

1673. December 10.

VEITCH against PALLAT.

JAMES SANDERSON being at the horn, there was a gift taken of his escheat by David Rodger, and a second gift by Veitch. Rodger's interest is satisfied, and before Veitch's gift, Sanderson did grant to Robert Brown an assignation to three bonds addebted by Lieutenant-Colonel George Stuart to Sanderson, which bonds had been before assigned to Ronald Grahame in trust to Sanderson's behoof; upon which assignation, Robert Brown makes a transaction with Sir George Maxwell of Pollock, who had a sum of money of Lieutenant-Colonel Stuart's in his hand, whereby Brown accepted a lesser sum, 'a part whereof was paid in hand;' and Sir George granted bond for L. 125 Sterling on this condition, the same should be paid so soon as Stuart's bond should be delivered up to Sir George. Robert Brown being at the horn, Peter Pallat is donatar to his escheat, so that there ariseth a competition betwixt Peter Pallat, as standing in Brown the assignee's right, and Veitch donatar to Sanderson's liferent; for whom it was *alleged*, That Robert Brown or his donatar could have no right to the sum, because Sanderson the cedent was rebel before the assignation; and, by his being denounced, the dominion and property of his moveable rights was escheat to the King, who thereby was stated in the right of property of them, and by the old custom might have intromitted summarily with them without any declarator; so that the King and his donatar cannot be prejudged by any assignation granted by the rebel after the rebellion, and Brown's assignation was long after the rebellion. It was *answered, imo*, That the right of property of the moveable estate was not stated in the King by the horning, but *ex delicto* in not obeying the horning the rebel became debtor to the King, whose right hath no effect till it be made effectual by possession or declarator; so that here the competition is in effect betwixt the King and his donatar as creditor *ex delicto*, and an assignee who is creditor *ex contractu*; and before the King owned his right, the assignee had obtained payment of part and security for the rest; for if the King had a right of dominion by the rebellion, then all diligence of creditors for debts before the rebellion would be void, and all dispositions and delivery of moveables, though bought in a market, or gotten in satisfaction of a debt before the rebellion would be void, and they liable to restore the King's goods, which is clearly contrary to the constant and unquestionable consuetude of the Lords. *2do*, Albeit the King, by the rebellion, had a right of dominion, yet that right is burdened by law and custom, not only with the debt of the horning, but with the diligence of creditors before gift and declarator, and with payment made by the rebel, and delivery of money or moveables in satisfaction of debt before the rebellion, without which commerce could not consist, which public interest doth allow to be most free and absolute; and as these are valid against donatars, there is the same reason that the rebel may effectually assign a debt due to him in satisfaction of a debt due by

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An assignation granted after rebellion, tho' for a prior debt, and before declarator of escheat, is excluded by the gift of escheat; but if the assignee obtain payment he is secure, because after denunciation, the matter becoming litigious, the rebel cannot grant voluntary deeds, of which nature an assignation is; but payment is a necessary deed, the rebel being antecedently bound to pay.

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him before the rebellion. And in this case, Sanderson the rebel granted assignation to Brown for a debt due to him before the rebellion, and the date of the assignation, intimation, and new security, is long before Veitch's gift; and, as Brown might have arrested before the gift for that same debt, so getting assignation thereto, which hath as much effect as an arrestment and sentence, he must be in the like condition. *3tio*, Whatever might be alleged as to the donatar and assignee, competing as to a debt of the rebel's yet extant and not extinct; there can be no question, that if a creditor of the rebel, for a debt anterior to the rebellion, get payment from the rebel himself, or upon his precept or assignation from any other, that creditor is secure *quia suum tantum recipit etiamsi a non debitore recipiat*; so that albeit he who paid by the precept or assignation were not due, the creditor who got payment is secure; but in this case, Brown was not only assignee before Veitch's gift, but had obtained payment of a part; and for the rest, the debt due by Stuart became extinct and innovate, in so far as Sir George Maxwell granted a new bond, and the old bonds granted by Stuart to Sanderson were delivered up to Sir George for the use of Stuart before Veitch's gift; so that at the time of Veitch's gift, Stuart was not debtor to Sanderson, but that debt was extinct, and Sir George Maxwell was only debtor to Brown. It was *replied* for the donatar, *imo*, That it is beyond all question that rebellion gives the King a right of dominion and not of obligation only *ex delicto*, and though custom hath burdened the King's right with the payment made to creditors whose debts were before the rebellion, and their legal executions by poinding or any other complete diligence, yet there is no such custom that assignations after rebellion can be effectual to recover the sum out of the rebel's debtor's hands, in competition against the donatar; for then all gifts of escheat would be clearly evacuated, there being scarce any person denounced that hath not more debt than moveable rights, and so would not fail to grant assignations to exhaust all their moveable estates; but on the contrary, there is an express act of Parliament, 'That assignations after rebellion shall not be effectual;' neither doth it alter the case, albeit the assignee hath obtained payment before the gift; for if the assignation be null, all effects of it must fall in consequence, in the same way as if a debtor should pay to a second assignee after the first assignation were intimate; for, though the debtor might be secure by payment made *bona fide*, not knowing of the intimation, which might be at his dwelling-house, the first assignee would recover from the second as *indebite solutum*; so must the donatar who is a legal assignee by the rebellion, recover from the rebel's posterior assignee, albeit he had gotten payment; but here, there is neither payment nor any thing equivalent by novation or otherwise, for novation is never understood but when it is expressed; and Sir George Maxwell's obligation is but accessory, he interposing for Stuart who yet remained debtor.

THE LORDS found that an assignation granted by a rebel after rebellion, albeit before gift and declarator, and for a debt anterior to the rebellion, could

not prefer the assignee to the donatar, if the debt due to the rebel remained unsatisfied or extinct; but found, that such an assignee getting payment either from the rebel himself, or from any other by his precept or assignation was secure and not obliged to repeat the same to the donatar, and so preferred Brown and Pallat his donatar, in so far as Sir George Maxwell had made payment; but as to that point whether there was here equivalent to payment, by delivering up the first bonds granted by Stuart to Sanderson before Veitch's gifts, the LORDS inclined to find the same relevant; but that the manner of giving up the bonds might be known, did, before answer, ordain Sir George Maxwell to be examined upon oath *ex officio*, if Stuart's bonds were delivered to him, when and how.

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Fol. Dic. v. 1. p. 556. Stair, v. 2. p. 236.

* * See No 127. p. 1029. and No 159. p. 1073., *voce* BANKRUPT; No 91. p. 2874., *voce* COMPETITION; and No 13. p. 5083., *voce* GIFT OF ESCHEAT.

1676. December 19.

GRANT against LORD BANFF.

No 54.

A BLANK bond delivered by a rebel to one of his creditors after denunciation, but before declarator, in satisfaction of a debt due before rebellion, was sustained against the donatar of escheat.

Fol. Dic. v. 1. p. 556. Stair. Dirleton. Gosford.

* * This case is No 3. p. 1654., *voce* BLANK WRIT.

1677. November 21.

NICHOLAS and BURN, and their Factor, against The ARCHBISHOP of Glasgow.

No 55.

TARBOT being debtor to Hector M'Kenzie, suspends on double-poining against an arrester and assignee. The Archbishop *alleged*, That though his arrestment was posterior to the intimation of the assignation, yet, he denouncing Hector before the making the assignation, he could not make it to his prejudice. THE LORDS preferred Nicholas, &c. assignees, because their assignation was for satisfaction of a just debt, whereupon prior diligence by denunciation was done before the Archbishop's.

Fol. Dic. v. 1. p. 556. Fountainball, MS.

* * Stair's report of this case is No 152. p. 1060, *voce* BANKRUPT.