

it to whom he pleased; and that it was to be performed to the assignee in the same case as to the cedent, without any entry, seeing the cedent was never infest.

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Fol. Dic. v. 2. p. 76. Stair, v. 2. p. 163. & 246.

* * * Gosford reports this case :

1673. *January 29.*—DAVID KINLOCH of Bandoch being obliged, by a bond, to obtain from his father a sufficient infestment of the mill and mill-lands of Aberbrothick, to be holden feu of himself, to Andrew Wadder and his heirs, and to enter them for payment of L. 20 Scots; whereupon being charged, and suspension raised, compearance was made for Mr James Ogilvie of Clunie, who had obtained assignation from Andrew Wadder, and craves that the disposition may be granted to him and his heirs, in place of his cedent. It was *alleged* for the suspender, That he being obliged to infest Wadder and his heirs, without mentioning his assignees, that he was not obliged to grant a right to him, seeing his minute and bond being in favour of a new vassal and his heirs, there was *electio personæ et familiæ*; and it was not in the power of the new person chosen to be the vassal to obtrude upon the superior another, specially this Ogilvie, who was of greater quality, and with whom Bandoch had several pleas and lawburrows standing against him; *2do*, If Wadder was infest, which he was willing to grant, upon his resignation, he was not obliged to infest Ogilvie, or any other, unless he were charged upon a comprising or adjudication, *quo casu*, he would get an year's duty. It was *answered* for Ogilvie, That, albeit infestment were passed, the superior was not obliged to accept a resignation in favour of another; yet, so long as the bond to grant infestment remained a personal bond, it might be assigned or comprised.—THE LORDS did, notwithstanding, find the letters orderly proceeded; which was hard.

Gosford, MS. No 564. p. 305.

1674. *December 3.* COCKBURN *against* The LORD SINCLAIR.

THE Lord Sinclair having married his daughter to the Laird of Harmiston, did, in a contract of marriage, dispone the whole estate, with burden of his debt, and did retain only for his aliment 8000 merks yearly, and that he might have the less trouble by arrestments of creditors, Harmiston gave bond to Pilton, for paying him 8000 merks yearly, during the Lord Sinclair's life. Thereafter Pilton obtained a gift of Exchequer of Harmiston's escheat and liferent, and gave a backbond, bearing, that, after the debt of the horning, and expenses of the gift, the benefit thereof should be applied, in the first place, for payment of this annuity of 8000 merks yearly. Thereafter there is a gift of escheat of the Lord Sinclair, granted to Mr George Gibson, who gave a back-

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An aliment granted by the king was found not affectable by the grantee's creditors, though bestowed *ex pietate* only, and not for services.

bond for applying the same for the payment of several creditors, and after them, for my Lord Sinclair's aliment. The Lord Sinclair's estate, now belonging to Harmiston, being affected with many diligences, there was a double poinding raised, and a decret of preference thereupon, preferring Pilton, as donatar to Harmiston's liferent for 8000 merks yearly, during Sinclair's life, conform to Harmiston's bond to Pilton, and Pilton's backbond to the Exchequer. And now the estate being farmed, and several creditors having arrested that were not in the first double poinding, the tacksmen and their cautioners gave in a bill of suspension upon double poinding.—THE LORDS ordered the cause to be heard in their presence upon the bill.—The creditors had arrested in the tacksman's hand, *in anno 1664*; and did now *allege*, That the bond of 8000 merks, granted by Harmiston to Pilton, was to the Lord Sinclair's behoof, as appears by Pilton's oath, produced in a former process, and so being the same case as if it were granted to Sinclair himself, his creditors arresting would exclude him; *2do*, The bond is null, as being fraudulent, contrary to the act of Parliament 1621, anent bankrupts; for these creditors being anterior to the disposition made by the Lord Sinclair to Harmiston of his whole estate, by which he became insolvent, this was a fraudulent conveyance, to take a bond from Harmiston to Pilton, for the use of the Lord Sinclair, to hinder access to Sinclair's creditors, wherein Pilton was partaker of the fraud; and this bond being either declared null or fraudulent, Pilton's gift, founded thereupon as to the preference, will fall in consequence; or it being clearly in trust, in Pilton's person, to the behoof of Sinclair, it must be presumed, that Pilton, taking the gift of Harmiston's escheat, was a continuance of that trust; so that, if the gift were in Sinclair's name, the creditors would be preferred. It was *answered* for Pilton, That he denied any such trust; but that, albeit it had been in trust to Sinclair's behoof, there was no fraud; for the Lord Sinclair having disposed to Harmiston an estate of 28,000 merks by year, with burden of his debt, which exceeded not 50,000 merks, he had prejudged no creditor, and might fairly have taken a bond from Harmiston for his aliment of 8000 merks yearly, which was no more than proportionable to his quality and estate, and the putting of it in the name of another was to the prejudice of no creditor who had access against his estate, yea, and against his person, but it only saved him the trouble of arrestments as he expected; so that there being no fraud, albeit the bond had been to Sinclair's behoof *ab initio*, Pilton might very fairly according to that trust, expend sums for Sinclair's aliment, which being done before any diligence of Sinclair's creditors against Pilton, the bond became onerous, and in so far no trust, but Pilton's proper interest; for that which is to the behoof of another *ab initio*, may and often doth cease to become trust, and becomes the proper right of the person once in trust; for such rights are ever sustained for all debts due to the intrusted person, who cannot affect a right standing already in his person, and therefore, the trust is always held as effectual as any diligence he could do to affect the same in another per-

son. *2do*, That which here is in question, is Harmiston's rent, which falls within his liferent-escheat, whereunto Pilton is donatar upon this very account to secure himself, that he might without hazard, employ the sum for Sinclair's aliment, which gift is declared before any arrestment. And as the King might freely gift the liferent, excluding creditors who had not done diligence *in cursu*, so he had given it to Pilton for securing this bond, as appears by Pilton's back-bond; and albeit it could be presumed that the gift was also to Sinclair's behoof, yea though it had been given in Sinclair's name, it being an aliment granted by the King, would not be affected with Sinclair's creditors, much less could Pilton be called in question when he had expended the same.

THE LORDS preferred Pilton upon his gift against these creditors, as they had done against the other creditors in the former decret of preference.

Fol. Dic. v. 2. p. 77. Stair, v. 2. p. 288.

1676. December 22.

DICK against DICK.

DICK of Grange, arrests a sum of £. 100 Sterling yearly, granted by the King in favour of Sir Andrew Dick, his Lady and children, and pursues to make forthcoming; it was *alleged* for the Lady and Children, That this being a free donation, granted by the King out of compassion, and upon a supplication, bearing, to prevent the perishing of this Lady and family, it is an aliment granted to a wife, not by her husband's means, and, therefore, can be affected by none of his debts and deeds, and falls not under his escheat, nor *jus mariti*. It was *answered, imo*, That alimentary donations are never presumed but when they are so expressly granted, and are necessary for the maintenance and subsistence of the party; but this donation of the King is not upon these terms, but proceeds upon the husband's means, because he opposed not the reduction at the King's instance, of the Earl of Morton's right of Orkney, whereupon there were 80,000 merks due to Sir Andrew; *2do*, Though this donation were alimentary, and thereby had a privilege, yet it cannot defend against this pursuer, whose bonds are granted for furnishing to the family, which, therefore, being alike privileged, *et privilegiatus contra privilegiatum non utitur privilegio*. It was *replied*, That alimentary provisions not being affected with their debt, is not by any privilege, but by the nature of the right, which being granted for the necessaries of life, can be applied to no other use but for the current provision, and not for the provision of anterior years; and the formality of stile is not to be regarded in the King's donations, where the substantial requisites are clear, as in this case, where the gift is not granted to Sir Andrew Dick, but to his wife and children, to prevent their perishing; nor is it by the husband's means, the right of Orkney being reduced against the Earl of Morton, and Sir Andrew compearing, whose right fell in consequence with the

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A gift made in exchequer of a sum to a man's wife and children, not expressed to be alimentary, found not to be attachable by his creditors, nor even for alimentary furnishings of prior years.