

1730. June 12.

ROBERTSON *against* BLAIR.

No 32.

An assignee, in particular circumstances, found not obliged to assign in prejudice of an arrestment.

MRS DALGLIESH, creditor to the Earl of Roseberry, arrested the rents of his estate in the tenants hands, as also a personal bond of his, in the hands of Alves the debtor; thereafter the same rents were arrested by Blair, another creditor, who, by decret of furthcoming, was preferred *secundo loco* on that subject; last of all, the common debtor granted assignation of Alves, his bond, for onerous causes to Robertson; the debtor in the bond raised a multiplepinding, wherein the arrester was preferred to the assignee. Robertson the assignee, whose subject was thus carried away by Mrs Dalgliesh the arrester, demanded an assignation to the arrester's debts and diligence, in order to operate his relief out of the other subject affected thereby, *sciz.* the rents of the estate in the tenants hands.—Against this demand, Blair, the second arrester of that subject, appeared for his interest; it was *pleaded* for him, That he could not be prejudged by the common debtor's assigning to Robertson.—It was *answered*, That the common debtor remained fiar of the bond, just as much after Blair's arrestment as before, the arrestment not affecting the bond; and therefore, his assignation to Robertson was valid and effectual in law, and did infer an obligation upon the catholic creditor, chusing to draw his payment out of a fund that now no longer belonged to his debtor, to assign for a total relief.—*Replied* for Blair, That the bond being affected by the preferable arrestment, was made litigious; and, therefore, still to be considered as remaining in the person of the common debtor.—THE LORDS found, That Mrs Dalgliesh was not obliged to assign to the assignee Robertson, in prejudice of Blair's arrestment. See APPENDIX.

Fol. Dic. v. 1. p. 225.

1730. November 12. JOHNSTON *against* SUITTIE.

No 33.

Whether, in particular circumstances, a party was bound to assign an inhibition upon payment.

GEORGE GORDON lent 1000 merks upon bond, conjunctly and severally to Kincaid and Suittie. Kincaid got the money, and gave Suittie a bond of relief; upon this bond, after the term of payment, diligence was done by horning and inhibition. Thereafter Kincaid, Suittie, and Johnston, conjunctly and severally, granted bond of corroboration, containing a clause, obliging the other two to relieve Johnston as their cautioner. Johnston after this, and after existence of the inhibition, lent Kincaid, the common debtor, L. 100 Sterling by an heritable bond. Last of all, the said Johnston paid the debt wherein he was cautioner, and took from Gordon, the creditor, assignation to the debt and diligence, and insisted against Suittie for relief. In this process the question occurred, Whether Johnston was bound to assign the inhibition to Suittie, upon payment.—Johnston *pleaded*, That the inhibition striking against his heritable bond, the law did not oblige him to assign against himself.—Suittie *contended*, That this rule holds not betwixt cautioners, who, seeking relief of one another,

are bound in strict law, from the nature of the contract, to assign.—THE LORDS found no necessity upon Johnston to assign the inhibition. See APPENDIX. *Fol. Dic. v. 1. p. 225.*

No 33.

1771. November 19.

WILLIAM GARDINER of Ladykirk, and JOHN CAMPBELL of Wellwood, Suspenders, against ROBERT AGNEW of Sheuchan, Charger.

MESSRS Gardiner, Campbell, and William Donald, were co-obligants in a bond for L. 1200 to Robert Agnew. Donald having become bankrupt, Gardiner, upon the 11th June 1770, went to Agnew's house at Stranraer, and having offered instantly to pay down the L. 1200 with the interest due, insisted he should accept it, and grant an assignation of the bond, to enable them to operate their relief for Donald's proportion of the debt.

Agnew at first stated objections to receiving the money between terms; yet at length said he was willing to take payment, giving up the bond with a discharge on the back, but would not grant an assignation.

Donald's effects having been carried off by other creditors, Messrs Gardiner and Campbell, upon the ground that they had been prevented from operating their relief against Donald their debtor, by the tortious act of Agnew in refusing to grant an assignation, presented a bill of suspension; which, after setting forth the *res gesta*, and that they were threatened to be charged with the whole debt, insisted that the charge should be suspended *quoad* a third.

The question having been reported to the Court,

Messrs Gardiner and Campbell, the suspenders, *pleaded*;

imo, It was now an established point in law, whatever it might have been formerly, that a creditor, upon receiving payment from one of several co-obligants, whether cautioners or principals, was bound, for their relief, to assign the debt. Principles of Equity, v. 1. p. 114. 126.; Bankton, v. 1. p. 23.; Ibid. b. 1. tit. 24. § 2.; b. 3. tit. 4. § 8.; Spottiswood's Stiles, p. 212. 249.

511.

Upon some occasions, in the last century, before the law on this point had come to maturity, it had been found that creditors were not obliged to assign. Stair, 10th July 1666, Home, No 4. p. 3347.; Fountainhall, 31st December 1697, Rae, No 12. p. 3356. Yet even then, the obligation to assign had, in some instances, been enforced; Stair, 10th January 1665, Lessly *contra* Gray, No 37. p. 2111.; 15th July 1680, Anderson, No 10. p. 3354.; 25th November 1708, Adamson *contra* Lord Balmerino, No 15. p. 3359.; 19th December 1705, Reid *contra* Man, No 23. p. 3368. In the case, Blackwood against

VOL. VIII.

19 M

No 34.
Is a creditor bound *de jure* to assign his ground of debt to a co-obligant, who, without having been called upon, before the term of payment, and in particular and unusual circumstances, tendered him payment of his bond? And is such creditor, for having refused to assign, liable in damages to the co-obligant?