
REPORTS OF CASES

ON APPEAL FROM SCOTLAND.

Sir James Gray, Baronet, - - - - - *Appellant*;
James Duke of Hamilton, Charles Earl of
Selkirk, and Captain Alexander Gavin, *Respondents*.

Case 1.
Fountain-
hall, 22d
and 31st
July 1708.

10th March 1708-9.

Foreign Deeds.—An assignment of a bond, (both being executed in England and in the English form) intimated by letter only, is preferable to a posterior arrestment.

The judgment, finding that the law of Scotland should regulate this case, is reversed.

Holograph letters.—The Court, having refused to allow holograph letters to be equivalent to an intimation—judgment also reversed.

IN 1703 the Duke of Hamilton having borrowed 1000*l.* from Captain Gavin at London, he there granted Gavin his bond in the English form for re-payment of that sum with interest.

Gavin being indebted to Sir James Gray, the appellant, who was then also in London, he in July 1704, assigned the said bond to Sir James; and the assignment was executed in England, and in the English form. No formal intimation of this assignment was made to the Duke of Hamilton according to the mode practised in Scotland, but Sir James, on the 7th of September 1705, gave the duke notice of it by letter, and he received an answer from his grace, in his own hand-writing, bearing date the 22d of the same month, acknowledging that he had notice of the assignment, promising payment to Sir James of principal and interest, and desiring not to be pressed till he was in a condition to pay: and Sir James received another letter from the duke of a similar nature, also written by his grace himself, and bearing date the 5th of April 1706.

The respondent, the Earl of Selkirk, brother of the Duke of Hamilton (*a*), to whom Captain Gavin was also indebted in a large

(*a*) They were both sons of Lady Ann Hamilton and William Earl of Selkirk afterwards Duke of Hamilton.

sum of money, having got notice of the duke's debt to Gavin, and the assignment thereof, on the 14th of June 1706, laid arrestments in Scotland in the hands of his grace and Sir James Gray towards satisfaction of his own debt. But Sir James, notwithstanding these arrestments, on the 31st of March 1707, procured a new bond from the duke to himself corroborating the former, and for payment of the 1000*l.* by instalments; and he at same time granted the duke a counter obligation, that he would procure a decree of the court of session for the duke's payment of the money to him, and to keep his grace harmless from the arrestment. All the parties in these transactions were Scotsmen.

Sir James having brought an action before the court of session against the Duke of Hamilton for payment of the money to him accordingly, the Earl of Selkirk appeared for his interest, insisting that his arrestment was preferable to Sir James's assignment, which had not been legally intimated. Sir James contended, that the law of England, which did not require a formal intimation, ought to regulate this case; and, further, that the duke's letters were equivalent to an intimation.

After sundry proceedings in this cause, the Lord Ordinary found, that the duke's letters were equivalent to an intimation, and that the dates thereof were prior to the earl's arrestment, and therefore preferred Sir James Gray, and decerned.

But the respondent having brought the Lord Ordinary's judgment under review, the court by interlocutor on the 22d of July 1708, found "that Sir James Gray having made his election
" to prosecute his action before a Scots judicature, had submitted
" it to the law of Scotland, which requires an assignment to
" be intimated in a particular manner prescribed as essential to
" complete the right of the assignee, and makes all assignments
" void where there is the least variation from this form, and
" that the duke's private letters could not supply the defect of
" such legal intimation, nor be admitted to invert the order of
" preferring creditors established by law, especially in prejudice
" of a third party acting by law, and under a legal assignment,
" viz. an arrestment, which being executed according to the
" Scots law is equal to an assignment in writing, and therefore
" decerned the Duke of Hamilton to pay the money to the Earl
" of Selkirk, and assilzied the duke from the process at the
" instance of Sir James Gray."

The appellant reclaimed, and prayed the court to grant him a commission for proving the time of his having received the duke's letters: but on the 31st of July 1708, the court "refused to
" grant the appellant a commission. as desired in the petition,
" adhered to their former interlocutor, and ordained the same to
" be extracted."

Entered, 14
Dec. 1708.

The appeal was brought from "a sentence or decree of the
" Lords of Council and Session on the behalf of Charles Earl
" of Selkirk, and the affirmance thereof the 31st July 1708."

Heads of the Appellant's Argument.

The matters in question having been transacted in England, and the bond and assignment being in the English form, the law of England, by which intimation of an assignment as done in this case by letter would be sufficient, ought to rule this case. By the law of nations, bonds and other personal contracts may be sued upon *ubique*, and are to be determined on according to the custom of the place where they are entered into. It was so determined by the House of Peers in the case of *Foubert v. Turst*, 11th December 1703, and by the Court of Session in the case of the *Master of Saltoun*, Stair, 5th July 1673.

It ought not to be presumed that the duke's letters, objected to as not probative, would be antedated by a person of his grace's honour and quality, to defraud his own brother: if the Court of Session had thought this possible, they ought to have allowed a proof of the time of receiving those letters.

Heads of the Respondents' Argument.

By the law of Scotland an assignment ought to be intimated to the debtor, in the manner prescribed by the act of the Scots parliament 1681, c. 5.; in default thereof the assignment is void against a third party; and an arrestment used before making such requisite intimation, is equal by the law of Scotland to an assignment legally intimated.

After hearing counsel, *It is ordered and adjudged, that the sentence or decree, and the affirmation thereof, complained of in the petition and appeal of Sir James Gray, be reversed: and it is further ordered, that the 1000l. and interest secured by the said bond be paid to Sir James Gray the appellant; and the said James Duke of Hamilton is to pay to Sir James Gray the 1000l., and interest thereon due accordingly, and for so doing shall be and is hereby indemnified.*

Judgment,
10 March
1708-9.

For Appellant, J. Jekyll. Sim. Harcourt.
For Respondents, John Pratt. Dugal Stuart.

The decision of the Court of Session, here reversed, is stated as an existing case in the Dictionary of Decisions, vol. i. *Voce Foreign*, p. 318.; and vol. ii. *Voce Proof*, p. 258.; and in Erskine, book 3. tit. 2. § 22. 42.

The case of *Foubert* and *Turst*, referred to by the appellants, being on a point of general law, may be briefly stated.

By articles of marriage executed at Paris, between Foubert and his wife, it was covenanted that two-thirds of 1200 livres should be settled as an estate to descend to the wife and her heirs, and that the goods of the husband and wife should be in communion, and be distributed according to the custom of Paris. These persons,

Foubert v. Turst in the House of Lords, 11 Dec. 1703.

being protestants, settled in England after the revocation of the edict of Nantes, where the wife died without issue.

Her representatives filed a bill in the Court of Chancery in England against the husband, claiming the two-thirds of the 1200 livres settled upon the wife and her heirs, and also a moiety of the goods in communion according to the custom of Paris. The Lord Keeper in Michaelmas term 1702 decreed, that these two-thirds of 1200 livres should be paid to the plaintiffs, but that the husband and wife having left France, and settled in England, their goods in communion were not to be distributed according to the custom of Paris, notwithstanding the covenant in the marriage articles. But the representatives of the wife having brought their appeal against the latter part of the decree, in regard to the distributions by the custom of Paris, the same was reversed by the House of Lords.

Lashley v.
Hog, in the
House of
Lords, 16
July 1804.

In the important case of *Lashley v. Hog* in the House of Lords, in a speech previous to the decision by Lord Chancellor Eldon, this case of Foubert and Turst was stated; his lordship considered the reversal as having been founded in the *contract*, and that if there had been no contract, the law of England would have regulated the rights of the husband and wife, who were domiciliated in England, at the dissolution of the marriage.

Case 2.

Fountain-
hall, 26 July
1706, 12
July 1707.

Rose Muirhead, the Widow of James Muirhead
the younger, of Bradisholm, deceased, - *Appellant*;
James Muirhead of Bradisholm, . . . - *Respondent*.

14th March 1708-9.

Donatio non presumitur.—A disposition by a father to his son, (followed by a *resine*, which was not registered) made to preserve the estate from penalties of a test act, might be warrantably cancelled.

Qualified oath.—An oath received, though objected to as containing qualities.

THE late James Muirhead, the respondent's eldest son, in 1697 married the appellant an Englishwoman at London; and the parties in the present appeal severally allege, that deceit was used with respect to the fortunes of the husband and wife on that occasion. In September 1700, three years after the marriage, articles of agreement were entered into in the English form, whereby the husband covenanted to settle lands in Scotland of the annual value of 250*l.* for his wife's jointure; or to leave her at his death 2000*l.* personal estate, and 2000*l.* more to the issue of the marriage. He afterwards brought his wife to Scotland, where they both for some time resided with the respondent.

But misunderstandings arising in the family, the son brought an action before the Court of Session against the respondent his father for exhibition of a disposition of the lands of Bradisholm, which