

No 30.

l. 15. ff. De dolo; and there can be no distinction, whether the tutor's fraud consisted in making payment *mala fide*, or in any other instance.

THE LORDS found the defender liable for the principal sum, interest, and penalty, and also in the expence of extracting the decret.

Reporter, *Auchinleck.*Aft. *Lockhart.*Alt. *Rae, Burnett, Ferguson.*

Fol. Dic. v. 3. p. 97. Fac. Col. No 139. p. 253.

1759. *February 27.*

ALEXANDER HAMILTON and JOHN PUGET, voluntary assignees of Captain
ALEXANDER WILSON, *against* JOHN EARL OF ROTHES.

No 31.

Bona fide payments made by the debtor, in a bond granted in the English form, found good against an assignee who had not intimated his right.

Assignment does not, by the law of England, require intimation.

THE Earl of Rothes became debtor to Captain Wilson to the amount of L. 8840, for which he granted four bonds in the English form; the last of which was dated 2d May 1746. The interest of these bonds was paid up to Ladyday 1750.

In August 1750, Captain Wilson found it necessary to draw bills upon Lord Rothes: and, at the desire of Lord Rothes, in order to enable him to answer these draughts, he furnished a credit to redraw for the money. This practice was continued from 1750 to 17th January 1751; and the result was, that Mr Wilson drew for L. 5000 and upwards more than the amount of the Earl's redraughts upon him.

During the course of these transactions, Captain Wilson, upon the 12th September 1750, assigned over two of the bonds to Alexander Hamilton, for the Sun Fire-office; and upon the 12th of February 1751, he assigned over another of the bonds to John Puget, merchant. Both these assignments were granted for valuable considerations; but none of them were intimated till after Captain Wilson's bankruptcy, and till after Lord Rothes had accepted the several draughts in question.

Upon the 14th February 1751, he drew certain bills in favour of Innes and Clerk, which they indorsed to Adam Fairholm. Lord Rothes refused to accept these bills; and they were regularly protested.

Upon the 15th February 1751, Captain Wilson became bankrupt; and from that period his estate became vested in legal assignees under his commission of bankruptcy.

A competition arose with respect to the debt due by the Earl of Rothes to the bankrupt, between the voluntary assignees, the legal assignees, and Adam Fairholm. In this competition the Court preferred the voluntary assignees *primo loco*, Mr Fairholm *secundo loco*, and the legal assignees *tertio loco*.

In ascertaining the balance due by Lord Rothes, this question occurred, Whether Lord Rothes could take credit, in a question with Captain Wilson's assignees, for the payments he had made in consequence of Captain Wilson's draughts upon him, so as to diminish the sums contained in the bonds assigned? or, Whether, on the other hand, as assignments by the law of England do not require to be intimated, the assignees were entitled to demand the full sums in the bonds without regard to these payments?

It was *argued* for Lord Rothes, That if the question was to be determined by the law of Scotland, there could be no doubt of sustaining the defence, because payment made by a debtor, before intimation, is good against an assignee; but that even by the law of England *bona fide* payment, before knowledge of the assignment, is good against the assignee. By the law of England, a bond being a *chose en action*, is not assignable, so as to enable the assignee to sue at common law, in his own name; yet he has, by the assignment, such a title to the paper and wax, that he may keep and cancel it. The assignee therefore must, at common law, bring his action in the name of the obligee or cedent; and in such a case it would be competent to the debtor to plead every defence that was competent to him against the original creditor. It is true, that the assignee is permitted to sue, in equity, in his own name; but certainly no court of equity would allow a debtor, who had *bona fide* made payment to the cedent, to be subjected to a second payment. These principles are established by the authority of Bacon's abridgment, *voce* ASSIGNMENT: "In equity a bond is assignable for a valuable consideration paid, and the assignee alone becomes entitled to the money; so that if the obligor, (*i. e.* debtor), after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again; but payment to the obligee, without notice of the assignment, is good."—"An assignee must take it subject to the same equity that it was subject to in the hands of the obligee."

Answered, By the law of England, it is the assignment of the bond itself which carries right to the sums due by such bond, without necessity of intimation; and therefore, every debtor who means to act securely, when he pays money to account of a particular bond, takes care to have the payment receipted on the back of the bond; nor can any debtor be compelled to pay his bond, without getting it up, or having his partial payments marked on the back of it. But whatever may be the case with respect to payments actually made to account of these bonds, though not marked on the back, it is a different question, Whether Captain Wilson's draughts on the Earl in favour of third parties can be deemed payment of these bonds in prejudice of the assignees? Nothing of this kind is expressed in the bills themselves. They do not bear to be to account of these bonds; and, in fact, it was intended to carry on a practice of drawing and redrawing, and not to make payment of the bonds. The Earl, by accepting and paying more bills than he redrew for, became creditor to Captain

No 31.

Wilson in the contents; and though, in accounting with Captain Wilson himself, he might be entitled, *ex æquitate*, to set off the one against the other; yet that plea of equity cannot operate in a question with the assignees, the purchasers of these bonds, for a valuable consideration.

THE LORDS found, That the Earl of Rothes is entitled to an allowance out of the sums contained in his bonds, of the payments made by him in consequence of Captain Wilson's draughts.

A&t. *Lockhart, Ferguson.*

Alt. *Arch. Murray, Ro. Dundas.*

W. Johnston

Fol. Dic. v. 3. p. 97. Fac. Col. No 177. p. 315.

See APPENDIX.