

chell of Selkrig, and pursuing a pointing of the ground, compearance is made for Thomas Haliday, who produces two infeftments, both out of the Kingscrofts, and likewise some acres and tenements of land, the first for L. 1200 Scots prior to her's, and the second made up by accumulation of the annualrents of the first sum, and some accessions, for L. 2000, but posterior to her infeftment. The ranking of these rights were very plain, his first bond *primo loco*; her infeftment *secundo loco*; and his second bond *tertio loco*. But the difficulty arose, that she *contended* that he having two subjects for uplifting his first annualrent, he ought not to lay it all on the lands of Kingscrofts, wherein she was only infeft; but, having likewise the burrow-acres and houses, whereto she had no right, he should take his annualrent out of both; and if he would *ex æmulatione* and invidiously burden her lands by taking the whole out of them, then he ought in reason to assign her to a proportion, so far as she wanted, and was evicted to him, that she might be *indemnis* by getting it made up out of the other subject. *Answered*, No law obliged him to assign where he was paid by the debtor's own means, rents, and effects; for that extinguished the debt *pro tanto*, and were to assign a *non-ens*. But much less when the assignation would be to his evident hurt; for, he having a posterior infeftment out of both lands, he spared the burrow-acres as to his first debt, and affected them with the annualrents of his second bond, which she could neither hinder nor quarrel, not being infeft therein; and if he did assign, it must be with this express quality and condition that she should not make use of his assignation to the prejudice of his other rights; and this cannot be reckoned malice, seeing *nemini fraudem facit qui jure suo utitur*, and it was so decided 11th February 1676, Bruce *contra* Mitchell, No 19. p. 3365. She *alleged*, That in so far as his second bond was made up of the bygone annualrents of the first she allowed them to be privileged, but the *anatocismus*, making these to bear annualrent, was unfavourable in law. THE LORDS found where a posterior creditor pays a prior out of his own money, then he ought to assign simply; but if he left him only to get his payment out of the debtor's means, he was not obliged to assign, but with a quality and reservation that it should not prejudice his other debts and rights, though posterior to the party craving the assignation.

Fountainhall, v. 2. p. 612.

1714. June 29.

WILLIAM KER of Chatto *against* WALTER SCOT of Wool and other CREDITORS of Sir WILLIAM SCOT of Harden.

No 26.

ROBERT SCOT of ———, who was served and retoured heir-general to his brother, Sir William Scot of Harden, but not served heir in special to him in his estates, having granted to William Ker of Chatto, his brother-in-law, a general disposition and assignation of his whole moveable goods and gear, debts

A person served heir in general, and confirmed executor to another, executed a general disposition in favour of a

No 26.
third party.
The general
disponee be-
ing excluded
by preferable
creditors, de-
manded assign-
ation from
them.

Answered, No
person is en-
titled to de-
mand assigna-
tion, unless
against his
own debtor's
effects. They
were found
not bound to
assign.

and sums of money, heritable and moveable; upon which assignation, Chatto, after Robert Scot's death, having commenced a process against several of the debtors in the said disposition; compearance was made for Scot of Wool and others, originally creditors to Sir William, and also to Robert, as representing him who excluded Chatto by their preference.

Alleged for Chatto; That he being creditor to Robert by the warrantice of the said assignation, those creditors of Sir William ought to assign him to their debts and diligences upon the estate of Harden, in so far as he cannot get payment out of Robert Scot's effects by their debarring him, which necessity of assigning is introduced by the civil law, *l. 13. ff. de fidejuss. l. 38. 39. ff. de evict. l. 19. ff. qui pot. in pign.* approved by the universal consent of all the judicatures of Europe and opinion of the doctors, *Sande de action. cess. cap. 6. § 63. Voet. comm. in tit. ff. qui pot. in pign. § 5.* and founded in material equity and justice. *Factum quod mihi prodesse potest ipsi vero nihil nociturum hoc equitas suggerit.* When a person having a slender right to a subject, is attacked by one having a better, he who is preferred, cannot refuse making over his right, upon the other's paying all his just demands; or, if a creditor had two subjects disposed for his payment, out of either of which he can receive his payment, and do *in emulationem* of the possessor of one, draw his payment entirely furth thereof, justice requires that he should assign his diligence to the person distressed, to the end he may draw his relief out of the other; which is the present case. For Scot of Wool is heritably secured in the estate of Harden, out of which he may very easily recover his payment; and yet, he rather chuseth to draw it out of Robert Scot's effects, whose creditors have no other fund for their payment, in which, if Wool be preferred, without being obliged to assign, they will be entirely defrauded. This is also agreeable to our custom; for, as Dirleton observes, *Doubts of Law, Tit. DAMNUM, Si quis utatur jure suo ut vianus potius noceat quam sibi prosit, illicitum est et prohiberi potest. Quia magis jure suo abuti quam uti videtur.* And daily, in ranking of creditors, where an adjudication is led upon a bond, granted by two or three co-principals, and their estates adjudged thereon, if the creditor take payment out of one of these estates to the prejudice of co-creditors upon that estate, he will be obliged to assign his debt and diligence in favour of the creditors postponed, to the end they may affect the other estate. For the other co-obligants, being equally bound, and their estates affected for payment, it were most iniquitous that the estate of one should pay the whole debt, and the others nothing.

Answered for Scot of Wool and Others; True, the common law allowed assignation in two or three cases, as to a *correus* or *fidejussor* making payment, which arose from a tacit mandate supposed to intervene betwixt the *correi* or betwixt principal and cautioner. But, it is needless to take notice of any of the texts of the civil law, concerning *beneficium cedendarum actionem*, competent to *correi* and cautioners, which have no place here. Another case is, where a posterior creditor making payment to one who is preferred, gets assignation from

the payer ; but there, the preferable debt is paid out of another's effects, and not out of those belonging to the common debtor. But none of these, or the other cases cited by Chatto, come home to the question where Wool and the other Creditors are getting their payments out of their debtor's effects, Robert Scot, as well as Sir William, being debtor to them as served heir in general to Sir William ; and, where Chatto is seeking to be assigned to rights upon an estate, viz. Sir William's, which belonged not to his debtor, Robert Scot, who was never infeft therein, and could not be affected by diligence for his debt. Consequently, neither can Robert's creditors claim to be assigned thereto, seeing a legal fiction never operates an impossibility. And a habile case must be supposed, that at the time the assignation is sought, the demander could otherwise affect the subject in law. So the Lords found in a late parallel case, Colonel Charteris against the Younger Children of the Lord Phesdo, that the younger children, who were preferred as creditors upon their eldest brother's estate to Colonel Charteris, another creditor, were not obliged to assign him to some other effects which the father had also disposed to them, in security of their debt ; because the father was not debtor to the Colonel, and he could not seek assignation to an estate not belonging to his debtor*. Again, where in a ranking, an adjudger of more subjects excludes a partial annual renter, this adjudger will be obliged to assign, that the assignee may recover payment out of the other subject where he had no infeftment. But this will never be granted where there is either prejudice to the cedent or to a third party, or where the assignee could not have affected the subject by diligence, and hath not one common debtor with the cedent. Upon this ground it is, that Scot of Wool, one of the heirs of entail to Sir William Scot, contends, that he will not suffer his estate to be taken away by debts, which neither he nor his estate is subject to, having a *jus quæsitum* to hinder all assignation to his prejudice. *2do*, It is of no moment for Chatto to say, that Robert Scot's estate should go for the payment of his own debt, and not to be carried away by Sir William's creditors. For, *imo*, Robert being debtor to Sir William's creditors, by his representing Sir William, as heir in general, they will affect the readiest. But then, this did not entitle Robert's creditors to affect Sir William's special estate, to which Robert never established a right by special service, nor his creditors by charging him to enter heir in special, and adjudging thereon. *2do*, The subject out of which Sir William's creditors are claiming their payment, consisted chiefly of bonds, heritable and moveable, belonging to Sir William, to which Robert, by a general service and confirmation, established a right.

THE LORDS found, That, in so far as Sir William Scot's creditors are either paid out of his estate, or preferred out of his effects for their payment, they are not bound to assign their debts and diligences in favour of Chatto.

Fol. Dic. v. 1. p. 224. Forbes, MS. p. 70.

* See PROVISIONS TO HEIRS AND CHILDREN.