

73. 1730. April 9.

AFTER hearing counsel upon the petition and appeal of William, Earl of Aberdeen, complaining of a sentence or decree of the Court of Session in Scotland, of the 30th of July 1729, made on the behalf of Alison Callender, widow of Mr John Buchanan, James Haliburton, Henry Guild, Andrew Dunnet, and William, Earl of March, and praying, 'That the same may be reversed, and that the decree of the said Court of the 2d of the said July may be affirmed.' As also upon the joint answer of the several persons above-mentioned, put into the said appeal; and due consideration had of what was offered on either side in this cause;

It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said sentence or decree of the 30th of July 1729, be, and is hereby reversed; and that the said decree of the 2d of the same month be, and is hereby revived and affirmed: And it is hereby further ordered, That the L. 1000 secured by the bond, in the appeal mentioned, and interest for the same from Martinmas 1725, be paid to the appellant.

For Earl of Aberdeen, Appellant, *C. Talbot, R. Dundas.*

For Earl of March, Alison

Callender, &c. Respondents, *P. Yorke, D. Forbes, C. Areskine.*

Journals of the House of Lords, p. 530.

1751. June 12.

GEORGE TURNBULL of Houndwood, *against* SIR JOHN STEWART of Allanbank, and MR ARCHIBALD INGLIS, Advocate.

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An assignation was found sufficiently intimated to the debtor; the assignation being contained in a deed, in which the debtor was a party.

SIR ARCHIBALD COCKBURN of Langton having become bankrupt upward of 50 years ago, his estate was put under sequestration, and a ranking ensued of his creditors, which was carried on in a slovenly manner, and the lands were never brought to sale. His son, the late Sir Alexander, while a young man, acquired considerable funds of his own, entered heir *cum beneficio*, and made it his business to pick up as many preferable debts as he could purchase at easy rates, and to take the conveyances in his son Archibald's name; for, in those days, it was reckoned hazardous to take them in his own name, as he was heir *cum beneficio*. Among other debts, there was one of L. 1000 Sterling due to John Wardlaw, by heritable bond and investment, which Sir Alexander acquired, and took the conveyance as usual in the name of his son Archibald.

In the latter end of his life, Sir Alexander came to decline in his circumstances; and as he had laid out his whole stock upon purchasing preferable debts, he had no fund for satisfying his proper creditors, but by assigning to them debts, or parcels of debts purchased by him. Being pressed about the year 1723, by the Society for Propagating Christian Knowledge, he assigned to that Society several preferable debts upon the estate of Langton, settled as aforesaid in his

son Archibald's person; and, among others, the debt originally due to John Wardlaw. But, as the Society had sufficient security *aliunde*, the interest due upon Wardlaw's debt preceeding Martinmas 1723, was held by the society in trust for Sir Alexander and Archibald Cockburns.

George Turnbull of Houndwood came to be engaged for the family of Langton, in debts above L. 700 Sterling; and for his relief got an assignment of the said bygone interest of Wardlaw's bond. The deed is executed in the following manner: Sir Alexander and his son Archibald bind themselves, conjunctly and severally, to relieve Turnbull of his several engagements for them; and, for his relief, Archibald assigns to him the said bygone interest. This transaction was in the year 1730; and in April 1732 the society retroceded Sir Alexander to the said bygone interest, by granting a conveyance in the name of his son Archibald.

Notwithstanding this assignment, Sir Alexander and Archibald, pressed with diligence by Patrick Crawford merchant in Edinburgh, ventured to do an unwarrantable act, which was to assign a second time this very bygone interest to Patrick Crawford for his security. The assignment bears date the 18th May 1732, subscribed by Archibald, who was nominally in the right.

These several claims being produced in the ranking of the Creditors of Langton, preference was claimed by Sir John and Sir James Stewarts, and Mr Archibald Inglis, who had acquired right to Patrick Crawford's claim, upon the following ground; that though the assignment to Turnbull was prior in date, yet, that their assignment was first intimated and compleated, viz. by a pointing of the ground, being the only step which could be taken to compleat their right, seeing the assignment to the bygone interest of the heritable bond is not capable of infestment.—Turnbull, on the other hand, *contended*, That he had the first compleated right to this bygone interest, seeing his assignment was sufficiently intimated to the debtor, Sir Alexander Cockburn, who is one of the granters of that very deed in which the assignment is contained, and likewise tenant and possessor of the lands out of which the said interest is to be levied, and which therefore was as full an intimation to him as any formal intimation can be by a notary and two witnesses.

Turnbull, to clear his preference, applied himself to make out two propositions: *1mo*, That the deed in his favours is equivalent to an intimation; and *2do*, That an intimation in this case, as well as in the common case of an assignment to a personal bond, compleats the conveyance, and puts it out of the power of the cedent to grant a second assignment.

With respect to the *first* point, it was premised, that Sir Alexander was entered heir to his father Sir Archibald, consequently came to be liable personally to the debt in question due by Sir Archibald to Wardlaw. It is true, he entered *cum beneficio*; but this makes no difference; for an heir *cum beneficio* is universally liable for his predecessor's debts, and may be decerned accordingly: only he has a privilege, if he please to use it, which protects his person and proper estate

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With regard to the *second* point, the difficulty was, that it is not by intimation to the debtor that the preference of real rights is to be determined, but by infestment, where the subject is capable of it, or by real execution of poinding the ground where there can be no infestment, as in the present case. In answer to this difficulty, it was *observed*, That, in transmitting rights, there are different forms used in order to compleat the transmission: Intimation to the debtor makes a compleat transmission in personal rights: In real rights passing by infestment, the real right is not vested in the assignee till he take infestment. The subject under consideration, viz. the bygone interest of an heritable bond, is of a middle nature: The subject is not conveyable by infestment, and though a moveable subject, it is notwithstanding secured upon land. The question is, What is the proper form for compleating the transmission of such a right? This question admits of an easy solution, by putting a plain case: A creditor infest upon an heritable bond makes a conveyance of the bygone interest, and the assignment is intimated to the debtor who enters upon payment; will not the debtor be secure, so far as he pays, to afford him a defence against a second assignee, who has a process of poinding the ground? There seems to be no doubt, unless we maintain this absurd proposition, that an assignee to such interest cannot claim payment by a personal action, nor even take voluntary payment, but must in all cases raise a poinding of the ground. And there seems to be as little doubt of the conse-

quence, that the assignee's right must be fully established by the personal intimation, otherways the payment made to him will not be available ; for it is a general rule, that wherever an assignee is in such a situation as to be able to force payment from the debtor by a personal action, the transmission must be compleat in his person. It was further observed for Turnbull, that in this view of the matter, the very point urged for his parties pleads for him. They insist upon a poinding of the ground as the only proper step for compleating the conveyance. Now, in a poinding the ground, the debtor is the principal person called : the conclusion being, ' That because of his failure of payment, the goods that belong to him upon the ground, and his tenants goods, to the extent of the rent, should be poinded for payment ; and so far as these are not sufficient, that the ground-right and property itself should be poinded and apprised.' From the nature of this execution, it is evident, that there is an order of discussion, *imo*, That the debtor should pay : *2do*, Failing of his payment, that his goods and his tenants rents should be made liable : And *last* of all, that the land should be made liable. It follows then, that real diligence against the land cannot proceed properly till the debtor's moveables be discussed ; and as this is the last step in the order of execution, it must be the personal intimation that compleats the transmission, and entitles the assignee, *first*, to demand payment from the debtor by a personal action ; *then* to poind his moveables just as in common poindings ; and *last* of all, to poind and apprise his land. And, at bottom, this execution upon real debts does not vary from the common execution upon personal debts, except in the following particular, that a clause of registration, which is a sufficient foundation for other execution without a process, has not been reckoned sufficient for a poinding of the ground, which makes a process necessary to authorize that execution.

Found, That the assignment to Turnbull, being contained in the same deed with the obligation granted by Sir Alexander and Archibald Cockburns to him, was thereby sufficiently notified to Sir Alexander, and made a formal intimation unnecessary ; and therefore Turnbull was preferred.'

Fol. Dic. v. 3. p. 46. Rem. Dec. v. 2. No. 124. p. 260.

D. Falconer reports the same case thus :

1751. *June 25.*—ALEXANDER INGLIS of Murdifton having right to an infeftment of annualrent effeiring to 18000 merks Scots, out of the estate of Langton, granted 1690, by Sir Archibald Cockburn of Langton ; and Alexander his eldest son, conveyed the same, 1720, to Mr Archibald Cockburn advocate, son to Sir Alexander Cockburn of Langton ; and he, 1723, disposed it, with the bygone annualrents, to the Society for Propagating Christian Knowledge : They, 20th April 1732, redispensed to Mr Archibald the annualrents preceding their purchase, on condition that he should not compete with them, but they should be preferable for the annualrents afterwards falling due ; and Sir Alexander and Archibald Cockburns, 18th May 1732, disposed these bygones to Patrick Crawford of Auchinames.

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Sir Alexander Cockburn was served heir, with the benefit of inventory, in the estate of Langton, to his predecessors, granters of the heritable bond; but never took possession thereof on that title, the estate having been sequestrate, and set to Sir James Stewart of Goodtrees, Sir Robert Stewart of Allanbank, and John Inglis of Auchindinny; and by them subfet to him.

Patrick Crawford, October 1736, attempting to poind Sir Alexander's effects on the estate of Langton, was stopt by the principal tackmen on their hypothec; and having pursued them in an action of deforcement, upon what appeared in that process, obtained them made liable in the debt: Whereupon he, 25th July 1738, assigned to them the bygone annualrents in his person; and they, 1739, obtained decret of poinding the ground, and raised letters to that effect, which they produced as their title of competition, in a ranking of the creditors on the estate of Langton.

Sir Alexander Cockburn and Mr Archibald his son granted bond, 6th July 1730, to George Turnbull of Houndwood, wherein Archibald, narrating that these bygone annualrents were then in the Society for his use, assigned them to him; and Houndwood claimed preference on this title, as his assignation was made good by the subsequent retrocession of the Society to his authors.

Pleaded for Houndwood, bygone annualrents are a personal, not a real right, though there is a real action for making them effectual; and thereupon it was found, 15th June 1750, Scot against Coutts,* in the competition upon this same estate, that they could not be secured by inhibition: For this reason they are carried in the manner of personal rights, not by infestment, but assignation and intimation: A poinding of the ground might be good, considered as an intimation, for the debtor heritor of the ground is called; but here Houndwood's assignation was first intimate, being granted in a deed, wherein Sir Alexander Cockburn, the heir in the estate, was a party, who also possessed as tackfman: Poinding was improper in this case, the estate being sequestrated.

Pleaded for Mr Crawford, The assignation was null, being made when the right was not in the cedent's person; and the maxim that supervening rights accrue to a disponee holding in real not personal rights: Intimation cannot complete an assignation to annualrents, which are to be raised out of the ground, not paid by a debtor; or, if it could, there was in this case no debtor to whom intimation could be made, Sir Alexander having been served heir with the benefit of inventory, and debarred from possession by the sequestration: As infestment could not be taken, the only way to complete the assignation was by obtaining possession upon it, which was done by the decret of poinding the ground; and though, the estate being sequestrate, execution could not be done upon it, yet being produced in the competition, it ought to be sustained as an act of apprehending possession, sufficient to found a preference.

THE LORDS, 12th June, found that Mr Archibald Cockburn's assignation to Houndwood, being contained in the same deed with the bond granted by Sir Alexander Cockburn, his father, and him to Houndwood, this was a sufficient in-

* D. Falconer, v. 2. p. 161. see INHIBITION.

timation to Sir Alexander Cockburn, debtor in the annualrents in question; and therefore, and in respect of the priority of the said assignation, preferred Houndwood: And this day refused a bill, and adhered.

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For Houndwood, *H. Home.*Alt. *R. Craigie & R. Dundas.*
Clerk, *Justice.*Reporter, *Drummore.**D. Falconer, v. 2. No 211. p. 253.*1776. *January 18.*ELIZABETH and JANET DICKSONS, *against* GEORGE TROTTER.

THE LORD ORDINARY having assilzied the debtor, in a bond that was assigned, from an action brought at the instance of the assignee, the pursuer reclaimed, and prayed the Court either to find the defender, in respect of his being in the knowledge of the assignation to the pursuer, liable in the contents of the bond; or, at least, to allow a proof of that knowledge by the oaths of two persons named.

THE LORDS 'adhered to the Lord Ordinary's judgment.'

Fol. Dic. v. 3. p. 47. Wallace, No 213. p. 163.

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The debtor's private knowledge is not equivalent to an intimation, nor is parole evidence competent for proving such knowledge.

For assignation to Mails and Duties, and many other cases regarding assignations,
See COMPETITION.

For cases where the cedent had granted a gratuitous discharge after assignation, and other cases, in which assignation is connected with Bankruptcy,
See BANKRUPT.

For cases of *bona-vel mala fide* payment to the cedent, *See Bona fide* payment.
See Bona et mala fides.

Whether *bona fides* of the assignee, defends against the fraud of the cedent.
See Bona et mala fides.

Effect of Assignation upon Cautioners. *See* CAUTIONER.

Effect of Compensation and Retention upon Assignees.
See COMPENSATION and RETENTION.

In what cases Creditors bound to assign upon payment.
See DEBTOR and CREDITOR. *See Beneficium cedendarum actionum.*

Diligence preftable by assignees in Security. *See* DILIGENCE.