

No 90.

THE LORDS found that the intromission was to be ascribed to the first apprising, which alone carried the right of property, and not to the sums only anterior to the inhibition: So that the whole apprising behoved to be satisfied within the legal; and if it were so satisfied, the property did accresce to the second apprising, in which there were some sums prior, and some posterior to the inhibition; to all which *pro rata* the posterior intromission was to be ascribed; but, if the saids apprisings were not found satisfied within their legals, the LORDS reserved to their consideration, whether the apprisings, as founded upon the anterior sums, should carry the right of the whole estate, or only a proportional part of the estate effeiring to the sums anterior to the inhibition, and that the inhibition should reach the rest of the estate, as reducing the sums posterior; but the LORDS found, that the intromission at any time before the end of the three years of the prorogation, was to be imputed in satisfaction. See INHIBITION. *Stair, v. 2. p. 263.*

1676. December 20.

VEITCH against PALLAT.

No 91.

A rebel might assign after rebellion, the assignee proving, in competition with the donatar, that the debt for which the assignation was obtained, was contracted before rebellion.

JAMES SANDERSON being debtor to Nairn, and being denounced, David Roger took the gift of his escheat, anno 1648. In anno 1650, Sanderson grants a bond to James Brown, bearing expressly, 'to be for wines sent by James Brown from France in anno 1649.' Sanderson assigns James Brown to a sum due to him by Sir Robert Stuart in Ireland, in satisfaction of the foresaid bond, and therefore, in anno 1662, he granted a new assignation, whereupon Sir George Maxwell retired Stuart's bond, and granted a new bond; thereafter, William Veitch being a creditor of Sanderson's, obtains assignation to David Roger's gift, and took a new gift of the escheat of Sanderson in anno 1673. Peter Pallat, merchant in Bourdeaux, being donatar to the escheat of James Brown, there falls a competition between William Veitch, as assignee to David Roger's gift of Sanderson's escheat, and Peter Pallat as executor to Brown, both claiming right to that sum due by Sir George Maxwell. It was *alleged* for Veitch, That he ought to be preferred to the sum contained in Sir George Maxwell's bond granted to Brown, because that bond was granted in place of a former bond due by Sir Robert Stuart to Sanderson the common debtor, in anno 1638, which fell under Sanderson's escheat, and therewith also the new bond in place of it, and therefore any assignation granted by Sanderson to Brown, whereupon Sir George Maxwell's bond was granted, was null, and could not affect the moveables and escheat of Sanderson which befell to the King by his rebellion. It was *answered*, That by the interlocutor in this case, the 10th of December 1673, it was found, That an assignation granted after rebellion, for a debt due before rebellion, attaining payment or new security, by innovation of the former security before any gift declared, did secure the

creditor against the donatar, who could never repeat payment so made to a creditor. *Ita est*, The rebel Sanderson gave bond to Robert Brown shortly after the rebellion, bearing expressly, 'to be for wines sent from France,' and that before the rebellion, which is offered to be proven by Brown's compt-books, bills of loading, and other evidences and witnesses. It was *answered* for Veitch, That Pallat cannot subsume in the terms of the interlocutor, *imo*, because the rebel's bond granted to Brown, is after he was denounced; and though it bear, *for wines*, the narrative of a rebel's bond can never prove against the King nor his donatar; and the greatest length that ever the Lords have gone to burden escheats, is for the rebel's debts before rebellion, doing diligence, or obtaining satisfaction before a donatar's gift declared, for thereby the right is established in a private person, and is no more the King's right; but, if it shall be yet further extended to debts anterior to the rebellion, to be proven by witnesses, it may wholly evacuate the King's interest. *2do*, The rebel's assignation to Brown is after declarator of David Roger's gift.—It was *replied* for Pallat, That the favour of commerce requires, and hath introduced a fixed custom, that creditors getting actual payment at any time before the special declarator, are secure; the reason whereof is as effectual for bonds granted after rebellion, and payment gotten after declarator, as before, otherwise no commerce can proceed, by taking bond or assignation for any goods or ware, without inspection of the register, to see whether the buyer was denounced before or not. *2do*, Brown's assignation was for a debt anterior, viz. for wines sent from France; and, albeit it be after general declarator of Roger's gift, that is not relevant, because, by the act of Parliament 1592, it is declared, that wherever the rebel, his wife or bairns, are suffered to continue in possession of his goods, lands, rooms, and tacks, the gift shall be reputed simulate, and to the behoof of the rebel; and, it is offered to be proven, that Roger's gift is simulate, and that Sanderson the rebel was suffered to continue in possession of certain tenements and acres in and about Lauder, and of his whole moveable goods and gear, albeit he had a sum of L. 2000 Sterling due to him by Sir Robert Stuart. It was *duplicated, imo*, That this presumption of simulation can take no place, unless the rebel had a visible and considerable moveable estate that could be affected, and that the donatar had done no diligence; for donatars being comptable by their back-bonds to the rebel's creditors, they are not liable to do diligence; and therefore, if they recover their own debt, and the debt of the [horning, and the expense of the gift, though they proceed no further against the rebel, it infers no presumption that the gift was to his behoof. *2do*, Simulation being a kind of fraud, it is not relevant against singular successors, for causes onerous, as is clear by the act of Parliament 1621. But here Veitch hath taken assignation to the gift of the rebel's escheat, for satisfying of a debt due to him by the rebel, and is not partaker of the donatar's fraud or collusion. It was *triplicated*, That whatever might be pretended in the case of an assignee by a donatar recently after the gift; yet, in this case, Brown the creditor had gotten payment before Veitch's

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assignation, and therefore he can only *uti jure auctoris*; but if the donatar were competing, it were beyond question that he would be excluded, and the gift found simulate to the rebel's behoof.

THE LORDS adhered to their former interlocutor, but found that the rebel's bond granted after rebellion was still to be presumed simulate; being without sums received to that effect, that the rebel might burden the gift, and dispose upon the money, being moveable; which because of commerce would be effectual, even after rebellion; and therefore found that an assignee behoved to instruct his debt to be prior to the rebellion, and satisfaction prior to the general declarator; but found, that the bond granted by the rebel to Brown, bearing 'to be for wines,' though it mention not the time when they were sent from France, yet seeing the date was shortly after denunciation, they found it probable by writ, the merchant's compt-books, bills of loading, and witnesses, 'that there were wines truly loaded in France by Brown upon Sanderson's account, set down in Brown's books effecting to this sum, and that prior to the denunciation,' and found the allegiance of simulation relevant, that the rebel had a considerable and conspicuous estate, unless it were instructed that the donatar had done some diligence to affect the same; and that Veitch's assignation being posterior to Brown's payment, he was in no better case than the donatar.

Stair, v. 2. p. 482.

1697. December 9. MILN of Carriden *against* CREDITORS of NICOLSON.

No 92.

THERE being a set of adjudgers ranked *pari passu*, some of them struck at by inhibition; yet it was found that the inhibition could have no effect, in respect the other adjudications were more than sufficient to exhaust the subject; with whom the inhibitor, who had not adjudged, could not come in *pari passu*, though he should adjudge; it being more than year and day since the first effectual adjudication; and therefore he could have no interest to reduce, seeing he could make no benefit by his reduction. See No 136. p. 1046.

Fol: Dic. v. 1. p. 184.

* * * See This case *voce* INHIBITION.

1707. November 27.

CAPTAIN FRANCIS CHARTERIS and MR PATRICK MIDDLETON *against* SIR ROBERT SINCLAIR, of Stevenstown.

No 93.
In a competi-
tion between
assignations

THIS was a competition about the Lady Dalhousie's liferent annuity. Charteris and Middleton, as creditors to my Lord Bellenden, her second husband, had