

signation thereto, and, conform to the same, intromitted; and so ought not to pay any of her debts. Which allegiance was repelled; seeing the assignation made by Sir James Fullarton was confessed to have been made before the lady's decease, and it was made to a conjunct person, *viz.* to her own son; notwithstanding whereof the lady still retained possession, during her lifetime, to the time of her decease, at which time the Earl her son intromitted; and so, in respect of the Act of Parliament 1592, the gift is null, in prejudice of the creditors, as this pursuer is; which reply the Lords sustained.

Gibson, *Clerk.* *Vid.* 17th July 1635, Lord Johnston.

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1635. July 22. The LAIRD of RENTON *against* The LAIRD of WEDDERBURN.

THE L. Renton, being made assignee by one Heriot, to a contract betwixt Heriot and the L. of Wedderburn, whereby he made to Heriot an heritable feu of an husband-land in ———, for payment of the feu-duty therein contained, and bearing no other clause obligatory upon the part of the feuar; upon which contract there was a charter subscribed to Heriot, bearing some clauses different from the tenor of the contract, as a clause irritant to amit the feu if the feu-duty should not be paid two years together, and that the feuar should compare in the Laird's courts, &c.; and upon the charter Heriot being infeft and seised, and by virtue thereof, since the date thereof, ten years in possession of the land,—thereafter Heriot makes the Laird of Renton assignee to the contract, who charges Wedderburn to give him, as assignee, infeftment of the land, conform to the tenor and clause of the contract; alleging that the charter subscribed and given to his cedent was different from the tenor of the contract, and therefore he ought to give him another charter agreeing with the contract: Who alleging that such summary charges ought not to be sustained at the assignee's instance, seeing there was an heritable infeftment and sasine expedite upon the contract, which, being a real security, could not be transmitted by a simple assignation, to produce such summary charges; but if any difference was therein from the contract, the assignee ought to pursue by way of action and ordinary pursuit therefore, to hear it be found that the contract was not fulfilled, or by any other pursuit which he might best move in law thereanent; but it ought not to be sustained, after this manner, by charges upon an assignation:—This allegiance was repelled, and the order and charges were sustained, without necessity of any other action to be made thereanent. And because Wedderburn alleged that the cedent, having accepted a charter from him, whereupon he was seised ten years since, and bruiked it, and possessed the lands ever since, conform thereto; so that this being done, *inter majores prudentes et scientes et tacentes*, and wherewith he acquiesced, therefore it ought not to be permitted to an assignee to charge for any other charter than for that which was accepted by the cedent, as said is, albeit it be of a tenor different from the contract;—the Lords, before they decided this allegiance, found that they would examine the cedent, who was a mean, simple, ignorant man, who could neither read nor write, and the notary, writer of the charter, who was also notary to the sasine, and the witnesses inserted therein,—to try if the charter, at the delivery thereof

to the cedent, was read to him, and if he knew the contents thereof and was acquainted with the clauses which differ from the contract, and rested content therewith; or if he was any ways ignorant thereof, and the clauses kept obscure from him.

*Act.* Advocatus. *Alt.* Stuart. Gibson, *Clerk.* *Vid.* for the first part of this decision, 15th July 1642, La. Garleis; and 21st March 1635, Lo. Yester.

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1635. *December 12.* JOHN SEATON *against* JAMES CLERK.

By contract betwixt John Seaton of Achorty and Mr Robert Udney, it is provided that neither of the parties shall take any right of the teinds of the other party's lands; and if any does, that the same shall accresce and belong to the other party, his heirs and successors to his lands:—after which contract, the said Mr Robert Udney, then heritor of the lands of Tullichortie, dispones these lands to Mr William Barclay, who thereafter dispones the same to Mr James Clerk, defender, in this action of spuilie, and who is convened for spuiliation of the teind-sheaves of the said lands of Tullichortie, so acquired by progress from the said Mr Robert Udney;—the said Mr Robert, the time of the alienation, being tacksman of the teind-sheaves, as also he was heritor of the lands disponed; but neither having disponed his right of the teinds to the said Mr William Barclay, to whom he sold the lands, nor having made him assignee to that clause of the contract made before, as said is, betwixt him and the said John Seaton, providing therein that neither of them should take the right of the other's teinds of their lands, and, if they did, that the right should forefault to the other party; and the said Mr Robert Udney, after the alienation of the lands to Barclay, having made this Seaton, pursuer, assignee to his right of the teinds of the said lands so disponed by him, as said is, before which, Seaton, having also acquired new tacks thereof from the E. Marischal, and by virtue thereof pursuing spuilie against the defender; and he defending with the clause foresaid of the contract, alleging him to be successor to Mr Robert Udney in the said lands; and the clause being conceived in favours of his successors, *per expressum*, it must accresce and be profitable to him, and must liberate him from spuilie. The Lords repelled this allegiance, and sustained the action of spuilie, in respect the defender nor his authors was not made assignee by Mr Robert Udney to that clause of the contract, the time when the heritable right of the lands was disponed; for, as Mr Robert Udney, who disponed the land, might have pursued the defender, or Barclay his author, for the teinds thereof, so might the pursuer his assignee to his right:—likeas they found that the said Mr Robert might discharge that clause of the contract to the pursuer, notwithstanding that he had sold the land before that discharge to the excipient's author; by the which preceding alienation of the land, the defender alleged that he was in his place as successor in the lands to him, and so alleged that he could do nothing thereafter to his prejudice, in respect of the clause foresaid;—which the Lords repelled, as said is, seeing he was not made assignee to that clause, nor to no right of the teind which he then had; and the action of spuilie was sustained.

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