

1674. *December 3.* GEORGE COCKBURN of PILTOUN *against* The EARL of SOUTHESK, and other Creditors of the LORD SINCLARE.

THE Laird of Hermistoun, younger, having married the only daughter and apparent heir of Lord Sinclare, who did dispoone, by contract of marriage, his whole proper estate to Hermistoun; who did grant bond to John Watt, then servant to the Earl of Southesk, for payment of a yearly annuity of eight thousand merks: the bond being assigned to Piltoun; who thereupon did pursue the tenants of Hermistoun, as having comprised upon the said bond; and as being donatar to Hermistoun's liferent escheat; and recovered decret preferring him to Hermistoun's creditors, who did then compear. Thereafter Hermistoun's whole estate being set in tack; and the Laird of Cockburn being cautioner for the tacksmen; Piltoun having charged upon the foresaid decret the whole tacksmen, there was a bill of suspension given in, in name of the Earl of Southesk, and divers other creditors who had arrested; whereupon the Lords ordained all parties to be heard, as in a double poinding, before the passing of the bill.

It was ALLEGED for the Earl of Southesk, That he ought to be preferred, because, he being a lawful creditor to the Lord Sinclare, before any assignation made to Piltoun by John Watt, the said assignation was a deed of the Lord Sinclare's who was common debtor, for his own behoof, and Piltoun was only a trustee to the behoof of the Lord Sinclare, who was noways debtor to him before the said assignation; and therefore, by the act of Parliament, 1621, anent bankrupts, Piltoun's right was void and null, and would not prejudice any lawful creditor who had done diligence, as the Earl of Southesk had done by inhibition, and the other creditors who had arrested in the hands of Hermistoun his tenants and tacksmen of the estate, as being lawful creditors to Hermistoun; and the Lord Sinclare, or his trustee, could not be preferred to them, who had done lawful diligence, as said is, seeing Piltoun's interest being only a right on trust, and for no onerous cause, he could be in no better condition than the Lord Sinclare, who, having no real right out of Hermistoun's estate, could never compete with them for the mails and duties of the said lands which they had arrested; which was a real diligence: Neither could Piltoun's comprising or gift of escheat give him preference, they being only founded upon his assignation, made to him as trustee, when he was noways creditor to the Lord Sinclare; and albeit Piltoun, being assignee, got a new bond from Hermistoun, in his own name, for payment of the said annuity, yet that being a voluntary deed, and in trust, as said is, could never be a title whereupon to crave preference; seeing, in that former process, wherein he had obtained decret, it being referred to his oath that his name was only borrowed, he did confess that the Lord Sinclare had made choice of him as a person on whom he relied, and had taken bond in his name from Hermistoun, the common debtor, for that annuity of eight thousand merks.

It was ALLEGED for Piltoun, That, notwithstanding of all these reasons, he ought to be preferred to the Earl of Southesk, because the rents of the lands in question, belonging to the Laird of Hermistoun, his debtor, from whom he had comprised the same, were not affected by an inhibition served against Lord Sinclare; who was not thereby incapacitated to grant an assignation to Hermistoun's bond, nor Hermistoun to grant a new bond in favours of Piltoun, who was a

singular successor to John Watt : neither could his right fall within the Act of Parliament, he having taken the same for a most onerous cause, *viz.* for alimending the Lord Sinclair, and furnishing him money upon his necessary occasions ; which accordingly he had performed by alimending him, and debursing money for him, upon many pressing occasions, to physicians, and for his funeral ; which were just causes of Hermistoun's granting of that bond of annuity, to whom, and to whose heirs, he had disposed the fee of his estate, by contract of marriage, as said is ; and the Earl of Southesk, being only a creditor, as having the Lord Sinclair's only bond as cautioner to him for the Earl of Caithness's debt, for which the Earl of Seaforth was likewise bound, he might recover payment *aliunde* ; and his inhibition could not hinder the Lord Sinclair, or Piltoun, to take security for an aliment, which *bona fide* was paid by Piltoun yearly before ever Hermistoun's rents were affected by any diligence, either at Southesk's instance, or any other creditor of the Lord Sinclair's or Hermistoun's. *2do.* The rents of Hermistoun's estates, belonging to the King by his annual rebellion, Piltoun had obtained the gift thereof, upon that special reason and consideration, that he had alimended, and was bound to aliment, the Lord Sinclair during lifetime ; and, by virtue thereof, as the King's donatar, ought to be preferred to all creditors ; likeas he had already obtained decret upon these grounds, notwithstanding of any declaration of trust being qualified, as said is, against the creditor compearing *in foro contentiosissimo*.

The Lords, having much debated upon the first reason of Piltoun's, if it did fall within the Act of Parliament, upon that consideration, that the time of his assignation, and the time of the renewing the bond, he was no true creditor for any sums of money advanced by him either to Hermistoun or the Lord Sinclair ; and that, albeit he was chosen as a confidential person by the Lord Sinclair, as being of near relation, yet, *per tractum temporis*, he making truly payment of that yearly annuity, he was a true and lawful creditor after payment ; as likewise, considering that it might be of a dangerous consequence to sustain latent and private rights, which could not be known to any lawful creditor, who did advance sums of money in contemplation of a visible estate in the person of the common debtor, they gave not sentence upon that debate : but were all clear to prefer Piltoun upon that title, that he was donatar to Hermistoun's escheat ; and that his gift was expressly given for my Lord Sinclair's aliment, which he had undertaken, and so had undoubted right, as the king's donatar ; but the first point, founded upon the Act of Parliament, as having great difficulties, was no ground of the decret.

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1674. December 1^r. JAMES GUTHRIE *against* HENRY GUTHRIE.

JAMES Guthrie, pursuing Henry for the price of some merchant-ware, delivered to him *anno* 1660, extending to a blank sum. It was ALLEGED for the defender, that he ought to have compensation of the £300 ; because, by a ticket subscribed by the pursuer, he grants the receipt of the said sum from the defender ; and obliged himself to deliver the same to the defender's father ; and, in the meantime, to pay annualrent therefor.

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