and not singular successors, as was found, Mr Lawrence Charteris, No 5. p. 10165.; and found his right to foggage and grass was an annual prestation that could far less descend to singular successors; but demurred a little if my Lord Salton could be reputed one, seeing he had bought in the rights on his grandfather Philorth's estate.

Fol. Dic. v. 2. *p.* 62. *Fountainhall, v.* 1. *p.* 601.

1724. *July* 22.

Colonel JOHN ERSKINE of Carnock *against* CHARLES BELL Writer to the Signet.

No 12.
Arrears of a widow's jointure are a real burden on her husband's estate.

MR SCOT Sheriff-clerk of Edinburgh, in his contract of marriage with Marion Cuningham, became obliged to employ 10,000 merks on good security to her in liferent, and to the children of the marriage in fee; and for their farther

No 12. security, and in corroboration of the said obligation, he obliged himself to infeft her for her liferent, and the children in fee, in certain subjects within the town of Mussleburgh; upon which he gave her sasine *propriis manibus* in October 1689, and in the year 1705 she adjudged for the inlacks of her provision.

The deceast Mr Andrew Ure having adjudged the same subject *anno* 1692, there arose a competition betwixt Mr Bell, who had acquired right to Ure's adjudication, and the Colonel who had right to the relict's. Mr Bell was preferred upon his adjudication, as prior; but there occurred a question, 'Whether 'or not the Colonel was preferred on the contract of marriage and infeftment, 'though it was not an infeftment of annualrent, and albeit no adjudication had 'been deduced thereon; and whether the relict's right of liferent was of such 'a nature, that in case she had not got full payment of her provision stipulated by the contract, the inlacks could be charged as a real debt upon the common debtor's estate, now when the liferent was determined?'

It was *pleaded* for Mr Bell, 1*mo*, That where land are burdened, and made a security for a sum of money, they are disponed expressly in security, which is explained in the clause of infeftment, and made an explicit provision, that they are to stand and remain affected, ay and while the sum for which security is granted shall be satisfied and paid; but in the present case it is not so, for the precept bears a warrant to infeft her for her liferent use; and though the sasine *propriis manibus* cannot be said to proceed on a precept, yet it bears expressly to be given to her for her liferent, and the symbols are the same which are used in infeftments of property, or rights of liferent of lands, and no money given and delivered as a symbol, which is always done, where the intention is, that there should be a money debt upon the subject, or an annuity of money; her liferent right therefore must resolve into a locality, establishing to her a right to uplift the mails and duties while her liferent did subsist, but could last no longer than till her decease, and consequently there could be no claim thereafter for inlacks. 2*do*, Whatever might be the import of the contract, yet since the precept of sasine did only grant warrant to infeft her in the subjects for her liferent use, that was sufficient to determine the nature of the right, and no person was obliged to regard any other condition not exprest in the sasine.

On the other hand, it was *contended* for the Colonel, 1*mo*, That it appeared from the contract, that Mr Scot's intention was, in all events, to secure his spouse in the annualrent of 10,000 merks, for which he expressly obliged himself, and to infeft her for security; wherefore she being infeft, the annualrent stood secured to her by the sasine, and the subject was impignorate to her for payment thereof; and as there could be no doubt, but if children of the marriage had existed, they would have been secured in the fee by the infeftment, so the annualrents must be secured to the mother in the same manner: And besides, this is one of those infeftments for security, which though distinct

from infeftments of annualrent, yet are equally burdens on the fee of him who grants them; Lord Stair, b. 4. t. 35. § 24. 2*do*, That the sasine contained at full length the obligation to infeft, and the obligement being to grant infeftment for security of annualrents, the sasine must be interpreted in a congruity with it. It is true, that she was only infeft for her liferent-use, yet that was not the liferent-use of the subject, but of the sum secured upon it by infeftment; for she could have touched no more than to the extent of the annualrent, whatever had been the value of that subject. And, *lastly*, That the meaning was the same, as if she had been infeft *per expressum* in an annualrent, though in different words; and though all the conditions in the cotract had not been narrated, yet the infeftment bearing to be given conform to the tenor thereof, singular successors were bound, before they could purchase *bona fide*, to look into the conditions of the contract. No 12.

THE LORDS found, that the inlacks of the jointure were a real burden, and that the adjudication was to be drawn back to the date of the infeftment.

Reporter, *Lord Royston.* For the Colonel, *Cha. Erskine.* Act. *Alex. Hay.* Clerk, *Mackenzie.*

Fol. Dic. v. 4. *p.* 63. *Edgar, p.* 99.

1762. *February* 3. COLLEGE of ST ANDREWS *against* CREDITORS of NEWARK.

No 13. Rent-charge.

IN the year 1477, John Kinloch of Cruivie, granted to the friars predicators of St Monance a perpetual annuity of L. 26, to be levied out of his lands of Invery, part of the estate of Newark. A sale of this estate being brought before the Court of Session, upon the bankruptcy of the proprietor, appearance was made for the College of St Andrews, who had right by progress to this perpetual annuity; and craved to have it declared as a condition in the articles of roup, that the estate should be burdened with payment of the said annuity. The Court had no hesitation to grant the prayer of this petition, even against a purchaser of the said lands of Invery, though the annuity was a rent-charge only, and never clothed with infeftment. The reason was, that rent-charges were customary in Scotland before infeftments of annualrent were introduced; and they were real rights even without infeftment, so as to be effectual against all singular successors. What is curious in this case, is to find rent-charges subsisting in Scotland even to this day. And it is remarkable, that here is a real right upon land against which the records afford no security to a purchaser.

Sel. Dec. No 186. *p.* 251.