

No 7.
did not render the subject litigious, so as to give the debtor the benefit of the cedent's oath.

Answered for the suspender, That he had presented a bill of Suspension, which was past against Dalziel the cedent before intimation of the assignation, whereby the debt became *res litigiosa* and so he must have the benefit of the cedent's oath, As February 15, 1662, Pitfoddels *contra* Glenkindy, *voce* PROOF, it was found that a debtor pursuing reduction of his bond against an assignee, ought to have the benefit of the cedent's oath; notwithstanding it was *alleged*, that the debtor calling him in the reduction as assignee, could not pretend his right was not intimated. And indeed nothing is more required to make *res litigiosa*, but a party's signifying his mind as to the right by a legal remedy, which no doubt was done by obtaining the past bill of suspension, after which no diligence could have been done by the creditor or his assignee till the days of the sist had elapsed.

Replied for the charger, Nothing can render a subject litigious but *deductio in judicium* before the assignation was intimated; so that there having been no intimation of the suspension, nor citation upon it before the assignee's intimation, it is impossible that the subject could be litigious. For the passing of a bill is no judicial act to which any body is cited; and before intimation the cedent himself might have proceeded to diligence. The decision adduced is not to the point, for there the cedent's oath had been taken before the dispute came in about it. And the LORDS found that the process at the debtor's instance, wherein the assignee was called, could not be such an intimation of the assignation as to exclude the cedent's oath.

THE LORDS repelled the reason of suspension, and found that the passing of the bill of suspension without intimation, did not render the subject litigious, so as to give the suspender the benefit of Dalziel's oath.

Fol. Dic. v. I. p. 551. Forbes, p. 189.

1708. June 9.

MR THOMAS FRASER & MR JOHN M'KENZIE *against* The TOWN of INVERNESS.

No 8.
Mutual declarators were raised by an heritor and a neighbouring burgh, about the property of a moss. The heritor craved interdict. The burgh pleaded *uti possidetis*. Found that the pos-

MR THOMAS FRASER of Drumballoch, and Mr John M'Kenzie, clerk, as proprietors of the mosses in the lands of Drumchardin and Mount Capaloch, pursue a declarator of property in these mosses against the Town of Inverness; and the Town repeating a declarator of property, a mutual probation was allowed, both as to right and possession, which was coming in, by the course of the roll, to be advised; but Mr Fraser alleging the townsmen are exhausting the moss *medio tempore*, by casting the double quantity of peats they were in use to cast in years preceding; therefore, he gives in a bill to the Lords, representing, That, if this be allowed, they will very soon exhaust the subject in controversy; and there being lawburrows served, they are sparing to use an interruption *via facti*, lest it be construed as a contravention; therefore, cra-

ved the Lords might discharge any farther casting, or the removing what is already casten, during the event of this plea, that they may not totally destroy the moss. *Answered*, They deny the inhabitants have casten up any more fuel this year than they were in use to do formerly; and it is a known maxim in law, that, *lite pendente nihil est innovandum*; and their possession cannot be stopped, seeing their right will clearly appear, when the probation comes to be advised; so the safest rule is, *uti possidetis ita possideatis*, till it be otherwise found. THE LORDS thought their possession could not be inverted or stopped *medio tempore*; but declared, when the cause came to be advised, if they found there was no right in the Town to these mosses, or a limited right, then they would consider the wase and damage made, and lay it on upon some other quarter of the moss belonging to the Town, to compensate and make it up.

Fol. Dic. v. 1. p. 552. Fountainhall, v. 2. p. 441.

1708. December 29.

HOUSTON against NISBET.

AGNES NISBET grants a bond to David Fitzgerald for L. 125 Sterling, bearing, it was for merchant-ware furnished by him to her, but not payable till her marriage. This bond he assigns to James Houston, brother to Sir John; and he charges, in regard the term of payment was come by her being married to the Laird of Kincaid. She suspends on this reason, that, whatever narrative be put in the bond, yet the true cause was *intuitu matrimonii*, there being a design of marriage betwixt them, and he gave a bond for the equivalent sum to compensate it; but she having discovered, that, though he feigned himself a Protestant, yet he was an Irish Papist bred in France, she gave over the marriage as inconvenient, and they agreed to tear the two several bonds; but he, conform to his equivocating religious principles, had only torn a double of her bond, instead of the principal, and so deceived her; and she offered to prove, by the instrumentary witnesses, that this is fact, and by others present at their communing. *Answered*, Mr Houston was not concerned in this romantic story and amour, being an assignee for an onerous cause; so that no probation could be led against him, to take away his clear right, neither by his cedent's oath, nor by witnesses; and *esto* Fitzgerald himself were the charger, yet clear writ could never be allowed to be taken away by witnesses, even though it were to prove payment, as was found, 8th December 1664, Scot against Henderson, No. 17. p. 4450.; neither can the Lady's scruples, nor his religion, alter the clear principles of law, to defraud an assignee for an onerous cause. *Replied*, It is very true, the cedent's oath cannot be taken against an onerous assignee; but here is a plain specialty; she had rendered the cause litigious before the assignation, in so far as she had raised and exe-

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session could not be inverted or stopped, during the dependence.

No 9.

A Lady raised reduction of a bond granted by her; but, after executing against the creditor, allowed the reduction to fall, by lapse of year and day. Found, that this did not make the cause litigious against an onerous assignee, whose right was dated after the summons had fallen, so as to give the pursuer the benefit of the cedent's oath.