

and by its object having been not to give him a preference to other creditors, but to bring him in *pari passu* with them. A great majority of the Court, however, were of opinion, that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature.

It was farther *observed*, that the case of Spottiswood against Robertson Barclay, having been settled by compromise, could be of no weight in point of precedent.

THE LORD ORDINARY sustained the objection; a reclaiming petition was refused, without answers; and upon advising a second, with answers, the Lords 'adhered.'

Lord Ordinary, *Ankerville*.

For the Creditors, *Honyman*.

For Sir James Grant, *James Grant, Maconochie*.

Clerk, *Gordon*.

Fol. Dic. v. 3. p. 52. Fac. Col. No 61. p. 133.

D. Douglas.

S E C T. II.

Payment, whether Challengeable.

1675. November 11.

VIETCH against PALLAT.

IN *anno* 1648, James Sanderfon merchant in Edinburgh being debtor to James Nairn, and David Rodger being cautioner for Sanderfon, was distressed, and paid the debt, and obtained assignation from Nairn, and as assignee raised horning, and charged and denounced Sanderfon; and in *anno* 1652 took a gift of Sanderfon's efcheat, and obtained general declarator thereupon; and in *anno* 1649, James Sanderfon became debtor to Robert Brown for some wines sent to him from Bourdeaux, to the sum of 3000 pounds, whereupon he did also charge and denounce Sanderfon *anno* 1649; and in the same year Sanderfon obtained decret against Sir Robert Stuart for 2000 pounds Sterling. In *anno* 1655, Sanderfon grants assignation to Robert Brown to 700 pounds Sterling, as a part of the 2000 pounds Sterling, and thereafter Sanderfon having obtained three bonds from Sir Robert Stuart in *anno* 1662, containing 800 pounds Sterling, Sanderfon grants a new assignation to Robert Brown of the third part of the said sum of 800 pounds Sterling, which assignation relates the former assignation to 700 Sterling as a part of the 2000 pounds Sterling, and both assignations are granted in satisfaction to Robert Brown of the said sum of 3000 pounds. In *anno* 1666, Sir George Maxwell of Pollock interposeth for Sir Robert Stuart, and gives his bond to Robert Brown for 100 pounds Sterling, on condition that the bond and assignation granted by Sanderfon to Brown should be delivered up, which accordingly

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A bankrupt having granted assignation to one of his creditors, in prejudice of another, who had done more tedious diligence by horning, &c.; the prior creditor having affected the subject assigned, by taking a gift of efcheat, was found to have action of repetition against the assignee who had received payment.

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was done : And Sir George Maxwell being pursued upon his bond by the executors of Brown, compearance was made for Peter Pallat, merchant in Bourdeaux, as donatar to the escheat of Robert Brown ; compearance was made also for William Veitch, merchant in Edinburgh, as having assignation to 600 pounds of the sum due by James Sanderfon to James Nairn satisfied by David Rodger, Sanderfon's cautioner, and having assignation to the horning at the instance of Rodger against Sanderfon, and to the gift of his escheat, and also as having obtained a new gift of Sanderfon's escheat in *anno* 1672, upon which last gift Veitch first insisted, and after full debate it was found, upon the day of 1673, that Robert Brown being a lawful creditor to Sanderfon rebel, and having obtained assignation from him for payment of his debt before Veitch's gift and declarator in *anno* 1672, and having thereupon obtained payment in so far as Sir Robert Stuart's bond, to which Brown was assigned, was delivered up to Sir George Maxwell, and thereby that debt extinct, and Sir George gave a new bond to Brown, which was found equivalent to payment, that therefore the donatar of Sanderfon's escheat could never make Brown or any representing him repeat that sum; whereupon Veitch insists upon this new ground, viz. that albeit payment obtained by Brown would secure him against Veitch as donatar, yet by the last clause of the act of Parliament 1621, it is expressly statute, that no bankrupt can by any voluntary deed prefer any creditor, although he had done diligence, to another creditor that hath done a prior diligence in prejudice of that prior diligence: *Ita est*, David Rodger author to Veitch had done diligence by horning in *anno* 1648 against Sanderfon, and had obtained gift of his escheat in *anno* 1652, whereas James Brown, though he had used horning in *anno* 1649 against Sanderfon, yet he proceeded in no further diligence by pointing, arrestment, or gift of escheat, but took a voluntary assignation from Sanderfon to Sir Robert Stuart's bonds, and therefore Sanderfon being bankrupt and insolvent, he could not prefer Brown's posterior horning to Rodger's prior horning by a voluntary assignation, but the said assignation is null, and by the express words of the act of Parliament, 'the posterior creditor preferred by the voluntary deed of the bankrupt, is declared liable to repeat,' and therefore though Brown had gotten real payment, he was obliged to repeat, much more when Sir George Maxwell's bond is granted for the same sum, and is yet resting. It was answered for Pallat, 1st, That he opposed the former interlocutor, whereby Brown was preferred to Veitch the donatar, as having gotten payment by the rebels assignation. 2^{dly}, By the act of Parliament 1621, 'Bankrupts cannot prefer posterior diligences to prior affecting the rebel's estate.' *Ita est*, That horning can affect no estate, and assignation was granted to Brown before the gift of escheat to Rodger in *anno* 1652, and so was before that diligence by the gift, which only could affect the sum in question. 3^{dly}, Gifts of escheat are not only excluded by payment made to lawful creditors, but likewise by assignations granted by the rebel for a debt due by him before rebellion; if the assignation was granted before declarator; but Brown's assignation was granted before either gift or declarator: And there is this singularity in Brown's case,

that his debt being for wines sent to Sanderfon from France, if payment of such wines were not secure, but liable to repetition, it would mar commerce; yea if a lawful creditor should get payment in specie, or money from his debtor, though a rebel, it would be of dangerous consequence, if any other who have used horning should take a gift of the rebel's escheat, and thereupon recover. It was *replied* for Veitch, That he ought to be preferred, as having right from the creditor who did first diligence, and that he is not now insisting as donatar only, for then he might be excluded by payment of the rebel's creditor; but now he insists as a creditor, having done diligence by the horning and gift, which affects the sum in question, and makes Brown the other creditor liable to repetition of what he recovered by the rebels preference by his voluntary assignation; for albeit Brown having used a posterior horning, if he had first compleated his diligence by pointing, arrestment, or gift, he would have excluded the prior diligence, but not having proceeded upon a diligence, but upon a voluntary assignation, the same is null, and he is liable to repetition by the express words of the statute, neither is there any exception relating to strangers or to commerce; neither did the first creditor Rodger fail in diligence, because his horning being in 1648, shortly thereafter the judicatures ceased by the incoming of the English, who set up new judicatures in *anno* 1652, and that same year Rodger took a gift of Sanderfon's escheat, and declared the same shortly thereafter.

THE LORDS found, that Veitch as having right from Rodger, who used horning in *anno* 1648 against Sanderfon the common debtor, and took gift of his escheat in *anno* 1652, and declared the same could not be prejudged by the rebels voluntary assignation, but that the same was null; and though payment had been obtained on that assignation, it was liable to repetition, in respect there was sufficient evidence and probation adduced that Sanderfon was bankrupt and insolvent. In this there was nothing to hinder commerce by buying from bankrupts or rebels goods for present money delivered to them, or by any permutation without fraud, in which case the bankrupt did not become debtor, nor the feller creditor; but if he sold upon trust, and became creditor; a merchant, whether a foreigner or country-man, behoved to run the hazard of his debtor's condition and estate, who could not prefer him, becoming once creditor, to the more timeous diligence of other creditors, the debtor being bankrupt, and not able to pay them all. See Sec. 8. of this Division.

Fol. Dic. v. 1. p. 77. Stair, v. 2. p. 366.

* * * Dirleton reports the same case:

1675: February 9.

SIR ROBERT STEWART in Ireland and his son, being debtors by bond in the sum of L. 800 Sterling, to the deceased James Sanderfon; which bond being conceived in the form of English bonds, did not bear annualrent: The said James did assign the said bond in favours of Ronald Graham, in trust, and to his own behoof, upon a back-bond; and thereafter did assign the said back-bond in favours of James Ker and Robert Brown, merchants; as to two parts to the said Ker, and the third part to Brown.

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Sir George Maxwell of Pollock being trustee, and acting in name of the said Stewarts, did grant a bond to the said Ker and Brown, making mention of the said bond granted by the Stewarts, and of the assignation made by the said James Sanderfon to the said Brown and Ker; and that after compt and reckoning, there was only resting of the said sum L. 300 Sterling, which the said Sir George, in name of the said Stewarts, is obliged to pay within three months after that Stewarts bond should be delivered to him, with an assignation or discharge.

The said James Ker being deceased, his executors did intent action against the said Sir George Maxwell, for his part of the said sum, viz. L. 200 sterling.

In this process, William Vietch did compare for his interest, and did *allege*, That the sum in question, due by Sir George Maxwell, did belong to him, having fallen under the rebellion of the said James Sanderfon, and the gift of his escheat, first gifted to David Rodger, from whom the said William had right, and thereafter to the said William himself; and though the said bond, granted by Sir George Maxwell, was granted to the said Ker and Brown, yet it was granted for the same sums, that were due by the said Stewarts to the said Sanderfon, as appears by the bond granted by the said Sir George Maxwell; so that the foresaid sum due to Sanderfon, and the bond for the same, having (as said is) fallen and belonged to the King, it does still belong to him and his donatar, notwithstanding the said new bond granted by Sir George Maxwell in place of the same, seeing *surrogatum sapit naturam, &c.*—It was *answered*, That the said Sanderfon being debtor to Ker and Brown, as he might have paid his debt after the rebellion, or the creditors might have gotten satisfaction by poiding or arrestment before the rebel's escheat, so he might have assigned the debt due to him for their satisfaction.—Whereunto it was *answered*, for the said William Vietch, That the rebel cannot make assignation *stante rebellione*, the act of Parliament in *anno* 1592, K. Jam. 6. Parl. 12. cap. 145. entitled, *Anent the Escheats of Rebels*, bearing expressly, That no assignation shall be valid being made by a rebel at the horn, in defraud of the creditor, if he be at the horn for the same cause; and therefore the said assignation, made by Sanderfon when he was at the horn, in prejudice of Rodger, Vietch's cedent, at whose instance he was at the horn for the same debt, is void; and what may be in the case of actual payment, or of poiding, or legal diligence, needs not be debated in this case; seeing the rebel did neither make payment, nor was the said debt due by the Stewarts, affected with legal diligence, but a voluntary assignation was made by the rebel; which being null, for the reason foresaid, and the pursuer's right to the sum in question being founded upon the same, the pursuer can have no right to the foresaid sum; and the said Vieth having undoubted right (as said is) ought to be preferred.

THE LORDS, by their interlocutor 10th December last, did find that an assignation made by a rebel to his creditor, albeit for a debt preceding the rebellion, and that the assignation was granted before the gift of the rebel's escheat, cannot prejudice the King or his donatar: But that payment made by the rebel, or

any other in his name, upon his precept or assignation, being before the donatar's gift, is sufficient to liberate the creditor from repetition.

It was further *alleged* for the pursuer, That the said bond granted and due by the Stewarts was extinct and innovate; in so far as the said Sir George Maxwell had granted the said other bond to the said Ker and Brown for the same sum, which was equivalent to payment.

Wherunto it was *answered*, That the said bond granted by Sir George Maxwell, was in effect but a bond of corroboration, whereby the said Sir George became *expromissor*, and upon the matter surety for the said sum; so that the former bond was not innovate nor extinct, being neither discharged nor retired; but being only to be discharged or assigned upon payment made by Sir George, which implies that it could not be innovate nor extinct, seeing it could not be assigned if it had been extinct.

THE LORDS, before answer to that point, viz. If the said transaction was equivalent to payment, declared they would take Sir George Maxwell's oath *ex officio*, at what time the said bond granted by the Stewarts were delivered up to him, and by whom; and if any discharges were granted to him of the said bond.

Sir George Maxwell having declared upon oath, That he had recovered the said bond from Ronald Graham, and that he had not taken a discharge of the said bond either from him or from the said Ker and Brown:

This day the debate was again resumed at the bar, and amongst the Lords; and these arguments were used by his Majesty's Advocate, viz. That by the rebellion *ius quaritur domino regi*, and that confiscation *ex delicto* is upon the matter a legal assignation, and equivalent to an assignation intimate: And if there were two assignations, and the debtor being out of the country, the first assignation had been intimated at the market cross and pier and shore of Leith, and the debtor having returned, the second assignee had intimated his by way of instrument, and thereupon the debtor had *bona fide* made payment to him, the first assignee notwithstanding would be preferable: And though the debtor would be free in respect of payment *bona fide*, yet the first assignee might repeat the debt from the second, as *indebite* paid to him who had no right; so that the King and his donatar having right to Stewarts debt, though the sum in question had been paid to Ker and Brown, (as it is not) *a paritate rationis* the donatar might repeat the same as *indebite* paid to them; seeing by the said interlocutor it was found, That an assignation made by a rebel, albeit before the gift, cannot prejudice the King or his donatar, for the reason foresaid. It follows necessarily, that the assignee by virtue of such an assignation has no right to the sum assigned, and consequently, if the debtor pay the said sum *bona fide*, though he may be liberate, yet the said payment cannot prejudice the King or his donatar, but they may repeat the sum belonging to them; and if it be not paid, but a bond is renewed for the same, as in this case, the donatar ought to be preferred.

The assignation being null, as said is, there can be no innovation or deed done by the assignee who has no right, in prejudice of the King or his donatar; seeing a debt cannot be innovate but by a person having right to the same.

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The law does so far favour legal diligence done by the creditors of rebels, that there are some decisions in their favours preferring their diligence done before the gift be declared; but voluntary deeds done by rebels in prejudice of his Majesty, who has a *jus quesitum*, and of the creditor who has denounced, are altogether reprobate; and the law being clear, and there being no decision to the contrary in favours of creditors in the case of payment upon such assignments as are void in law, the donatar ought to be preferred; otherwise a door should be open to prejudice his Majesty of his casualty, and creditors of their diligence, seeing the rebel may assign, and upon such voluntary assignments payment may be made; and there should need no application to the Exchequer for gifts of escheats, if they may be so easily evacuate by such practices.

It appears by Sir George Maxwell's oath, and by his bond, that the said debt was not extinct; seeing Sir George did act in the affair as a trustee and doer for the Stewarts; and their bonds were neither discharged, nor given back by the assignees, who had right to the same; but were recovered by the said Sir George by his own means from Ronald Graham.

THE LORDS did adhere to their former interlocutor, and did find, That creditors getting payment from rebels, either by pointing or by assignment, before declarator at the donatar's instance, doth secure the creditor against the donatar; and did also find, That in this case the first bonds were extinct; and that the same being delivered to Sir George Maxwell, before declarator at the instance of the second donatar, that the assignee is preferable.

This decision appears to be hard, seeing *declaratoria non tribuit jus*; but *declarat jus quod est*; and the horning being declared upon the first gift, there needed not a declarator upon the second. See COMPETITION. See ESCHEAT.

For Vietch, Sir David Falconer.

Alt. Dalrymple, Chartris, &c.

Clerk, Gibson.

February 12. 1675.—It was further *alleged* for the said William Vietch, That he ought to be preferred, because by the act of Parliament 1621, assignments or other rights granted by bankrupts in favours of any of their creditors, who had not done diligence, and in prejudice of a creditor who had done diligence by horning or otherwise, are void; and the creditor who is partially preferred and gratified, if he recover payment, he is liable to re-fund; and by the act of Parliament in *anno* 1592, anent the escheats of rebels, cap. 145. assignments made *stante rebellione* in prejudice of the creditor, at whose instance the cedent is at the horn, are null; and that the said assignment made by Sanderfon in favours of Ker and Brown, was made by him after he was at the horn at the instance of David Rodger, Vietch's cedent; and the said assignment being null, for the reason foresaid, all that has followed thereupon is void.

It was *answered*, That the said act of Parliament is only to be understood, in the case when any voluntary payment or right is made in defraud of the lawful and more timely diligence of another creditor, having served inhibition, or used

a horning, arrestment, comprising, or other lawful mean to affect the dyvor's land or estate; and that horning is not such a diligence as does affect, being only personal execution against the debtor; and that the said debt of Stewarts was many years contracted by the rebel after the said horning; and that the said Stewarts residing in Ireland, and their bond being conceived after the stile of English bonds, did not fall under Sanderfon the creditor's escheat.

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Whereunto it was *answered*, That by the said act of Parliament, bankrupts, after they are at the horn, cannot make any voluntary right or payment to gratify or prefer other creditors; so that there is no necessity to debate whether horning doth affect or not; and yet the truth is, horning is such a diligence as doth affect, seeing thereby all the escheatable goods are affected, and do belong to the King, and to the creditor at whose instance the horning is, who is preferable to the King, and has an interest in the said goods; and that whatever belongs to a rebel, whether the time of the rebellion, or at any time how long soever thereafter during the rebellion, the same accrues to the King, and consequently to the creditor in the horning; and that *nomina debitorum* and debts *non habent situm*, but are personal interests, and *sequuntur personam creditoris*; and if they be moveable, do fall under his escheat, which is a legal assignation, as said is.

THE LORDS inclined to prefer Vietch. But because some of the Lords in voting were *non liquet*, the business was delayed. See Sect. 8. of this Division. See ESCHREAT.

November 10. 1673.—THE LORDS having resumed the debate, and it appearing upon trial, that the common debtor Sanderfon, the time of the granting the assignation in *anno* 1662 in favours of Ker and Brown, was not only rebel, but was in effect *fallitus & lapsus*; they preferred Vietch to Pallat.

Dirleton, No 249. 255. & 296. p. 118. 123. & 145.

1709. July 9.

MARGARET DALGLISH, Lady Riccarton, against THOMAS GIBSON, Writter in Edinburgh.

THOMAS GIBSON, factor appointed by the Lords for the estate of Riccarton, having obtained a decret before the Sheriff of Edinburgh against Robert Cleghorn, one of the tenants, for his rent of the crop 1703, and in time coming, the terms of payment being first come and bygone: In November 1704 he charged and denounced thereon: In December thereafter the Lady Riccarton denounced this Robert Cleghorn, who was her debtor; and about September 1705, Mr Gibson took a disposition from him to the corns then on the ground for payment of three years rent, viz. For the crops 1703, 1704, and 1705, and by virtue thereof recovered payment.

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A landlord obtained from his tenant, a disposition for payment of arrears of rent, not falling under the hypothec, after the tenant had been denounced, by another creditor.