

It was *replied* for Allan, to the *1st*, That neither principal nor annualrents are preserved, except in so far as they can be made effectual by diligence within the seven years, which in the present case being only an inhibition, could not affect the fund in question; and suppose the debt were preserved, yet the growing annualrents after the seven years were not due; for, though the statute excepts 'lawful diligence,' yet that was restricted to make effectual only what fell due within that time.

It was *replied* to the *2d*, That the disposition being made in security of the proper debts due to Sir George, and for relief of cautionries, and the debts due to himself far exceeding the sums disposed, he did not thereby become a proper debtor.

To the *3d* it was *replied*, That the inhibition being executed at the head burgh of the shire where the inhibited party dwelt, it was sufficient since it was registered in the public register, Lord Gray *contra* Hope, No 71. p. 3733; which holds the rather in this case, where the subject falling under inhibition was not secured by infestment in land, but by an adjudication; which is therefore to be regulated by diligence done *in domicilio* of the debtor: And though the inhibitory part relates only to one bond, yet seeing the inhibition narrates both, and bears a discharge of contracting, &c. in defraud of the complainer, anent payment making of the sums of money, &c. therein contained, it is evident, that although the letter *S* be omitted, the prohibition will extend to both bonds, which were sufficiently notified by the narrative and registration.

THE LORDS found the inhibition at Macceellan's instance secured the principal sum and annualrents due within the seven years; and found the inhibition at Allan's instance cut off the effect of the corroboration to Macceellan; and found the making over securities to Sir George Hamilton, did not make any alteration in the nature of his obligation, but that notwithstanding thereof he continued cautioner; and repelled the objection against Allan's inhibition. See INHIBITION.

Reporter, Lord Forglan. For Allan, *Ja. Boswell*. Alt. *Alex. Hay*. Clerk, *Mackenzie*.  
*Fol. Dic. v. 3. p. 246. Edgar, p. 186.*

1750. June 12.

The KING'S ADVOCATE against JAMES BLAIR and CHRISTIAN RAMSAY.

THE Earl of Northesk, 21st July 1716, granted bond to James Blair of Ard-blair, which he assigned, 18th January 1720, to Alexander Alison of Birkhill, on his back-bond, to hold the same for the use of Jean Blair, the assigner's sister, and spouse to Alexander Ramsay of Drumlochry, in life rent, and her children in fee: And Alexander Alison granted bond, 8th December 1726, declaring he had uplifted the sum and interest thereof, which he became bound

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A rebel, with a view of dis-appointing his forfeiture, and saving a sum of money to his children, discharged a bond due to him, upon

No 62. which the debtor granted a new bond payable to a third party in trust, for behoof of the forfeiting person's children. The Lords found the Crown had a right to the money.

to pay to James Blair and John Ramsay merchant in Dundee, for the use of Drumlochy's children, the Lady being then dead.

Christian Ramsay, one of the children, pursued James Blair to account for her share; who, besides insisting on some debursements made by him on her account, alleged that the money was the property of Drumlochy her father; but that he having engaged in the rebellion 1715, and been attainted therefor, had discharged, as of date 19th May 1715, a bond granted to him 11th February preceding, by the Earl of Northesk; who thereupon granted the bond pursued for: That, as she had no title to the money, which had been saved out of her father's forfeiture, otherwise than as by this contrivance the security had been conceived in her favour, she behoved to allow of payments made by James Blair to Drumlochy, subsequent to his forfeiture. THE LORD ORDINARY, 8th July 1748, "Sustained the objection against the articles of discharge claimed by the defender, in extinction of the sums in Birkhill's bond, in so far as these articles were for furnishings to, or debts of the pursuer's father; and found that the defender could not have allowance of these articles; and 19th December, adhered."

A petition being presented against this interlocutor, was intimated to the King's Advocate, who gave in a petition claiming the sum, as belonging to the King by the forfeiture of Drumlochy; whereupon he was admitted to appear in the process for his Majesty's interest; and both parties ordained to answer his petition.

*Answered* for James Blair, He cannot be liable twice for the same sum; and if the Crown evict this, it must relieve him of his obligation to Drumlochy's children: Nor can it be alleged there is no proof the Earl of Northesk's bond to them came in place of a former bond to Drumlochy; since the existence of any such bond, wherewith he is said to have intromitted, is only proved by his declaration; which must be taken entire, and bears the childrens bond to have been taken for it.

*sdly*, He is not at all debtor to the King; the Earl of Northesk got a discharge from Drumlochy, possibly when he was intending to enter into the rebellion, but of which the Earl was ignorant; and that of date prior to the term from which the rebel's deeds are annulled; and hereupon he thought himself bound to grant bond to the children: But supposing any management in this matter, and the discharge antedated, if the bond is not validly discharged, the Earl and his representatives are still liable therein; and Mr Blair has nothing to do with it: He received the sum of another bond granted to the children.

*Pleaded* for the King's Advocate; Mr Blair has acknowledged the receipt of a sum of money belonging to the King, and is therefore his debtor: And it is no matter whether he may have come under another engagement, which he cannot free himself of to the children.

*Answered* for Christian Ramsay to James Blair; There is no evidence, as against her, that the Earl of Northesk's bond came in place of a former bond to her father, which cannot be taken for granted on his allegation.

*Pleaded* for James Blair; This appears from the circumstances of the case, the date of the bond to Drumlochy, and apparent date of the discharge thereof, as narrated in Alison's back-bond, which are so near, as it must have been discharged before the term of payment, according to the ordinary course of business; the coincidence of the sums, and the second bond granted to the children of an attainted person, which cannot be presumed a gratuity from the Earl of Northesk; and he will bring further evidence.

*Answered* for Christian Ramsay, to the King's Advocate; He cannot now recover this sum by process in this Court; the estates real and personal of rebels, were vested in trustees for the use of the public, who had the sole power of inquiring into, and hearing all claims competent thereanent: Afterwards *anno* Geo. II. the estates that remained unsold were vested in the King for the use of the public: This regarded only real estates, which the trustees were empowered to sell; so that there is now no provision by law, for recovery of personal debts, though such provision might be made, if any thing of this nature should appear of consequence to deserve it.

*Pleaded* for the Advocate; Estates real and personal, are re-invested in the King: But supposing otherwise, this was a debt due to the King, when in the trustees; and would have been recovered by them as such; and on the determination of that commission, is recoverable at common law.

For Christian Ramsay; This being a personal debt ought to be sued for in Exchequer.

For the Advocate; As a competition has arisen concerning it, the Lords ought to determine the right; and then it will be recovered by process out of the Exchequer.

For James Blair; He has in him debts on the estate of Drumlochy, for which he was not satisfied out of the price; and of which he will claim payment out of what he may be found resting.

THE LORDS found, That his Majesty's Advocate was entitled to compear and claim both the debts in question, and in his petition mentioned, as due to the King for the use of the public; and found, by the said James Blair's own acknowledgment, that he was accountable for both the said debts to his Majesty; but before answer to what was insisted for on behalf of Christian Ramsay the pursuer, that James Blair should notwithstanding be found accountable to her for the contents of Mr Alison's bond, allowed the said James Blair to bring what further evidence he could, that the same was granted for the money contained in Lord Northesk's bond to Drumlochy. *See* SURROGATUM.

*Act. Lockhart.*

*Alt. R. Craigie & D. Grene.*

*Advocatus pro se.*

*Fol. Dic. v. 3. p. 246. D. Falconer, v. 2. No 136. p. 154.*

\* \* This case is also reported by Lord Kames :

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JAMES RAMSAY of Drumlochy, having joined in the rebellion 1715; for which he was attainted; and wanting to secret his effects from the public, did, in March 1716, assign to James Blair his brother-in-law, a bond for a considerable sum due by the Earl of Northesk. James Blair recovered payment 21st July 1716, and granted his discharge with absolute warrandice. The onerous cause of this discharge was a bond of the same date, and for the same sum with that mentioned in the discharge which the Earl granted to James Blair. In July 1720, James Blair assigned this bond to Alexander Alison under back-bond, declaring the assignation was granted to him in trust for behoof of James, Christian, and Margaret Ramsays, children of the said James Ramsay of Drumlochy. Alexander Alison having recovered payment *anno* 1726, granted to James Blair a bond of corroboration upon the narrative of his former back-bond to the said James Blair, for behoof of the said James, Christian, and Margaret Ramsays; and, in the year 1729, James Blair received payment of the sum from Alexander Alison.

Christian Ramsay and her husband having insisted against James Blair for her share of the sum in this trust-bond, the defence was, That the trust-bond came in place of the bond originally due by the Earl of Northesk to Ramsay of Drumlochy; that the defender had laid out the bulk of the sum for behoof of Drumlochy himself; and that he was only accountable to the pursuer for her share of the remainder. This brought to light the concealment; and appearance having been made for the Crown, his Majesty's Advocate claimed from James Blair the whole sum in the said original bond as received by him, proved by the said discharge which he granted to the Earl of Northesk with absolute warrandice.

This discovery furnished James Blair, who had no defence against the Crown's claim, an additional argument against Christian Ramsay, That the trust-bond being for the same sum that was contained in the original bond, he could not be obliged to pay the same sum both to the public and to Christian Ramsay.

Her *answer* was, That the bond taken by James Blair from the Earl of Northesk was no doubt a *surrogatum* in place of the Earl's former bond assigned to James Blair, but that James Blair having assigned this bond in trust for behoof of Drumlochy's children, without any provision or condition, their right to this sum was the same as if it had been assigned to them for onerous causes. The Earl, who was debtor, could have no defence against payment, even though he had been obliged to pay the sum in the first bond to the Crown; for security against which event, he relied upon James Blair's warrandice; and James Blair, who received the money, can be in no better situation by his transaction with the Earl; he took his hazard of the Crown; and, by his trust-assignation, he laid no part of that hazard upon the pursuer. Neither is the defence good, considered in the light of equity. James Blair concurred with Drumlochy in

crime, which was robbing the public. And if a robber, as an expiation, bestows upon the poor, or upon any person, the money he robs, the detection of his crime, which subjects him to a restitution of the money robbed, will not entitle him to a repetition of the sum he laid out upon pious uses. It was added, That if such a crime were countenanced, it would be an encouragement to concur in robbing the Crown or the public. The defence was repelled; and James Blair was decerned to pay to the pursuer and her husband her proportion of the sum in the trust-bond; notwithstanding of being liable to the public for the sum in the original bond. See SURROGATUM.

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*Sel. Dec. No 19. p. 21.*

1790. November 18. THOMAS KINNEIL *against* ALEXANDER MENZIES.

No 63.  
Sale *retenta*  
*possessione in-*  
effectual.

A TENANT of Kinneil's having become bankrupt, a sequestration of his effects was awarded by the Sheriff of the county.

Upon this, Menzies claimed the property of several articles of household-furniture found in the tenant's possession. He proved, that a sale had taken place, and that his not removing them was owing to the tenant, who was willing that they should remain where they were, as long as it might be convenient.

The Sheriff having sustained the claim, a bill of advocation was preferred, which was followed with answers.

THE LORD ORDINARY affirmed the judgment of the Sheriff, "in respect that every presumption of fraud or collusion between Menzies and the bankrupt had been removed by the evidence."

A reclaiming petition was preferred by Kinneil, which was followed with answers:

THE COURT altered the interlocutor of the Lord Ordinary, on this ground, that the agreement of sale, though *bona fide* made, had not been fulfilled by delivery, the goods sold still remaining in the possession of the seller. Erskine, book 3. tit. 3. § 6. and 7.

THE LORDS found, That the articles of household-furniture claimed by Menzies fell under the sequestration.

Ordinary, *Lord Monboddo.* Act. *Tait.* Alt. *M'Cormick.* Clerk, *Colquhoun.*  
C. *Fol. Dic. v. 3. p. 246.* *Fac. Coll. No 149. p. 298.*