25th January 1632, *Kaidly*; where the Lords found a passive title in one process proved in another by production of the decreet, without adducing the probation *de novo*. *Vol. I. Page* 702.

1696. *January* 22. JOHN ROBERTSON *against* DAVID BEATSON of POWGUILD.

Rankeilor reported Mr John Robertson against David Beatson of Powguild, for payment of 3000 merks contained in his bond, bearing that Robertson had assigned him to 7000 merks due to him by the Earl of Dalhousie, with this quality,—that he should do diligence for that, as well as for the sums due to himself by Dalhousie; and that he should pay him the said 3000 merks out of the first and readiest of what he should receive from Dalhousie, either by virtue of the rights assigned to him by Robertson, or any other rights whatsomever standing in his own person: and Robertson subsumed that Powguild had got considerable sums from Dalhousie, and so the condition of paying him the 3000 merks was come, *dies tam venerat quam cesserat.*

ALLEGED,—That his receiving money from Dalhousie *non relevat*, unless it was by virtue of Robertson's assignation; and these words, "or by virtue of any other right," can admit no rational sense and construction but this, by virtue of any other right in his person relating to the sums transferred to him by Robertson. And it is not to be presumed he would have given him 3000 merks for nothing, which he would be forced to do, if this were sustained: for he offered to prove, he got no money from Dalhousie by Robertson's assignation, because he was either excluded by preferable rights, or it was paid before the assignation.

ANSWERED,—This was a bargain of hazard, like the *jactus retis* mentioned in law,—I give you right to 7000 merks, providing you pay me 3000, if either you get payment by my right, or by the debts due to you by Dalhousie standing in your person at the time of the transaction, extending to 20,000 merks and more; and I offer to prove you got payment of your own.

The Lords found this a bargain; and that he was liable for the 3000 merks, if he got as much from Dalhousie, by virtue of any right standing in his person at the time of the agreement with Robertson; but thought it relevant to infer warrandice against Robertson, if Powguild proved the sum assigned was paid before the assignation; but found his being debarred by preferable rights not relevant. *Vol. I, Page* 703.

1696. *January* 24. MUIR of MONKWOOD *against* CRAWFURD of NEWARK.

IN the cause Muir of Monkwood against Crawfurd of Newark; this allegeance was proponed,—I cannot pay this sum contained in my father's bond, because your cedent, from whom you derive the right to it, was my tutor, and so *præsumitur intus habere ante redditas rationes*, he not having as yet counted with me for his administration. ANSWERED,—That brocard only extended to debts acquired by tutors or curators, *durante tutela et curatela*; but this debt

was in his person before his entry to the office; and not only so, but he was denuded of it by assignation before he became tutor. REPLIED,—It still remained *in ejus bonis*, the assignation not being intimated.

The Lords balancing the decision in this case, *Cranston and Ramsay* against *the Earl of Winton, January* 24, 1662, and others; they found they mainly struck against debts bought in during the tutory; but, if the pupil's father was debtor to one of the tutors, no law hindered him to pursue his pupil, being authorised by other tutors to pay the same; and the minor's hypothec *in bonis tutoris* does not reach that case;—Therefore they repelled the defence and sustained proofs at the assignee's instance.

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1696. *January* 24. EDWARD BROWN *against* ARCHIBALD KER.

PHESDO reported Edward Brown against Archibald Ker, brewer in the Potterrow. The debate was upon a blank bond which Ker had delivered to the deceased Mr Alexander Stevenson, servant to the Master of Stairs, when he was King's Advocate; and, Mr Alexander being debtor to Brown in 1000 merks, he gave him also this bond instead of a cautioner, wherein Brown filled up his own name. Ker raised a declarator that the bond was granted for a gratuity to the King's Advocate, to get him an ease of his excise, which he never got; and so, being *causa data non secuta*, the bond ought to be declared null; and craved Mr Stevenson's oath anent the cause of it: which the Lords, *ex officio*, granted, he being then on death-bed; who deponed that the Master of Stairs refused to accept of the gift, but desired him to speak to Sir James Oswald and the other tacksmen; and that Ker bade him keep the bond to himself; and accordingly he gave it Brown to fill up his own name in it. The Lords falling to advise this oath, it was ALLEGED for Ker, he had interpelled Brown by his declarator, and getting Mr Stevenson examined, before any intimation made of his name being filled up in the blank.

The Lords found, That in a competition among arresters, and other creditors of the party to whom the blank bond is delivered, intimation of the filling up of the name is necessary; as was found in the case of *Geddes and Veitch*, mentioned by Stair, 11*th November*, 1665; as also 19*th December* 1676, and 17*th January* 1677, *L. Banff* against *Grant*: Yet here, the competition being only betwixt the debtor, granter of the said blank bond, and the party whose name is now filled up in it, the objecting the want of intimation was not competent to the debtor himself, especially seeing the bond was offered upon so dishonest an account.

The Lords afterwards, on a bill, allowed Brown, whose name was filled up in the blank bond, to be examined, if he knew what was the cause of granting it, or was conscious that he had reclaimed against it, as not Mr Alexander Stevenson's money.

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