

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 disposed to Mr James Chalmers an heritable bond upon the lands of Glencorse, belonging to George Patullo, to whom the disposer was apparent heir, and, after intimation of that disposition to the debtor in the bond, having re-disposed 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.

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 disposes 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

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.

No 23.

acquired the right himself, which cannot be disputed, otherwise there would be no such thing as *jus superveniens*; it follows, that the creditor first infeft must be preferred; because, *quoad* the common author, who cannot plead the defect of his own right, the creditor's infeftment is unexceptionable *a principio*. The common author, thereafter, can no more effectually deprive the first creditor of his possession, and deliver the subject to another, than if the property had been his before granting the first infeftment; and the second creditor, who has nothing to plead, but upon supposition that the common author is proprietor, cannot object against the first creditor's right, derived from the same author. In a word, whether the common author's title, at the date of the infeftments flowing from him, was unexceptionable or not, or if he had no title at all, is all the same thing with respect to rights derived from him; the creditor who gets the first infeftment, though he may be unsecure as to third parties, is absolutely secure with regard to his author, and all those deriving right from him.

The present question is a competition among creditors; but let us suppose it were a competition among purchasers, who had each of them got an absolute disposition, with infeftment, to the same subject, from the common author, the same rules must govern that case; for, if they were to be preferred *pari passu*, the subject behoved to be found a commonty, or common property, which would never go down. See *L. 72. Rei Vind.* Stair, B. 3. t. 2. § 2. 16th January 1663, Tenants of Kilchattan, No 19. p. 7768.

For Murray of Broughton, &c. it was *contended*, That all the competing infeftments being null, until the common author was infeft, they could only be validate the moment of his infeftment, and could only be effectual from its date; so that they must all come in *pari passu*, as if one infeftment had been taken for the whole, seeing the whole were void, in the same manner as if Gordon had no title to the estate; it not being easy to conceive how his infeftment could operate *retro*, in favour of the first infeftment, all the intervening ones being so many mid-impediments to the retroactive virtue of his. By the operation of the law, a right supervening in the author's person accrues to his singular successor, to whom he had disposed with absolute warrandice, of which there is no doubt, when the question occurs betwixt the author and one singular successor; but, where he had disposed the same subject to different persons, for onerous causes, he is equally liable to all of them to make it good; and the absolute warrandice, competent to the first, being merely personal, cannot be more effectual toward constituting the real right, or accretion of the same, than that which is competent to the second; the title of both is void; as a real right; and, when considered as a personal one, inferring an obligation upon the author to make good the real right, both are upon a level. It is impossible to imagine that the common author, before he was vested, could be denuded; or that a real right could be constituted, before he had any himself; so that, to suppose the other creditors infeftments' good from their date,

were *filius ante patrem*; consequently, it seems absurd that any infestment flowing from Gordon can be effectual, of a date prior to his own; of course, they must all be preferred equally, as if granted of the very date of the common author's infestment. See *L. II. § 2. De pign. et hypoth. Voet. tit. Qui pot. in pign. B. 3. t. 2. § 2.*

THE LORDS found, that the creditors ought to be ranked according to the priority of the dates of their infestments, notwithstanding that their author was not infest.

*C. Home, No. III. p. 179.*

\*.\* See Lord Kames's report of this case, No 99. p. 2895, *voce* COMPETITION.

1742. December 10. PATERSON against KELLY.

WHERE two infestments proceeded from the same author, who himself was not infest, the said author being thereafter infest, his infestment was found to accresce so as to validate the first infestment; notwithstanding it was argued, that the two infestments having been validated *eodem momento*, they ought to be preferred *pari passu*.

*Kilkerran, No I. p. 321.*

\*.\* C. Home reports the same case :

JOHN GIRDWOOD purchased some lands from David Aikman in July 1732, the disposition to which contained a procuratory and precept; and in September thereafter, he, upon the narrative of being heritable proprietor, granted an heritable bond thereon to Kelly. In January 1733, Girdwood granted another heritable bond, upon the same narrative, to Robert Paterson, containing procuratory and precept; upon which Paterson was infest in November 1734, sasine recorded the 17th December thereafter. *Anno 1735*, Girdwood granted another heritable bond to Kelly, which contained procuratory and precept.

In April 1737, Kelly discovered that his debtor Girdwood was not infest, whereupon he applied to him to do him justice, who accordingly delivered him his disposition to the said lands from Aikman; whereupon he obtained himself (upon his two heritable bonds above mentioned) and author infest in April 1737.

Robert Paterson having raised a process of mails and duties on his heritable bond, Kelly appeared and craved to be preferred upon his two heritable bonds to the pursuer, in respect the common author's infestment was attained by him, and at his expense, which therefore could only operate in his favours; at least, that he should have a *pari passu* preference with the pursuer, in re-