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ed, but which has not even been transmitted to him through any part of the period intervening from its origin till now. Its antiquity, in these circumstances, is unfavourable to his claim; and until the warrants be produced of his charter and infeftment, these last are to be deemed absolutely of no avail.

The majority of the COURT however seemed to disapprove the idea of a charter and sasine, though of an old date, being unavailing from the want of possession.

Some of the Judges did not admit the presumption of redemption *post tantum temporis*, and objected to the effect allowed to the distinction between real and nominal rights; observing, that though there was good ground for disregarding in future the nominal right of Lord Lauderdale, yet as long as he was not divested of it, he was entitled to its effect; for so long the right of Lord Eglinton, though redeemable, was not in fact redeemed; and its redemption ought not to have a retrospect.

But the COURT in general adopted the presumption, and therefore,

THE LORD ORDINARY having 'assoilzied from the conclusions of declarator at Lord Eglinton's instance; and preferred Lord Lauderdale to the patronage in question;'

THE LORDS 'altered that judgment, and found the right of Lord Eglinton to be preferable.'

Lord Ordinary, *Hailes*. For the Earl of Eglinton, *Wight*, *J. Boswell*.
For the Earl of Lauderdale, *Ilay Campbell*. Clerk, *Home*.

Fol. Dic. v. 3. *p.* 156. *Fac. Col. No* 80. *p.* 124.

1783. *February* 5.
JOHN and HUGH PARKERS, *against* DOUGLAS, HERON, and Company.

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Disponees in security found preferable to the disponer's personal creditors, who had executed a poinding of unripe crops, in the natural possession of the disponer.

In 1774, James Campbell being debtor to Douglas, Heron, and Company to a large amount, by a deed, containing procuratory of resignation and precept of seisin, and on which infeftment followed, 'sold, alienated, and disponed his 'lands of Adamhill, &c. in security to them,' redeemable upon payment of the principal sums and annualrents. The deed farther contained an assignation to the rents and profits, with a power to take the subjects into their own possession, to grant leases, to appoint factors without being liable but for their own intromissions, and to sell the lands by public auction.

A considerable part of the lands was allowed to remain in the debtor's natural possession; and on the 31st of May 1780, Messrs Parkers, creditors to him by bill of exchange, executed a poinding of the growing crops. In August following, before they had completed their diligence by cutting down and ingathering, the Sheriff of the county, upon the application of Douglas, Heron, and Company, awarded a sequestration over the lands, in security of the current annualrents due to that Company.

This judgment was brought under the review of the Court of Session, by a bill of advocation, at the suit of Messrs Parkers, who likewise brought an action of declarator, for having it found, that they had right to the subjects in the hands of the sequestrators.

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Pleaded in defence for Douglas, Heron, and Company: The infeftment in favour of the defenders effected a complete transference of the debtor's estate, defeasible only upon full payment of the debt and annualrents. Hence they are entitled to every benefit which would have been competent to a purchaser; and as no arrestment used in the hands of the tenants, by a creditor of the disponer, could have affected their interests; so, as to lands in the disponer's natural possession, to the effect at least of drawing a full rent, they must be in the same situation as if they had granted a lease to him.

Even in the character of creditors heritably secured, the defenders preference must be unquestionable. Although the statute 1469, § 36. has provided, That in the action of poinding the ground, the goods of tenants should only be attached for their landlord's debts to the extent of the rents due by them; yet the creditor is still entitled, to the exclusion of all others, to attach without limitation every species of moveables which are the property of the debtor, and found on his lands.

This privilege, which is of the same endurance with the debtor's right of property, requires not for its constitution the intervention of any action. As a landlord has a property in the fruits till his rent is paid; so to the extent of his debt, the creditor, by his right of security, has these impledged to him. He cannot indeed, like the landlord, recover those which have been sold, or evicted by the complete diligence of other creditors; but so long as the property remains in the debtor, he is entitled to assert his preference, without actual execution by poinding the ground, which is only necessary to operate payment when not voluntarily made. Hence rents being arrested for a personal debt, a creditor infeft appearing in the furthcoming will, without any poinding, be preferred; Lady Kelhead against Wallace, &c. No 30. p. 2785.; Webster *contra* Hay Donaldson, *infra h. t.* And hence, in a competition between two annualrenters, the COURT found the first annualrenter pursuing a poinding of the ground, preferable to a second annualrenter in possession; Clerkington against Clerkington, *voce* POSSESSORY JUDGMENT. Upon the same principles, when a personal creditor is proceeding to poind, one heritably secured producing his interest at any period before the complete execution of that diligence will be preferred for the annualrents already due; by sequestration, he may secure those which are still current. A contrary doctrine, by abolishing his preference in subjects in the debtor's possession, would exceedingly impair his security.

Farther, The infeftment on record being equivalent to an intimation of the assignment in favour of the defenders, of the *rents* and *profits* of this estate, Webster *contra* Donaldson, *sup. cit.* it must be preferable to every subsequent diligence used for attaching the produce.

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Answered: There are in the law of Scotland only two sorts of debts which create a preference on the fruits of land; the rents due to a proprietor, secured by the hypothec, and *debita fundi*, which are made effectual by an action of poinding the ground. In the character of purchasers under redemption, therefore, the defenders are entitled to no privilege. As they have stipulated no rent, they have no right of hypothec; and being proprietors, the action of poinding the ground is altogether incompetent; Erskine, book 4. tit. 1. § 11. Gartland *contra* Lord Jedburgh, *voce* Legal Diligence. On this footing the debtor must be understood to have possessed on a *precarious tolerance;* Stair, book 1. tit. 11. § 10. And although perhaps liable, on principles of equity, to the defenders in a recompence for the use of their subject, he must be proprietor of the produce to every effect, either of voluntary or legal alienation.

But the defender's infeftment, however conceived in terms appearing to denote a transference of the property, imports no more than an incumbrance or security, which, in its nature and effects, is essentially different. In a right of property, whether the deed of conveyance be unconditional, or qualified with clauses of reversion, the disponer is completely denuded; and the powers inherent in property, of possessing the lands, letting them to tenants, uplifting the rents, and the rights of electing members of Parliament, &c. can be exercised by the disponee alone. In securities again, whether constituted in the form of an infeftment of annualrent, where, without any security for the sum lent, the lands are burdened with a certain yearly duty; of an heritable bond where the real right is accessory to the personal obligation; or of a disposition in security, such as occurs in the present instance, matters are in a situation totally different. In these, though some of the powers already noticed may, for the conveniency of creditors, be superadded by express provision, the right created by the infeftment over the lands themselves is no more than a pledge, analogous to the *hypotheca* known in the Roman law, which is perfectly compatible with the radical right remaining in the debtor, and with the exercise by him of every faculty attending on property. Hence in a late question between Taylor of Southfodd, and his Creditors, the Lords found, that an infeftment in security did not entitle the creditors to pursue a removing against the debtor: *See* Removing. And hence, though rights of property cannot be lost by the negative prescription, heritable securities of every denomination may be extinguished in that manner; March 3. 1758, Naismith *contra* Anderson. *See* Prescription.

With regard to the fruits of lands affected by securities of this sort, they remain the property of the debtor, and subject to his debts and deeds, till the creditor, by the action of poinding the gronnd, or some other diligence, has appropriated them to himself. Indeed, it appears, that by the ancient practice, no preference whatever was created in favour of the incumbrancer over other creditors. Thus a creditor, in consequence of a prior arrestment of rents, was preferred to an appriser; Gray *contra* Tenants, No 1. p. 565. And although, in the competitions of the Creditors of Kelhead and Saintford,

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this rule seems to have been departed from in the case of arrestments, because that diligence is not productive of any real *lien;* no argument can, with propriety, be adduced from thence with regard to poindings, by which a transference of property is effected; February 15. 1707, Lady Mary Bruce *contra* Cochrane of Ochiltree. *See* RIGHT in SECURITY.

The introduction of a preference of this sort would be the source of much fraud and undue advantage among creditors. By withholding it till diligence be used by another creditor, in the manner here practised, the heritable creditor might for ever maintain a bankrupt in the possession of his most valuable moveable effects. An opportunity is thus offered to him of preferring one creditor to another, as whim or interest shall direct. And as personal creditors, though apprised, by the records, of the constitution of the security, must be altogether ignorant of its extinction by payment or intromission, it is in the power of the heritable creditor to thwart their diligence after his debt has been completely satisfied. From motives of expediency, therefore, the heritable creditor, in order to entitle him to any preference, ought to be obliged, either by letting the lands to tenants, or by himself assuming the possession, to acquaint the public of the debtor's real situation. In the first case, in virtue of the assignation to the mails and duties, and the consequential powers for making these effectual, he may enjoy, without any inconveniency to himself, the right of hypothec competent to the proprietor. In the other, the produce will undoubtedly belong to him.

With respect to the assignation to the *rents and profits*, that relates solely to the rents and casualties due by tenants, and cannot, with any propriety, be extended to crops raised by the debtor.

The question here agitated, was thought to be attended with considerable difficulty. By one interlocutor, the COURT, moved with the particular terms of the defender's right, and the apparent inconvenience arising from an arbitrary exertion of a preference of this nature, decided in favour of the personal creditor. But their ultimate judgment, resting on the consideration of the defender's right as an ordinary heritable security, and the pursuer's diligence as incomplete when the sequestration was awarded, was in favour of the creditors infeft.

THE LORDS assoilzied Douglas, Heron and Company, from the conclusions of the summons of declarator, and preferred them to the sums in the hands of the sequestrators.

Lord Ordinary, *Westhall.* Act. *Maclaurin, Rolland.* Alt. *Wight, Ilay Campbell.*
Clerk, *Home.*

Fol. Dic. v. 3. *p.* 155. *Fac. Col. No* 89. *p.* 135.