No 2.

*** Lord Dirleton reports the ſame caſe:

1668. *January* 17.—MR ANDREW BIRNIE having granted a bond, blank in the creditor's name, to his good brother Short, the creditor's name being thereafter filled up, Mr Andrew Birnie ſuſpended upon double-poinding againſt him, and another creditor of Short's who had thereafter arreſted.

THE LORDS preferred the perſon whoſe name was filled up; in reſpect he had ſhown Mr Andrew the bond before the arreſtment, and deſired him to ſatisfy the ſame, though he had not made intimation by way of inſtrument. This deciſion ſeemeth to juſtle with that of the 11th November 1665, Telfer againſt Geddes, *infra* Sec. 2. *h. t.*

Dirleton, No 139. *p.* 57.

1676. *December* 19. GRANT *againſt* LORD BANFF.

No 3.
A bond granted for the price of land, blank in the creditor's name, out of the cuſtody of the original creditor, was found effectual. The granter could not ſuſpend payment on account of incumbrances not being purged.

GRANT having charged the Lord Banff for payment of a ſum contained in his bond, he ſuſpends, on this reaſon, that the bond was blank in the creditor's name, and was delivered by him to Lyon of Mureſk, as a part of the price of the lands of Craigtoun, ſold with abſolute warrandice; and there hath lately occurred a diſtreſs, and therefore the diſpoſition of the land being the mutual cauſe, it is *causa data non secuta*. It was *answered*, 1*mo*, That the bond being granted blank, *ab initio*, the very granting of it in that way imports a paſſing from all objections, that it might paſs to ſingular ſucceſſors as currently as money, and therefore the Lords have refuſed compenſation againſt blank bonds, upon the debt of him to whom they were firſt delivered.

THE LORDS found, that this bond, though it had been blank *ab initio*, could not have been ſtopped upon the warrandice of the diſpoſition of the lands for which it was granted.

The ſuſpender further *alleged*, and offered to prove, that this bond was blank *ab initio*, and delivered to Mureſk, who was then at the horn; and, therefore, he being the true creditor, the bond fell under his eſcheat, and the ſuſpender hath right to the gift of his eſcheat. It was *answered*, That law and cuſtom allows, that, after denunciation, a creditor may obtain payment of debts anterior to the rebellion, by aſſignation, precept, delegation, or otherwiſe, and Grant offers to prove that he was Mureſk's creditor before the rebellion; and, getting this blank bond, it was truly a delegation, and an innovation of the former obligation to Mureſk, and more than if he had given an aſſignation to this creditor, who had thereupon diſcharged and gotten a new bond, which was lately found relevant, after much debate, in the caſe of Veitch againſt Pallat, *See* COMPETITION; and, in this caſe, the debtor, by letters produced, declared that the bond ſhould be as if any of Mureſk's creditors had been filled up *ab initio*. It was

replied, that though creditors getting ſatisfaction after denunciation are ſecure, if it be obtained before declarator; yet it hath never been further ſuſtained than in theſe terms, that ſatisfaction of a debt, before rebellion, obtained before declarator, is ſufficient: And though the favour of our Kings hath allowed the ſatisfaction of diligence of creditors out of eſcheats, yet when the eſcheat becomes a private right by a gift, complete by declarator, all deeds done after declarator by the rebel, have ever been repelled. It was *duplied*, That whatever the donatar might ſay, yet the Lord Banff by his letter having declared, that this blank bond being filled up by any of Mureſk's creditors, ſhould be holden as if his name had been filled up *ab initio*, this is a perſonal objection excluding Banff. It was *triplied*, That, long after that letter, Banff having acquired the right of the gift, he cannot be hindered to found upon the ſame, in the ſame way as the donatar might. No 3.

THE LORDS found the allegiance relevant, that a creditor for a debt before rebellion had obtained a blank bond to be delivered to him by the rebel before declarator, but not after; and that Banff's letter did not impede him to make uſe of the declarator, to which he had obtained right long after, and that no declaration of his, that it ſhould be holden as filled up with this creditor's name *ab initio*, when it was not ſo truly done, could have effect againſt the donatar, or againſt Banff himſelf, in the donatar's right. *See* ESCHEAT. *See* PERSONAL OBJECTION.

1677. *January* 17.—THIS cauſe being diſputed upon the 19th of December 1676, THE LORDS found, That a creditor, for a debt before rebellion, getting a blank bond from the rebel before declarator, was ſecure againſt the donatar. It was now further *alleged* for the donatar, that, before this blank bond was alleged to be delivered, the eſcheat was gifted, and ſufficiently intimated, by executing the general declarator againſt all the lieges, after which no other creditors could take any right from the rebel. *2do*, The delivery of the blank bond could not denude the rebel, but only the filling up of the name, and intimation thereof to the debtor, it being in effect an aſſignation, which, as to its accompliſhments, requires an intimation, as was found in the caſe of Veitch, *see* COMPETITION; where an arreſter was preferred to a perſon whoſe name was filled up in a blank bond, having arreſted before the blank was filled up and intimated; and if it were otherways, not only eſcheats might be made of no effect by blank bonds, but arreſtments of creditors. It was *answered*, that blank bonds, blank in the creditor's name, have been long in uſe, and are given and taken of purpoſe to exclude compenſation upon the cedent's debt, and are equivalent to that formula of bonds, obliging 'to pay the ſum to the haver of the bond,' which therefore paſſeth from hand to hand as current as numerate money, and needs no filling up of the name, much leſs intimation by a notary; but the having of it carries the right to it, unleſs an unwarrantable *acquiry* be inſtructed; and therefore, this creditor having the blank bond, it muſt be preſumed to have been delivered

No 3. to him *ab initio*, unleſs the contrary had been proven, that it had been in the rebel's hand after the declarator; neither can the ſummons of declarator be reſpected, though executed at the market croſs, that being a tranſient act without a record; therefore, the Lords have ever reſted on the decreet of declarator, which is upon record as an intimation of the donatar's gift; and there is no ſuch thing as is alleged in the caſe of the creditors of Veitch; but, on the contrary, it is there found, that an intimation by inſtrument is not required; but the allegiance of the name being filled up, and ſhown to the debtor, was found ſufficient, without any other intimation: And albeit, no further was alleged in that caſe, yet the having of the blank writ being proven by famous witneſſes before declarator, did ſufficiently denude the rebel; neither can witneſſes in this caſe be rejected, where writ neither needs nor uſes to be adhibited; but the keeping of the writ blank is an advantage to commerce to continue it current, againſt compenſations and other allegiances, upon the account of the many authors, through whoſe hands it might have come.

THE LORDS adhered to their former interlocutor, and found it relevant to be proven, that the creditor had the blank bond in his poſſeſſion before the decreet of declarator, in ſatisfaction of a debt due by the rebel before rebellion, although it had neither been filled up nor intimated. *See* ESCHEAT.

Fol. Dic. v. 1. *p.* 103. *Stair, v.* 1. *p.* 481. & 495.

*** Lord Dirleton reports the ſame caſe:

THE Lord Banff, having acquired the lands of Craigtoun from John Lyon, did give three bonds to the ſaid John Lyon, blank in the creditor's name, containing each of them 5000 merks. And, at the deſire of the ſaid John, did give a letter with the ſaid bonds, with a blank direction, bearing, that the ſaid John Lyon had diſponed to him the lands of Craigtoun, for which he had become debtor by certain blank bonds containing 5000 merks; and therefore deſiring that no perſon might ſcruple to take the ſaid bonds: For it ſhould be no diſſatisfaction to him, that they took them without acquainting him; but that it ſhould be holden as if they had received the bonds in the beginning, and had their names filled up therein at that time.

The ſaid John Lyon did fill up the name of John Grant of Roſſollis in the ſaid bonds, and delivered the ſaid letter to him, putting a direction upon the ſame, for the ſaid John Grant: Whereupon the Lord Banff being charged, did ſuſpend, upon that reaſon, that he ought to have retention, becauſe the ſaid bonds were granted for the price of the ſaid lands, and in contemplation of a valid ſurety, free of all incumbrances; and the ſurety not being valid, in reſpect the lands were affected with hornings, inhibitions, and compriſings, equivalent to the ſums contained in the bonds, he had in law condiction, as being *ob causam non secutam.*

There was alſo compearance for the donatar of the ſaid John Lyon's eſcheat, who did produce his gift, and decreet of general declarator; and *alleged*, that he ought to be preferred, becauſe he had right to the ſums due by the ſaid blank bonds, in reſpect the charger's name was filled up *in cursu rebellionis:* And the ſaid blanks being *ab initio* the rebel's, while they were blank, they fell under his eſcheat; and he could not fill up, or deliver the ſame, in prejudice of the fiſk. No 3.

THE LORDS found, that the pretence foreſaid, of *conditio causa data*, though competent againſt the ſaid John Lyon himſelf, if the bonds had been filled up in his own name, would not be competent againſt the charger, if his name had been filled up *ab initio;* becauſe, if the ſuſpender had been content to give bond to him, it would have been *delegatio*, in which caſe the exceptions competent againſt *delegantem* would not have been competent againſt the perſon in whoſe favours the delegation was made: And that the charger was upon the matter in the ſame caſe, ſeeing the ſuſpender by his letter was content, that the bonds ſhould be holden, as if they had been filled up *ab initio*.

THE LORDS alſo found, that the ſaid bonds being blank, though they continued blank, were the ſaid John Lyon's proper bonds; and if he had deceaſed before the filling up of the ſame, they would have fallen under his executry; and, conſequently, he being rebel, and his eſcheat gifted and declared, they fell under his eſcheat: And his Majeſty, and the donatar, could not be prejudged by any deed of the rebel in filling up of the ſame.

It was alſo found, That albeit the Lord Banff, by his letter, was bound up, that he could not queſtion the ſaid bonds upon the pretence foreſaid of *conditio*, or any other that might have been competent againſt the ſaid John Lyon; yet, notwithſtanding of the ſaid letter, the King might have given, and he might accept, either a gift of Lyon's eſcheat, or a right from the donatar, and thereupon might claim right to the ſaid ſums. *See* ESCHEAT.

Reporter, *Theſaurer Depute.* Clerk, *Mr John Hay.*

Dirleton, No 405. p. 198.

*** Goſford reports the ſame caſe:

IN a ſuſpenſion raiſed at the Lord Banff's inſtance againſt John Grant of Roſſollis, who had charged upon a bond, for payment of 5000 merks, upon this reaſon, that he was never debtor to the charger, but having acquired the lands of Craigton from John Lyon of Mureſk, for the ſum of 26,000 merks, in *anno* 1674, he did ſubſcribe and deliver this bond charged upon with ſome others, blank in the name, to the ſaid John Lyon, as a part of the price of the lands, which was the true cauſe thereof; and now ſeeing there are diverſe incumbrances emergent, whereby the warrandice is incurred, the letters ought to be ſuſpended, there being *causa data non secuta;* and the Lord Banff ought to have compenſation or retention equivalent to the diſtreſſes, ay and while they be purged.

No 3. —It was *answered* for the charger, That the reaſon was not relevant againſt him, and could only militate againſt Lyon of Mureſk, who was obliged in warrandice; whereas the bond charged upon, bearing ſums of money received by the Lord Banff, as the cauſe thereof, and being ſubſcribed blank, and delivered, he thereby did conſent, and give full power to fill up any creditor's name, and to paſs from all objections that he could make againſt them, upon any pretence of warrandice in the diſpoſition made by Mureſk; and the charger having *bona fide* received this bond for a true and onerous cauſe, the Lord Banff is *in pessima fide* to ſuſpend from payment; and it would open a door to ſtop all commerce and ſecurity. 2*do*, The ſuſpender can never pretend that the charger is only in the caſe of an aſſignee, whoſe cedent's name had been filled up in the bond *ab initio*; ſo that whatſoever would militate againſt the one ought to militate againſt the other; becauſe, after ſubſcribing of the ſaid bond, and while it was blank in Mureſk's hand, he did write an expreſs letter to Mureſk, deſiring him, in his name, to aſſure any perſon with whom he had to do, and was content to tranſact upon this bond, that the filling up of their names ſhould be no diſobligation to him, and that he ſhould make honeſt payment to them of the ſum contained in the bond.—It was *replied* to the firſt, That the reaſon ſtood relevant notwithſtanding; and it being acknowledged, that the bond was blank *ab initio*, and filled up in the charger's name, after the warrandice of the diſpoſition was incurred and publicly known, he was thereby only in the caſe of an aſſignee, as hath been often found by the Lords in the caſe of blank bonds; ſo it is, as if Mureſk's name had been, *ab initio*, filled up, and he had granted aſſignation to the charger: Then whatſoever reaſon ſhould have been relevant againſt Mureſk would have been ſuſtained againſt his aſſignee, upon the warrandice of the lands diſponed, as was found in a late practick, the Earl of Kinghorn againſt the Earl of Winton, (*see* WARRANDICE) which already meets this caſe.—It was *replied* to the ſecond, That the miſſive letter was opponed, which doth only bear, that the filling up of any party's name by Mureſk, ſhould be no diſobligation or cauſe of offence; but doth not at all import that he did paſs from all legal remedies, in caſe the lands diſponed were diſtreſſed, as to which he was ſecure in law, both againſt Mureſk, upon the warrandice, and his aſſignee. Thereafter compearance was made for the Laird of Meldrum, as donatar to Mureſk's eſcheat, and thereupon it was *alleged*, that he ought to be preferred to the charger, and the Lord Banff ought to be decerned to pay to him, becauſe the bond being granted to Mureſk after rebellion, albeit blank in the name, yet it was truly his, and the filling up of any name after rebellion, could not prejudge the king nor his donatar.—It was *answered* for the charger, That the compearance in the name of Meldrum, was only for the behoof of Banff, the ſuſpender, who was *in mala fide* to make uſe of any ſuch title to free himſelf of the bond, filled up in the charger's name, with his conſent, and to whom he had voluntarily conſtituted himſelf debtor. 2*do*, The charger being a lawful creditor to Lyon of Mureſk, he might ſafely receive payment, by filling up his name in his bond, there being no declarator intented at the dona-

tar's inſtance, before the filling up thereof.——THE LORDS, as to the firſt debate of retention and compenſation, did find, that the Lord Banff had abſolutely precluded himſelf by the miſſive letter, bearing a ſecurity to any third perſon whoſe name ſhould be filled up, that he ſhould be as fully his debtor as if he had given him bond for borrowed money *ab initio proprio nomine*; and ſo they did not give judgment upon the ground of law alledged in filling up of blank bonds, ſimply bearing borrowed money, albeit the true cauſe was the price of lands; but as to the ſecond point, founded upon the donatar's intereſt, they did find, that the bond being blank when Mureſk was rebel, and delivered after gift and declarator raiſed, the ſame did belong to the donatar, or any having right from him; which may ſeem hard, if there was no ſpecial declarator, and the charger Grant of Roſſollis was a true creditor prior to the rebellion, and that the ſubject for which the bond was given, being land and heritage, could never fall under eſcheat to the king, if there had been no diſpoſition, and ſo by the ſale thereof, for payment of lawful creditors who might have compriſed theſe ſame lands, could never have been affected by the King's donatar as to the property, but as to the liferent only. It may alſo ſeem ſtrange, that the *bona fide* accepting of bonds for payment, as the price of lands and heritage, ſhould not be ſecured; which may hinder all commerce and bargains of lands, and force creditors to compriſe, as not being *in tuto* to take aſſignations for the price, or bonds in their own name, from the buyers of the lands.. No 3.

Goſford, MS. No 923.

1715. *June* 16.

LORD ALEXANDER HAY *againſt* MR JAMES INGLIS of St Leonards.

No 4.
A conveyance of a blank deed ſupported, on the preſumption that the party in whoſe cuſtody it was, had right to it.

LORD ALEXANDER HAY purſues the ſaid Mr James Inglis, brother to Mr Patrick Inglis, for 1100 merks, contained in a bond granted by Nairn of Saintford and Hay of Naughton, to the ſaid Mr James, and aſſigned by him to a blank perſon: Which aſſignation being in the cuſtody of the ſaid Mr Patrick his brother, it was transferred by him to William Stuart, merchant in Edinburgh, before the act 1696, and by him to Lord Alexander; which ſum, notwithſtanding, was uplifted by Mr James the firſt cedent, whereby Lord Alexander *alleged* that the warrandice was incurred. And the queſtion turning upon this, Whether the tranſlation granted by Mr Patrick Inglis to William Stuart, did inſtruct that the aſſignation granted by Mr James (which is blank in the aſſignee's name,) did belong to Mr Patrick?

It was *alleged* for the defender, That it could not inſtruct the ſame, becauſe, 1*mo*, The aſſignation mentioned in the ſaid tranſlation bears to have been granted to Mr Patrick, *nominatim*; whereas the aſſignation produced is ſtill blank in the aſſignee's name, and ſo cannot be the aſſignation mentioned in the tranſlation. 2*do*, The tranſlation amounts to no more than Mr Patrick's own aſſertion, which is no legal proof.