before: and as to the turnpike, it was ordinary that divers heritors entered to their houses by one and the same turnpike, and that it would be a prejudice to the structure to build more turnpikes, when they were needless.

The Lords, having considered the submission to the town-council, bearing, that not only all the houses to be builded should be of stone-work, but that the manner of all the building should be determined by them, without any reservation of any person's right or interest; and that upon the matter any pretended prejudice was satisfied, they did discharge the suspension, and, notwithstanding thereof, ordained the building to go on conform to the decreet of the dean-of-guild court; as being a matter of public concernment, and ought not to be retarded upon the account of lesion, to which the dean-of-guild and his council were most proper judges.

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1675. *February* 19. JOHN DAIKLE, English Merchant, *against* DAVID HOME.

THE said David, being cautioner in a bond for the deceased Earl of Home, to the said John Daikle, which bond was made and subscribed at London; being charged to make payment, did suspend upon this reason, That the principal, the Earl of Home, dying in prison, by the law of England it did liberate his cautioner.

It was ANSWERED, that, notwithstanding of that reason, the letters were found orderly proceeded. *2d.* That there is no such law or custom in England. *3d.* The bond being granted by Scotchmen, ought to have execution here, according to the law of Scotland, where the death of the principal doth not liberate the cautioners; and, even in England, that cannot be alleged but where the principal was at first incarcerated for that debt.

It was REPLIED, that the letters were found orderly proceeded in the first suspension, because there was no reason then libelled but that the Earl died in prison; whereas the contrary was notourly known; and, by an ordinance of the Lords, upon consignation of a special sum, there was liberty granted to suspend *de novo*, upon this reason, that the principal was prisoner, and let out upon a guard, under which he died, and his corpse carried back to the prison to liberate the keeper; which, by the law of England, did liberate the cautioner.

The Lords, before answer, did grant commission to try the law and custom of England in this last case, by a report of some of the judges of the common law.

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1675. *February* 19. PETER PALLET, Merchant in Bourdeaux, *against* RODGER and VEATCH.

IN an action against Sir George Maxwell, for payment of the remainder of a debt due by a bond granted to Robert Brown, as assignee by James Sanderson, to whom Colonel Stewart in Ireland was debtor in a great sum of money, for

which Sir George Maxwell did grant his bond; there being compearance made for William Veatch and David Rodger, who was donatar to Sanderson's escheat, who craved to be preferred, upon this reason,—That any assignation made by Sanderson to Robert Brown was *stante rebellione*, and could not prejudge the King or his donatar:—

To which it being ANSWERED for Peter Pallet, who was donatar to Robert Brown's escheat, and likewise assignee made by him; that they, being lawful creditors to Sanderson, were *in bona fide* to take an assignation to any of his debts; and, by virtue of his assignation, having in effect received payment, and extinguished the debt due by Colonel Stewart, by receiving this new security and bond from Sir George Maxwell, whereof a great part was paid; as there could be no repetition of what was paid, which hath been already found in this process, so as to the remainder he ought to be preferred to Rodger and Veatch, his assignee; because he was in the clear case of innovation, which extinguishes the old debt due to Sanderson, to whose escheat Rodger was donatar, and constitutes Sir George Maxwell debtor *proprio nomine*, and that before the gift granted to Veatch.

It was ALLEGED for the donatar, that this new bond could not be esteemed an innovation, because *Digestis, de novationibus*, no novation is to be understood, except where the parties, *totidem verbis*, declare that new bond to be a novation; which cannot be evinced from this bond granted by Sir George Maxwell, because it relates to Stewart's bond, as come in place thereof; and this was an existing debt the time of the second bond, which was not delivered back by Stewart or Sir George.

It was REPLIED, that Sir George's bond is a clear novation notwithstanding; because the law of the *Digestis* cited, is only *correctorie* of the former laws, which did ordain *(presumptione legis,)* novation in certain cases should be sustained, albeit it was *non constat* from the writs themselves, that the new bonds were in place of the old; and that the same were extinguished, and the debtor of the old bond liberated; but where, *ex certis indiciis voluntatis, novatio apparet*, the foresaid law cited takes not away the same; but, on the contrary, in the last words thereof, it does expressly bear, *et generaliter definimus voluntate solum esse, et non lege novandum;* which is clear likewise from Salycetus, Fachmeus, Mascandus, and several others, as being founded upon this reason, *nil interest verbo an factis quis mentem suam declaret:* and therefore Sir George's bond, which came in place of Colonel Stewart's, making only mention thereof in the provision and condition of his bond, that it should not be obligatory until Stewart's bond were retired, and delivered to him, which condition was fulfilled to him *in terminis* before Rodger's gift, Sir George's bond did thereby become innovate, and he constituted debtor *proprio nomine*.

The Lords, having ordained Sir George to give his oath upon the time when he granted this new bond, and when Stewart's bond was delivered to him in the performance of the foresaid provision, did find, that it was a clear innovation of the former bond, which was thereby extinguished; and it being done before Rodger's right, it was impossible they could both subsist, and Stewart being no more debtor by the retiring of his bond from Sanderson's assignee, without any translation thereto.

Thereafter they did, of new, allege, that, albeit this bond should be found an innovation, yet it was not equivalent to payment; because an executor grant-

ing a new bond, *proprio nomine*, for the defunct's debt, notwithstanding thereof the creditors of the defunct would make him liable; and the new bond is still subject to a double poinding; otherwise the creditor of the defunct might be frustrated by a new bond of their just debts: and, upon that same reason, a rebel being denounced, and thereby *jus acquisitum domino regi* to his whole moveable debts, a creditor, by voluntary delivering of his bond, and taking a new security, cannot prejudge the King or his donatar.

It was ANSWERED for Pallet, that, notwithstanding, he ought to be preferred; because he was in the case of *delegatio; et, Lege octavo digest: ad senatusion*, it is expressly declared, that *solvit quia reum delegat;* and the reason is, that *delegatio* operates all the effect of payment; so that the first debtor shall never be convened, albeit the person delegated should prove insolvent. Neither can the case of an executor be obtruded; seeing the defunct's creditor doth still remain, notwithstanding of the executor's new bond; so that, if the executor be not discharged, and the old bond retired, any new bond granted by him does not extinguish the defunct's debt; but the creditor may still affect the defunct's whole estate until he be paid: whereas, it is otherwise in the case of a donatar for payment to a lawful creditor by the rebel, either *in pecunia numerata* or *per delegationem*, which is equivalent, in law doth extinguish the old debt, the rebel being free, the donatar can never repeat what hath been truly paid.

The Lords did find, that Pallet was in the case of delegation; and, Sir George Maxwell becoming debtor *proprio nomine*, the donatar to Sanderson's escheat, to whom Sir George was never debtor, could never compete with Pallet, who had right from Brown to Sir George's bond, and therefore preferred Pallet.

Thereafter, upon the 11th of November 1675, the parties being again heard, it was ALLEGED for Veatch and Rodger, that he having only insisted as donatar to Sanderson's escheat, albeit by the foresaid interlocutor Pallet was preferred, as having got an assignation to a debt due to Sanderson by Colonel Stewart, and thereupon had recovered payment, in so far as Sir George Maxwell had become his debtor *proprio nomine*, and Colonel Stewart was discharged of any debt due by Sanderson or his assignee; yet notwithstanding thereof, Veatch, as having right from Rodger, ought to be preferred; because, by the Act of Parliament 1621, anent bankrupts and divours, the said assignation granted to Sanderson, being made after that Sanderson was charged and denounced rebel, at the instance of Veatch, the same was null; it being expressly provided that any divours can make no voluntary right to any person, in defraud of the lawful and more timely diligence of another creditor, having served inhibition, or used horning, or arrestment, comprising, or other lawful means, duly to affect the divour's lands or goods; in which case it is declared, that the concreditor, who obtained the said voluntary deed, should be obliged to refund the sums whereof he hath recovered payment, by partial favour of the common debtor, and the creditor doing the first diligence should be preferred to him.

Whereupon the Lords did ordain both parties to lead witnesses, and produce other documents, for proving whether or not Sanderson, the common debtor, was *lapsus bonis*, and to be esteemed a bankrupt the time that he granted the assignation *in anno* 1649, and thereafter a new assignation *in anno* 1662, whereupon Sir George Maxwell became debtor *proprio nomine;* after which, the depositions of the witnesses being read, one whereof did prove, that Sanderson, the time of the first assignation, was out of all credit, and nobody would

have trusted him; and that, before the second assignation, there was a gift of his escheat taken at Rodger's instance; and that, by the depositions of several witnesses, he was reputed to be a broken man.

Both parties having given in their informations, the Lords did advise the case, and, by interlocutor, did find, that Rodger and Veatch ought to be preferred to Pallet, upon that ground,—That the assignation made to Brown, his author, fell within the Act of Parliament 1621, and so was null; and that any payment, made by virtue of those assignations, doth not liberate Pallet from repetition, in so far as concerns the sums of money contained in the horning; reserving to Pallet his action of improbation of the principal horning, which was not produced, but only a gift of escheat and decreet of declarator, making mention thereof. Some of the Lords were of another opinion as to the first point of preference, and thought, that the assignation to which Pallet had right, and whereupon he had recovered payment, could not be declared null upon the Act of Parliament, upon these reasons:—1*st*. That the Act of Parliament was express, that the prior creditor had done more timely diligence, by inhibition, horning, arrestment, comprising, or other lawful means, which might duly affect the divour's lands or goods, or price thereof, to the common debtor's behoof; whereas no such thing can be subsumed in this case, against Pallet, or Brown, his author; seeing the debt due to the common debtor was never affected by any diligence at Rodger's instance, who had only charged, and denounced Sanderson, rebel, but had never arrested or affected the debt due by Stewart, until Pallet had recovered payment, and discharged Colonel Stewart, in contemplation of Sir George Maxwell's new bond, granted *proprio nomine*, which was found an innovation by the foresaid interlocutor. 2*d*. The said Act of Parliament, as to any dispositions made by the common debtor, which are declared unlawful, whether they be to conjunct persons or concreditors, supposes that they have done it by fraud for no just price, or of purpose to prefer one creditor to another, who hath done more timely diligence to affect his goods and estate; whereas no such thing can be here subsumed, Pallet's debt being contracted in France, for wine sent home by Brown, a factor, who was *in optima fide* to take an assignation to a debt due by Colonel Stewart, in Ireland, after he had charged and denounced the common debtor, rebel, before Rodger did get the gift of his escheat, or intented a general declarator; so that if he should be made liable to repetition, it would take away all public trade and commerce; seeing it is impossible that strangers can know if any who deal with them abroad, have been charged or denounced at the instance of a private party, who hath been suffered to trade in his own name, and bring home goods upon his own account, for which they cannot receive a precept or assignation upon others, or any other voluntary deeds for payment of the price of their goods, and thereupon do diligence and recover payment: And not only upon a public account, this were hard for strangers, but even as to subjects within the country, it seems to be against all reason, public trust and commerce, if a prior creditor only charging and denouncing, without affecting the common debtor's goods, or raising caption against him, but suffering him to trade as before, should lie still till other creditors recover payment upon their diligence, that they should be liable to repetition: whereas the Act of Parliament declares, that if, *bona fide*, a posterior creditor, buying lands or goods from a confident person, who is nowise *particeps fraudis*, that he can never be questioned, but only the common debtor, or

confident person, *ratio legis*, being only that fraud is committed, or the common debtor's goods affected; and by a practick in Durie, *in anno* 1623, betwixt William Hamilton and Dick, and by some of late, it was clearly found, That if the common debtor himself make voluntary payment to a lawful creditor, who had denounced for not payment, or had granted an assignation for payment, that the same was not null, and did not fall within the Act of Parliament. And the reason is, that the assignation could not be reputed a voluntary deed, but to have been made of necessity, after charging and denouncing the common debtor rebel; notwithstanding whereof, the greatest part of the Lords were of another opinion. Which seems very hard, seeing, by the former interlocutor, they found, that, notwithstanding both of horning and a decreet of declarator, yet Pallet should be preferred, albeit Veatch was both a creditor and had denounced; and farther, had obtained the gift of his escheat, and a declarator: And as to Sanderson being bankrupt, *anno* 1649, that appeared only by the deposition of one witness; whereas it was instructed for Pallet, that a decreet was obtained against Stewart for £2000 sterling, which he had affected as said is, having got an assignation thereto; and that, that same year, the wines were sent home to him in his own name, and was a public trafficking merchant, there being neither arrestment nor caption used at Veatch's instance, or any other creditor.

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1675. *June* 24. The COLLEGE of the NEW TOWN of ABERDEEN *against* The TOWN of ABERDEEN.

IN a declarator, at the instance of the Masters of the College of the New Town of Aberdeen, against the Magistrates of the town, to hear and see it found and declared, that they had the only right to present and admit bibliothecary, to have the care and custody of the bibliotheque of the said college; conform to a mortification, made by Doctor Reid, of a sum of money, to be put in the town's hands, whereof the annualrent extended to 600 merks, and should be yearly paid to the person that should be presented by the masters of the college, and of the grammar school:—It was ALLEGED for the town, that long before that mortification made by Doctor Reid, the town of Aberdeen having another bibliotheque of their own, did transport all their books to a place of the college, and appointed one to wait upon that office; and, accordingly, they did continue, from time to time, when the place vaiked; so that the mortification made by Doctor Reid, being but an accession to a standing bibliotheque and office, could not prejudge the town. Likeas, after Doctor Reid's mortification, Doctor Dun, as principal, did subscribe as witness to a contract betwixt the town and Mr Robert Dounie, who was the first person nominated by Doctor Reid, whereby the town of Aberdeen did present and confer that place upon Mr Robert Dounie, and he did accept thereof from them, as patrons of the said bibliotheque; so that they have been in constant possession above 40 years, and thereby had prescribed their right.

It was REPLIED for the college, That the bibliotheque being within the college of Aberdeen, and a constant stipend mortified to him, the town of Aberdeen having put therein a parcel of books, and appointed one to attend them, could not prejudge the college for the use and benefit, the whole bibliotheque