

ANSWERED for the defender,—That the act of sederunt must be so interpreted, that parties who are absent, (as Ochiltrie is,) must not instantly be concluded either in denial or acknowledgment; but the procurators must have a due time to acquaint their clients for a warrant, either to acknowledge or deny the fact.

The Lords nevertheless held the defender as confest, on the receiving a disposition after contracting the debt.

*Act.* Col. Mackenzie. *Alt.* Boswel. Gibson, *Clerk.* *Vol. I. page 178.*

1716. *June 21.* STEWART of Carsewell *against* BANNANTINE of Kaims.

SIR JAMES LAMONT of Inneryne being debtor by bond, in the year 1640, to Alexander Stewart of Carsewell, and Isobel Wallace, his spouse, in liferent, and Robert Stewart, their son, in fee, in 2800 merks; the mother and son, after the father's decease, conveyed the same to one William Home to lead apprising thereon; which he did *in anno* 1646. And thereafter, in the year 1666, the said mother, and Alexander, her second son, the other being dead, having entered into contract with Sir Dougald Stewart of Kirktown, disposed the said bond, apprising, trustee's back-bond, &c. in favours of the said Sir Dougald Stewart: for which cause, he, and Bannantine of Kaims, as cautioner, obliged themselves to pay to the mother, and failing of her to the said son, 2520 merks. Which son Alexander, in the year 1675, granted an obligation in favours of Archibald Campbell, his brother-uterine, that he should assign to the said Archibald all bonds and obligations of whatsoever nature, which he had or should acquire, belonging or granted to the said Alexander Stewart, his father, or Robert Stewart, his brother, by whatever persons, &c. Whereupon Archibald Campbell obliged the trustee's heir to denude; and thereafter, without noticing the contract 1666, enters into a new transaction with Sir Dougald Stewart's heirs, and disposes to them the subject. But, Mr. James Stewart of Carsewell, heir to Alexander, having insisted against Bannantine of Kaims, cautioner for Sir Dougald Stewart in the foresaid transaction, for payment of the 2520 merks therein contained, he obtained decret; the extracting whereof was nevertheless stopped, upon a petition of the defender, alleging, that the debt belonged to the said Archibald Campbell, (who also had transacted it in manner foresaid,) conform to the above obligation by Alexander Stewart, his brother-uterine, in his favours; and, having raised process of proving the tenor thereof, craved that extract might be stopped till the said process were discussed. And a double of the above obligation, by Alexander Stewart to Archibald Campbell, having at length been produced by the pursuer himself; who contended, that, though the principal were produced, it would not be relevant to stop his decret:

It was ALLEGED for the defender,—*Imo*, That by the contract 1666, which was the pursuer's title, it does appear, that the original ground of this debt was the foresaid bond in the year 1640, and apprising led thereon by the trustee; which

was to be validly conveyed by the creditors in the said original bond, in favours of Sir Dougald Stewart: but they not having denuded the trustee, there could be no action upon the contract for the 2520 merks; or, if there were, it was only competent to Archibald Campbell, who had denuded the trustee, and obtained disposition from him to the apprising, and so was in condition to transmit the same to Sir Dougald's heir, which he actually had done. *2do*, Supposing the case were simply taken on the contract 1666, yet Archibald Campbell had right to the 2520 merks by the said general obligation to assign; and the pursuer being heir of Alexander Stewart, could not quarrel the said payment, being bound to make good his predecessor's obligation. *3tio*, By the conception of the said contract 1666, Isobel Wallace, the mother, is fiar of the sum; and Alexander Stewart, who predeceased, could not be served heir to her: therefore, Archibald Campbell being her only child surviving, it was *jus tertii* to the pursuer to quarrel the payment made to him; since, as heir to Alexander Stewart, he can have no right.

ANSWERED to the first,—That, however the apprising was conveyed, yet the pursuer's predecessors had transmitted the trustee's back-bond by the contract 1666 in favours of Sir Dougald Stewart, who therefore became simply bound to them for the 2520 merks; and if Sir Dougald's heirs have afterwards paid the sums in the apprising, they had themselves to blame. Answered to the second, that the said general obligation gave Archibald Campbell no right to the contract 1666; the grantor being only thereby bound to make over all bonds, &c. granted to his father and brother; but the sum in question was directly due to the grantor, viz. Alexander Stewart himself. Neither could Archibald Campbell, by virtue of the said obligation, claim right to the bond *anno* 1640, and apprising thereon; because Alexander was previously denuded thereof, by conveying the back-bond to Sir Dougald Stewart. And as to its being *jus tertii* to the pursuer, answered, That since it is evident that the original bond belonged to the said Alexander's father and brother, it might be presumed, that the fee by the contract 1666 was likewise designed to be settled in the person of Alexander: and the obligation in favours of Isobel Wallace, the mother, must resolve into a naked liferent.

The Lords found that the right of the original bond for 2800 merks, was not comprehended in the original obligation granted by Alexander Stewart to Archibald Campbell, his brother-uterine; and repelled the allegiance founded upon Isobel Wallace's being in the right of the fee of the sum pursued for; and found the general clause to the said obligation by Alexander Stewart to Archibald Campbell, not relevant to prefer him; and therefore assoilyied from the proving of the tenor thereof.

*Act.* Ferguson.

*Alt.* Grhaam.

Sir James Justice, *Clerk.*

*Vol. II. No. 4. page 6.*