

1746. December 5. JOHN GRAHAM *against* CREDITORS of TRAIL.

No. 7.
Effect of personal
rights.

ISABEL TRAIL disposed the lands of Blebo-holes to Margaret Bonnar, with procuratory and precept; and she, with consent of Thomas Graham, her husband, for all right he had *jure mariti*, or otherwise, and as taking burden for his wife, and they both with one consent sell them to Thomas Trail. The husband acknowledges receipt of the price, and becomes bound in absolute warrandice, and assigns the procuratory and precept in Isabel Trail's disposition, but not being infest, did not themselves grant any procuratory or precept. A bond apart was taken for the price, containing a clause, empowering the buyer to retain for purging incumbrances; and a part of the price never was paid, but Graham the husband did himself purchase two old debts secured by infestment upon the lands. Thomas Trail broke, and his creditors adjudged, and one of them, Sir Alexander Wedderburn, took infestment on Isabel Trail's procuratory; but Graham the husband did not adjudge for the remainder of the price, relying as was said on his two real debts. In the ranking, the other creditors contended, that on the bond for the price he was only a personal creditor, and that he could not be ranked on these two real debts, because of the brocard *jus superveniens auctori*, which he was, and was liable in absolute warrandice, and Minto Ordinary found so. But upon a reclaiming bill we found, that he ought to be ranked on these to the extent of what remains due of the price. The Ordinary himself came to be of this opinion, and all of us but Dun. Some thought he was only consenter and not disponer, and that the brocard does not hold in the case of only a consenter; others thought that the non-payment of the price was a mid impediment. But my reason was, that a personal conveyance cannot denude any person of an infestment; that if infestment had been taken on a precept or procuratory by Margaret Bonnar, in which her husband was consenter, the infestment might indeed convey any right in him, or that he should afterwards acquire as *jus superveniens*; but that the only right flowing from Margaret Bonnar or him was a personal assignation, which could not transmit any real right that was in either of them; and though the husband was bound in the warrandice, yet the non-payment of the price was always a good defence against any action of warrandice.