

ally excluded the Earl of Home himself, yet seeing that right could accresce to the defender, the Earl of Home having renounced, or assigned it to a third party; the personal objection against the Earl of Home upon the personal clause of warrandice ceases; neither did the pursuer insist upon the Earl of Home's right, but his own.

Fol. Dic. v. I. p. 513. Stair, v. I. p. 217.

1698. December 2. VISCOUNT OF ARBUTHNOT *against* ALLARDYCE of that Ilk.

THE mutual reductions and declarators betwixt the Viscount of Arbuthnot and Allardyce of that Ilk were advised. The Lairds of Arbuthnot were patrons of that church, which was a parsonage. As law presumed the teinds of benefices came from the patrons, and so gave them, by our acts of Parliament, right to the fruits of the benefice during the vacancy; so it has permitted patrons without simony to paction with the intrant minister for a local stipend, and get from him a tack of the teinds. The heritors of Arbuthnot were in use to get tacks from time to time from the minister, of the whole teinds of the parish during their life, (for longer tacks except three years were esteemed by the common law a dilapidation.) The lands of Allardyce lying in the same parish, and there being a good correspondence between these two families, there is a contract entered into betwixt the Lairds of Arbuthnot, elder and younger, on the one part, and Allardyce on the other, whereby Arbuthnot assigns him to the standing tacks and prorogations, in so far as concerned his teinds of Allardyce in 1628, and oblige themselves and their heirs never to obtain any tacks or rights of the teinds of Allardyce's lands, and if they do, they shall access to him. By the 23d act of Parliament 1690, Arbuthnot, as patron, gets right to the teinds of the parish, in place of his patronage; and the minister of Arbuthnot, at the commission, obtains an augmentation of his stipend, which Arbuthnot, as patron, would allocate wholly upon Allardyce's tythes, conform to the power given patrons by the act 25th Parliament 1693. Allardyce reclaims, and intents a declarator on the contract, that Arbuthnot's right must accresce to him. The Viscount raises a reduction of the contract, on these grounds, *1mo*, That it is null and defective, bearing Sir Robert Arbuthnots elder and younger to be contractors, and yet there is but one of them subscribing; and so it is an incomplete deed. *2do*, It is presumed only to be signed by the father, the liferenter, and so the right died with him. *3tio*, The meaning of parties-contractors could be only to communicate conventional voluntary rights acquired by the Lairds of Arbuthnot by tacks, &c. but never a legal right introduced by a supervenient act of Parliament, which was *casus incogitatus et improvisus* by the parties, and could be neither foreseen nor provided for; and in such cases *jus auctoris non accrescit successori*. Answered for Allardyce, That the contract was obliga-

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No 6.

A patron who had a tack of the teinds of the parish, communicated it to an heritor so far as concerned his lands. The property of the teinds conferred on the patron by act 1690, was found to accresce to the heritor.

No 6.

tory and valid, though there was but one of the Lairds of Arbuthnot subscribing; and it must be presumed to be the son who was in fee, seeing *verba sunt interpretanda contra proferentem, et ea est interpretatio sumenda quæ facit ut actus valeat potius quam pereat; et in re antiqua omnia præsumuntur solenniter acta*; and whether it was the fiar or liferenter that subscribed, *non refert*, for this Viscount represents both, and so is liable in warrandice. And as to the third, the obligation is so comprehensive, that it will extend to all rights coming *provisione legis*, as well as *hominis*; and even *quoad* this given to him as patron by the act of Parliament 1690, he had a *jus fundatum* before; and to evade his contract by this were *fraudem facere legi*; and not only tacks, but all rights he should acquire, are declared to accresce to Allardyce; and it cannot be denied, but the title my Lord Arbuthnot has now to the teinds of the parish by that act is a right, and so falls under the contract. THE LORDS repelled the reasons of reduction, and sustained Allardyce's declarator, and found this right now in Arbuthnot's person, by the late act 1690, accresced to him, and so decerned; but, in case the Viscount of Arbuthnot denied his representing these contractors, then the Lords assigned a term to Allardyce to prove the same.

Fol. Dic. v. 1. p. 513. Fountainhall, v. 2. p. 22.

1746. December 5.

GRAHAM, and the other TRUSTEES of Sir ALEXANDER WEDDERBURN, and other Creditors of TRAIL, Competing.

No 7.

Debts were acquired by a party who had disposed lands with absolute warrandice to the purchaser, against all incumbrances. These debts were not found to accresce to the purchaser, as *jus superveniens*; but to the extent of the part of the price remaining due, the disponent was found preferable on these debts, and ranked accordingly, in competition with other creditors of the same purchaser.

MARGARET BONNAR, after she had acquired right by disposition to the lands of Blebohole, having intermarried with Thomas Graham of Greigston, did, with consent of her husband, dispone the lands to Thomas Trail, writer in Dundee; and, in respect she was not infest, the disposition contained an assignation to the procuratory of resignation contained in the disposition to her from her author, and the husband and wife became bound conjunctly and severally in absolute warrandice; and of the same date, Thomas Trail gave bond for the sum of L. 6283, bearing the same to be the price of the lands of Blebohole disposed to him of that date.

While about L. 2000 remained due of the price, Thomas Trail's affairs going into disorder, his creditors adjudged the lands of Blebohole; and Sir Alexander Wedderburn, one of the adjudgers, took out a charter, and infest himself upon the procuratory contained in the disposition to Margaret Bonnar.

Thomas Graham having, in order to put himself in condition to implement his obligation of warrandice, acquired two debts, which were secured by infestments of annualrent on the lands of Blebohole, prior to Margaret Bonnar's own right; James Graham, his son, compeared in the ranking of the creditors of Thomas Trail, and craved to be preferred upon these two debts to the extent of the sum still remaining due by Thomas Trail of the price.