

1739. December 11.

MR. GEORGE BUCHAN *against* SIR WILLIAM COCKBURN.

Lands being sold with the consent of a creditor, whose right was preferable upon that subject, as well as the other lands that remained with the seller, and the purchaser insisting against this creditor to communicate his debt and diligence to him, the purchaser, in order to protect him against the diligence of other creditors, the defence was, That consent in this case imports a *non repugnantia*, and not a conveyance. It was admitted, that the consent of a proprietor or creditor to a disposition of the whole subject affected by his right, is a virtual conveyance, for he can have no interest to withhold his right after he passes from all claim to the subject; but where a part is only disposed, a consent can imply no more than a *non repugnantia*, seeing it is of use to him to reserve his right *quoad* the subject not disposed. Found, That the consent in this case imports no more than a *non repugnantia*.—See APPENDIX.

No. 8.

Fol. Dic. v. 2. p. 504.

1779. January 14. RODERICK M'LEOD *against* COLIN CRICHTON.

William Seed, merchant in Belfast, remitted to Sir William Forbes & Co. bankers in Edinburgh, a draught, of 27th April, 1776, on Robert Rodger, for £.120, payable at three months date. This draught was received by the Company 3d May; and, on payment of it, 1st August, 1776, credit was given to Seed in their books for a balance of £.90 remaining due by the Company to him. Seed became bankrupt; and Sir William Forbes & Co. having brought a multiple-pounding, a competition ensued betwixt two of Seed's creditors, Roderick M'Leod and Colin Crichton, for this fund in the hands of the Company.

No. 9.
Virtual assignation of a draught by a bill and protest.

Crichton produced as his interest Seed's draught of 16th March, 1776, in his favour, on Sir William Forbes & Co. for £.137, value in account, payable at 41 days sight; which draught had been presented at the house of the Company on 27th March, and protested for not payment, 10th May, 1776.

Colin M'Leod founded on a bill of 3d April, 1776, accepted by Seed to Norman M'Leod for £.100, payable 30 days after date, "at the house of Sir William Forbes & Co." This bill was indorsed by Norman M'Leod; and by him protested for not payment, at the house of the Company, 8th May, 1776. M'Leod likewise brought a process for payment against Seed, having first used arrestment *ad fundam jurisdictionem*; and, on the dependence of this process, again arrested in the hands of Sir William Forbes & Co. 15th October, 1776; and afterwards obtained decree for payment against Seed. Upon this interest,

Pleaded for M'Leod: *1mo*, That although he had no draught directly on Sir William Forbes & Co. it was sufficient authority for them to pay the bill, that it

No. 9. was made payable at their house. The bill was equivalent to an assignation; and as the protest on this bill, 8th May, was prior to that on Crichton's bill, 10th May, it is preferable on any money then due by the Company to Seed, as being first intimated.

But, *2do*, In May, 1776, when both protests were taken, the Company had none of Seed's money in their hands. They had only his draught on Rodger, payable in August, which being clearly a *nomen debitoris*, is not conveyed under the implied assignation of a bill and protest. A bill of exchange is a mandate to pay *money* to the holder, but nothing else. Had there been a formal assignation to money in the Company's hands duly intimated, it would not have carried moveable effects, bills, or other *nomina debitorum* in their possession at the time. The draught, which is only an implied assignation to money, cannot carry what an express assignation would not reach to.

This doctrine has been already established in the case of the *ipsa corpora* of moveables, by a decision of the Court, Stewart *contra* Ewing, June 15, 1744, No. 82. p. 1493. The principle of that decision applies to the present case; for *nomina debitorum* are no more cash than moveable effects. There was not, therefore, any *lien* created by Crichton's bill and protest over the draught payable by Rodger to the Company. This draught continued liable to be attached by the diligence of creditors, which, when used, became a *medium impedimentum*, effectually barring any claim by Crichton upon his bill and protest as a mandate to pay. The arrestment, therefore, used on Seed's bill to Norman M'Leod, after the money had come into the hands of the Company, carries these funds in preference to Crichton's bill and protest.

Pleaded for Crichton: *1mo*, In this case, there can be no competition betwixt the two protests, as there was no draught on Sir William Forbes & Co. except that in favour of Crichton. The draught in favour of M'Leod is drawn by Seed upon himself, and the House of the Company is only mentioned in the draught as the place at which it is payable by Seed. This was no authority for them to pay. Had they done so, it would have been at their own risk.

2do, Whatever may be the case as to the *ipsa corpora* of moveables, it has never been found that a *nomen debitoris*, which is a debt of money, does not fall within the assignation implied from a bill and protest. Bills, in particular, are considered by the law as cash; and, therefore, as Rodger's accepted bill was in the possession of the Company at the time the protest was taken by Crichton, it was the same as so much cash in their hands. Crichton could have obliged them, in virtue of the assignation implied from his bill and protest, to have indorsed to him the bill on Rodgers, which they held. Although it continued to remain in the hands of the Company until paid up, it was only retained by them for behoof of Crichton. After his protest, they were not at liberty to indorse it to any person; and they could apply the money to no purpose but that of his payment. An arrestment, therefore, used in the hands of the Company, by a creditor of Seed, whether previous

or subsequent to the payment of the remittance, if posterior to the protest on Crichton's bill, could not have competed with it. No. 9.

The Court were of opinion, That the protest taken by M'Leod on the 8th May could not compete with that taken by Crichton on the 10th of May, as Seed's draught in favour of M'Leod was not directly upon the house of Sir William Forbes & Co. On the *second* point, they were of opinion, That Seed's draught, in favour of Crichton, on the Company, implied a conveyance of his bill on Rodgers in their hands. And it was said on the Bench, That *novum debiti* may be assigned in this way; that the Company could have been obliged to indorse the bill to Crichton after the protest taken by him, and were only to be considered as holding it for his behoof.

The judgment was,

“ Find, That Colin Crichton is, in virtue of his bill, drawn by the common debtor, on Sir William Forbes & Co. and protest thereof for not acceptance, preferable to the sums in the hands of the company.”

Lord Ordinary, *Ellick.* Act. *Sawinton.* Alt. *Ilay Campbell.* Clerk, *Menzies.*

Fac. Coll. No. 53. p. 94.

SECT. II.

Virtual Confirmation.

1663. *January 16.*

TEÑANTS of KILCHATTAN *against* LADY KILCHATTAN.

One having apprised an infestment which was null for want of confirmation, and being publicly infest upon his apprising, the charter of apprising, which passes of course, was not found equivalent to a confirmation of the original infestment.

Stair. Gilmour.

* * Stair's report of this case is No. 1. p. 1259. *voce* BASE INFESTMENT;
Gilmour's report is No. 4. p. 3008. *voce* CONFIRMATION.

1668. *December 9.* EARL of ARGYLE *against* GEORGE STIRLING.

The Earl of Argyle having pursued George Stirling to remove, he alleged, Absolvitor, because he stood infest on an apprising. It was replied, That the

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