

1682. February. DAVIDSONS *against* The TOWN of EDINBURGH.

No 9.

A notorial extract of an assignation, was admitted instead of the principal deed; because, by the custom of Holland, the principal is kept by the notary when he grants the extract.

SIR WILLIAM DAVIDSON, late Conservator in the Low Countries, having assigned to the Davidsons, his children, a sum of money due by the Town of Edinburgh, and they having pursued the Magistrates of the Town for payment; *alleged* for the defenders, That the assignation, which was their title, was null, being but the assertion of a notary in another country, and not subscribed by the cedent. *Answered*, That it was a notorial extract under a notary's hand, which by the custom of Holland, where it was done, is sufficient, the principal assignation being kept by the notary when he granted the extract; and writs made in other countries, being done according to the law of the place, are always sustained with us, and was so decided the 15th November 1626, Galbraith *contra* Cunningham, No 2. p. 4430., and the 6th Dec. 1626, Stranger of Middleburg *contra* The Executors of Smith, *voce* PROOF, which is conform to the custom of other nations.—THE LORDS sustained process upon the notorial extract of the assignation, the pursuers proving, that this form of an assignation was an habile way of transmitting rights in Holland; and, if they should fail therein, sustains process, the pursuers producing a formal title *cum processu*.

*Fol. Dic. v. 1. p. 317. Sir Pat. Home, MS. v. 1. No 143. p. 223.*

\* \* \* Fountainhall reports the same case :

1681. June 22.—Mary, Gertruda, and Elisabeth Davidsons pursue Sir William their father for exhibition of a bond assigned to them by him. *Alleged* The assignation produced by them as their active title is null, being only a notary's attested copy. *Answered*, It was subscribed at Dort in Holland, and offered to prove it was valid by the customs there. This being reported by Halton, 'THE LORDS sustained the writ, they either producing the principal *cum processu*, or proving that it was *consuetudo loci* that a writ subscribed by the secretary of that town was valid.' This has been so oft tried now, that the custom scarce needs any more probation; many testimonials from the Magistrates of these towns attesting it, and Grotius in his *introductio ad jus Batavum*, and other lawyers, affirming it.

1682. February 11.—Sir William Davidson's Daughters against the Town of Edinburgh, 'the LORDS, on Newton's report, sustain the notorial extract of the assignation to them from their father produced *in modum tituli*, the pursuers *cum processu* proving that to be sufficient by the customs of Holland.'

1682. March 15.—Davidson's case *contra* the Town of Edinburgh, is debated *in presentia*. The Town's defence was on the act of Parliament 1681, discharging public debts; *ita est* this was one. *Answered* for the Davidsons,

That the act 1681 was *lex novi juris inductiva, et maxime exorbitans a jure communi et equitate*; and made by the legislators (on the view of the public quiet,) *ex summa plenitudine potestatis*, taking away private men's rights; and therefore it was *lex strictissime interpretanda*; and not one jot or letter of it to be extended *a paritate rationis*, yea not *ex identitate et majoritate rationis*; and so it can go no farther than the acts of suspension of these public debts (to which it relates) past in the Parliaments 1661, 1669, and 1672, which are only anent public debts contracted in the years 1639, 1640, and 1641, and one debt of L. 40,000 Scots of Sir William Dick's contracted in 1645. *Replied*, The discharge of public debts in 1681 is general, and not restricted to any years, *et qui omne dicit nihil excipit; et ubi lex non distinguit, nec nos distinguere debemus*. The Good Town also insisted on another defence, that they were lesed like minors, by the granting of that bond, and that their Magistrates being only administrators could not prejudge them; and these arms and ammunition furnished in 1650, for which this bond was granted, were never converted to the town's use, but they were commanded and overawed by the States then to buy them; and they were employed in the rebellion against the King; and Sir James Stewart, then Provost, being but a dispensator and curator to the town, he and the other Magistrates *non poterant ejus conditionem reddere deteriore* by contracting unnecessary debts; and, therefore, they had raised a reduction of the bonds on that head of law: And the Roman law, *l. 27. D. de reb. credit.* is very clear that a city is not obliged to repay money borrowed by their Magistrates, unless it be instructed that it was *in rem civitatis versum*. (Yet the gloss says it is now in desuetude). The King may not alienate what is his annexed property; and, by the 112th act, Parl. 1587, royal burghs are discharged to alienate their liberties, and consequently should not contract superfluous debts. *Replied*, The creditors being all native Hollanders, (except one) were not obliged to consider to what use their goods were converted, else it would mar all commerce and traffick; and to put creditors to prove it was *in rem civitatis conversum*, is all one as to interdict burghs the freedom of all contracting and bargaining; and none would meddle with them, if that were. *2do*, Denying it was ever a public debt, it is now innovated, and transacted and changed; because, after the act of suspension of public debts, there is a new bond in 1664, granted by the town of Edinburgh of this debt; which is a clear novation. *Duplied*, Foreign merchants must be regulated by and astricted to the laws of the place where they trade; and for the transaction, there was none, that being always *aliquo dato et retento*; but here there was not a sixpence given down; and the town can no more corroborate, fortify, or innovate a null debt, than they can contract to the prejudice of the burgh; and the one may be revoked as well as the other.

*Fountainhall, v. I. p. 144, 173, & 178.*