

1703. June 29.

CHARLES MITCHELL Writer in Edinburgh *against* THOMAS JOHNSTON
Merchant there.

No 6.

The granter of a bond having raised reduction of it, it was found that the executing against the cedent though but an hour or two before the assignation was intimated to him, rendered the subject litigious *ad hunc effectum*, to give the pursuer the benefit of the cedent's oath against the assignee.

RICHARD SLOSS, merchant in Kilmarnock, having sold a quantity of fishes to the said Johnston, gets bond for the price, extending to 400 merks, and is trusted to carry the same with a greater parcel to Lisbon. Sloss disposes on the whole cargo, but taking the produce to himself, never returns home to count for the said product; whereupon Johnston seeing himself disappointed, raises a reduction of the bond, with a conclusion of declarator of the extinction thereof, as *causa data causa non secuta*, being the price of fish Sloss has disposed on, and never counted for, and craves delivery of his bond; and being informed it was in Charles Mitchell's custody, and that he might have impetrated an assignation thereto, he likewise cites him as a defender in the reduction and declarator; and some hours after, on the very same day wherein the reduction is executed by Johnston, does Charles Mitchell legally intimate his assignation from Sloss to him; and having charged him on the bond, he suspended, on this reason, that he offered to prove, by the cedent's oath, that the cause of the bond being fish committed to his care, he has embezzled and squandered away the price, and never yet counted, and whereon he has executed a reduction and declarator before the assignee's intimation. *Answered*, He cannot have the benefit of the cedent's oath in prejudice of the assignee; because, though he raised and executed his reduction against the cedent, before the assignee had formally intimated his assignation, about an hour or two, yet the assignation itself was of a date long prior, and Johnston knew perfectly of the assignation, otherwise why did he cite Charles Mitchell in the reduction; and, in the very libelling of the reasons, he acknowledges Mitchell as assignee, and calls for it with its intimation, so that he being an assignee for an onerous cause, no law can take the cedent's oath to his prejudice. *Replied*, *Esto* he had known of the assignation, yet it is a certain principle in our law, that private knowledge does not supply the defect of an intimation, which is a necessary solemnity requisite by law, and which has no known equivalent, except a bond of corroboration by the debtor, or other writ under his hand homologating the assignation, or partial payment to the assignee, or some diligence at the assignee's instance, relative to the subject in controversy; and his raising and executing a process made the matter so litigious, that he cannot be denied the cedent's oath, as was found, 15th Feb. 1662, Pitfodels *contra* Glenkindy, *voce* PROOF; yea more, the production of an assignation in a process *quoad* one article, was found not to be equivalent to an intimation of it *quoad* other articles assigned, 30th Nov. 1622, Murray *contra* Durham, No 56. p. 855; and payment to a cedent was found *bona fide* made, though the debtor knew of the assignation, and offered to transact with the assignee before the payment, 14th March 1626, Westerhall *contra* Williamson, No 62.

p. 859. *2do*, His citing Mitchell in his reduction and declarator, and calling for his assignation and intimation is no acknowledgement; because it is very well known, that writs are called for at hazard, and oft-times summonses are not libelled at the first raising, but are left blank, and this was not filled up till after Mitchell's intimation, and so might very well mention the same. *Duplied*, That though private knowledge alone be not sufficient to supply the defect of an intimation, or to finish and complete the assignation in law, yet being conjoined with the circumstances in this case, it is more than sufficient; for the assignation is long prior to Johnston's executing his declarator, which is acknowledged to have been blank, and what can be applied to any other extrinsic subject can never render this bond litigious; and the posterior libelling, and filling of it up, can never be drawn back to the prejudice of his assignation, either to put Sloss *in mala fide* to give it, or him to take it; for the *exceptio rei litigiosæ* is not competent in every subject, but only that, the alienation whereof is craved to be restrained. *2do*, Many deeds have been sustained as equipollent to intimation; as the treating with the debtor and offering terms, Dunipace *contra* Sands, No 60. p. 859.; the writing a missive to the assignee, or promising payment, M'Gill, No 64. p. 860., and Home against Murray, No 66. p. 863; or a citation at the assignee's instance against the debtor; and the assignation being before citation is sufficient, as has been found in the case of denunciation of apprisings, to which assignations unintimated have been preferred, Smith *contra* Hepburn and Barclay, No 47. p. 2804; and Robertson *contra* Brown, No 64. p. 2820; and therefore the assignation must exclude the cedents oath. Yet the LORDS found the executing the summons against the cedent before the assignation was intimated, did make the subject litigious *ad hunc effectum*, to give him the benefit of the cedent's oath against the assignee.

Fol. Dic. v. 1. p. 551. Fountainhall, v. 2. p. 184.

1707. July 23.

DAVID BURTON Glazier *against* WILLIAM HAMILTON of Monkland.

DAVID BURTON Galzier having charged William Hamilton of Monkland to make payment of 2000 merks assigned to the charger by Hamilton of Dalziel, he suspended upon this ground; that he offered to prove by the cedent's oath, that the sum assigned was only in trust in his name; for the behoof of John Hamilton of Bogs; which being proved, no charge could be sustained there-fore against the suspender, because Bogs was his tutor, and had not cleared accompts.

Alleged for the charger, The debt being assigned for an onerous cause, the suspender could not have the benefit of the cedens's oath.

No 7.

A debt being assigned after a bill of suspension thereof had been past against the cedent, it was found that the passing of the bill without intimation,