

1697. July 8. MARGARET CALANDER *against* MARY RUSSEL.

No 171.

MARGARET CALANDER, relict of James Russel, merchant in Stirling, pursues Mary Russel, his only daughter and heir, for paying her annuity of 600 merks, contained in her contract of marriage. *Alleged*, She is more than satisfied by her intromission with the moveables. *Answered*, Her intromission therewith being by virtue of a singular title, viz. as universal legatrix nominated, it can never be ascribed in payment of her jointure, the obligation whereof is heritable, and must affect the heir; likewise, she is provided to a part of the conquest, so she will apply her intromission with the moveables to her share of the conquest *primo loco*. *Replied*, Though the obligation for the jointure be heritable *quoad creditorem*, yet it is moveable as to the debtor, and will *primo loco* affect the executry; and the clause of conquest can take no place till the debts be paid; but *ita est* her obligation for a jointure is a debt. THE LORDS sustained the defence, and found the moveables liable *primo loco* for implement of her contract, and that her intromission therewith did satisfy the same *pro tanto*, seeing *debitor non præsimitur donare*; though the obligation for her jointure had *tractum futuri temporis*, and so it was contended ought only to affect the heir, because rights of that nature do properly accresce to heirs.

Fol. Dic. v. 2. p. 148. Fountainhall, v. 1. p. 783.

1706. July 24. WEMYSS and WHITE *against* MURRAY.

No 172.

A PERSON having given a disposition *mortis causa* of her wearing clothes to her aunt (who was also her creditor) that had attended her during her sickness, and at the bearing of her children; the LORDS found, that this was not to be considered as payment or satisfaction, but as a mere donative.

Fol. Dic. v. 2. p. 148. Forbes.

* * This case is No 42. p. 912. *voce* BANKRUPT.

S E C T. VIII.

Rights taken in name of Third Parties not delivered.

1672. February 1. SIR JAMES COCKBURN *against* The LAIRD of CRAIGIVAR.

No 173.

SIR JAMES COCKBURN, as assignee by Bailie Mercer, having charged the Laird of Craigivar to make payment of a sum due by bond, he suspends on this rea-

An assignation taken and intimated

No 173.
 in a third party's name, without his knowledge, and where the assignation remained with the granter, was found not a conveyance to the third party, because he was not creditor to the cedent; and therefore his name was presumed to be borrowed only for the cedent's behoof.

son, that he did compece the sum charged for with a sum due by Bailie Mercer, the cedent, to Sir George Gordon of Haddo, and by Sir George assigned to Craigivar, and the assignation intimated to Bailie Mercer before the intimation of Cockburn's assignation. It was *answered*, That the reason of compensation ought to be repelled, because albeit there be produced an assignation in the name of Craigivar, and intimation thereon before Cockburn's intimation, neither was the intimation made by Craigivar's warrant, nor did Craigivar accept the same; but all that was done was a contrivance betwixt Sir George Gordon and Mr David Thoires, who only got delivery of the assignation, and made the intimation without warrant, and without knowlege of Craigivar, to whom no right of assignation could be acquired in that way, but was dependent till he accepted the same, especially seeing that both Craigivar's assignation and intimation were posterior to the assignation made to Cockburn. It was *answered* for Craigivar; *imo*, That albeit Mr David Thoires had without his knowledge or warrant taken right and assignation to Haddo's bond, and intimated the same, yet this being taken by him as *negotiorum gestor*, the right is thereby acquired to Craigivar for whom he acted; and the delivery to Mr David Thoires, as *negotiorum gestor*, is as sufficient as if it had been delivered to Craigivar immediately; *2do*, Craigivar may justly deny, that the delivery was made to Mr David Thoires without warrant, for he had special warrant from Craigivar to transact with Haddo for the same debt before Cockburn's assignation; and, accordingly, he did transact and receive the assignation, and made intimation; and it is an undoubted ground in our law, that *ignorantibus jura acquiruntur*, neither is there any dependence upon the acceptance, but *ipso facto* that the right is complete, and delivered for a party's use, either to a mandatar, or to a negotiator, right is acquired to that party *instante*, albeit *ex post facto* he may reject the same. It was *replied*, That this was but a fraudulent contrivance to prefer one creditor to another, whereby he anticipates the other creditor whose assignation was prior; and Craigivar had no interest, seeing he behoved to pay the sum, either to Cockburn or Haddo. It was *duplicated*, That suppose a creditor should so endeavour his own preference by preventing the intimation of another creditor's assignation, yet this were not *dolus malus* but allowable, as in the case of creditors using all diligence to prefer themselves; and if Haddo had gotten a second assignation, though he had known of the first, yet knowing it was not perfected by intimation, he might by diligence prevent it, and first intimate, and so be preferred; so in this case he might grant assignation to Craigivar, and deliver and intimate the same to a third party to his behoof; and though thereby he put himself upon Craigivar's mercy, and trust whether he would pay him or not; yet as to Craigivar, the right was unquestionably acquired.

THE LORDS found this answer made to the reason of compensation relevant to be proved by Craigivar and Mr David Thoires their oaths, viz. that Craigivar gave no warrant to Mr David Thoires to transact with Haddo for acquiring this

assignation before Cockburn's right; or if he did, that Mr David Thoires did not get delivery of Haddo's assignation before Cockburn's intimation. No 173.

Fol. Dic. v. 2. p. 148. Stair, v. 2. p. 56.

* * * Gosford reports this case :

COCKBURN, as assignee made by Bailie Mercer to a bond of Craigivar's of 4000 merks, having charged thereupon, Craigivar did suspend on this reason, That before the charger had intimated his assignation, he had obtained from the Laird of Haddo an assignation to a bond of Bailie Mercer's for the sum of 3000 merks, which he had likewise intimated before the charger had made any intimation to him of his assignation. It was *answered*, That any assignation made by Haddo to the suspender was without his knowledge, as likewise the intimation thereof, and was a contrivance betwixt Haddo and Mr David Thoires, who was his advocate, of purpose to prefer Haddo to Cockburn, Bailie Mercer being *lapsus bonis*, so that Craigivar knowing nothing thereof, it did not liberate him from being debtor to Bailie Mercer, and so he might make a valid assignation to the charger. It was *replied*, That in law, *quilibet potest acquirere alteri etiam ignoranti vel absenti*; and so the assignation being delivered to Mr David Thoires, in name of Craigivar, and intimated, was a valid right, whereof he might now make use.

THE LORDS did repel the reason of suspension, and found, that unless Mr David Thoires had a special mandate whereby he might oblige Craigivar to accept of the assignation; and that, unless he had known and accepted thereof, by giving warrant to intimate the same, he could not thereafter make use thereof to the prejudice of Cockburn, who had done diligence by intimation before his knowledge, seeing that were to put it in his power who is debtor, to prefer one creditor to another, notwithstanding of the first diligence; and that, until he had accepted of Haddo's assignation, and become debtor to him, he was never liberated from the common debtor. Thereafter, it was offered to be proved by Craigivar's oath, and Mr David Thoires', that he had given a special mandate to procure an assignation from Haddo, and to intimate the same before Cockburn did intimate his right, which was sufficient to extinguish Craigivar's debt to Bailie Mercer, and to make him debtor to Haddo; which the LORDS did sustain, albeit it was alleged, that it was only probable *scripto*, that Craigivar did agree thereto, seeing that were to prove Craigivar's allegiance by his own oath, which was hard.

Gosford, MS. No 455. p. 236.

1677. July 12.

BAYNE against M'MILLAN.

MR JOHN BAYNE having charged Alexander M'Millan for payment of two bonds, he suspends on this reason, that he never borrowed any money from Mr

No 174.
Delivery of a
bond not ne-
cessary to
make it effec-