

The great solicitations used by the pursuer, and the disadvantage Hayston lay under in common repute, furthered much this cause.

Advocates' MS. No. 421, folio 226.

1673. *November.* PALLAT, STEWART, GRAHAM, and MAXWELL of Pollock, competing.

IN a triple poiding between Pallat, Stewart, Graham, and Maxwell of Pollock, in which a man being at the horn, and assigning a bond to his creditor, and who, in right of the assignation, having uplifted the money from his debtor's debtor; the donatar to the cedent's escheat contends, that, *condictione indebiti*, he may repeat from the rebel's creditor what was so paid him, as *indebite et injuste solutum*, and assigned by him who had no power, and whose goods *fisco domini regis per ejus rebellionem erant acquisita*.*

The Lords found, one at the horn could not assign, though it were in satisfaction to a lawful creditor whose debt was contracted *ante rebellionem*; but where the creditor, who was the rebel's assignee, has recovered payment before citation or interruption, they found that purged the vitiosity so far, as it could not be condicted by the donatar to the escheat; *Lege 10. D. Quæ in fraudem creditorum*.

This last part of the interlocutor seemed strange, how the numeration and solution could be of that energy and efficacy as to impede repetition, *et tractu temporis validate* that *quod ab initio non substiterat, contra regulam Catonianam*; unless we say, *multa fieri non debent quæ facta tamen valent: item*, after fungibles *quæ numero, pondere, et mensura constant*, as money, &c. are paid, *non amplius origo inspicitur. L. 7. C. Si certum petatur*.—M'Keinzie's Pleadings, p. 106. *Vide supra*, No. 156. Helen Hamilton *against* William Bell, 25th February, 1671; and 385. [Sir James Ramsay *v.* Robertson, February, 1673,] which seems somewhat contrary. *Infra*, num. 478. §. 2. [The Relict of Littlejohn *against* the Children, 17th June, 1676;] *infra*, No. 711, Deans and Purves, 18th January, 1678.

Vide Andreas Gaill, lib. 2. *Observatio 25, numero ultimo*.—See this debate and competition, between Veitch and Pallat, at much length elsewhere.

Advocates' MS. No. 422, folio 227.

1673. *11th November.* PATRICK HOME *against* GEORGE CRAW.

MR PATRICK HOME, advocate, as having right, by translation, from Mr Hary Home, commissary of Lauder, who was donatar constituted by Sir Jo. Home of Renton, late Justice-Clerk, superior of the lands of Netherbyres, holden of his barony of Fleemington, of the liferent escheat of George Craw of Netherbyres, pursues a declarator thereof.

* See Hadington's Decisions, 26th February, 1612, Johnston; *item*, folio 91, Tarbet; *item*, folio 94. Tweedie.

It is alleged for George Craw, That the horning, whereupon the gift of escheat proceeds, is null, in so far as, before the date of the denunciation, a bill of suspension of the charge of horning was passed by the Lords of Session, upon unanswerable grounds of payment and compensation of the debt charged for; after which no denunciation could be made, nor escheat fall, and all diligence thereafter was fraudulent and null: and a practique *in terminis* was alleged on in 1668, between Renton himself and ———, wherein the Lords found diligence done after a bill of suspension was passed, to be null, illegal, and unwarrantable.*

To this it was REPLIED, *Imo*, The nullity *non competit hoc loco* by way of exception. It must be insisted on by way of reduction, and in which the superior, viz. his brother Sir Alexander Home, (though he, by the tacks his father set to him, bruiks it,) must be called, who cannot be prejudged *cum res illius agatur*. *2do*, *Non relevat*, unless they be able to say the suspension was passed, signeted, and intimated to the charger, or messenger; since no other deed (being *res inter alios acta*) could prejudice them, or put them in *mala fide*.

DUPLIED, *Imo*, Though it be *nullitas facti* and not *juris*, yet, being instantly proven by production of the passed bill of suspension, compared with the date of the denunciation, *frustra* am I remitted to a reduction. *2do*, Oppones the foresaid practique in 1668, where there was no intimation; *et scire debere*— &c.†

The Lords found the allegiance of nullity not receivable *hoc loco*, till we called the superior in a reduction; and he being once *in campo*, reserved the consideration of the relevancy thereof to that place. But it seems hard it should annul the course of diligence before intimation made. *Vide supra*, No. 252. [11th November, 1671.] *Vide decisionem sequentem*.

Advocates' MS. No. 423, folio 227.

1673. November. JOHN SOMERVELL *against* THOMAS BEG.

JOHN SOMERVELL, wright and poultryman in Edinburgh, having charged one Thomas Beg, upon a decret of removing, obtained before the bailies of Edinburgh, Beg presents a bill of suspension to the Lord Preston, then Ordinary on the Bills, where it depends eight or ten days without an answer; which Somervell judging equivalent to a refusal, and imagining no legal stop, incarcerates Beg, on an act of warding, in the tolbooth of Edinburgh; who, upon a petition to the Lords, and Preston's assertion that he had verbally stopped execution till some things were cleared, Beg was ordained to be set at liberty, and Somervell sent to supply his room, for contemning the Lord's authority, the depending bill not being rejected. *Vide præcedentem practicam*. *Vide infra*, No. 499, Laird of Pittarrow and ———, [October, 1676.] *Vide* 7th November, 1678, James Johnston.

Advocates' MS. No. 424, folio 227.

* See Stair's Decisions, 30th January, 1663, Mr Andrew Hamilton.

† *Vide infra*, numero 463, Marquis of Atholl, [February, 1676;] *infra*, No. 711. Deans and Purves, [18th January, 1678.]