

1715. July 13. JOHN DOUGLAS *against* COCHRAN of Ochiltree.

Sir John Cochran having been pursued by John Douglas for a tailor-account, due to William Douglas, his father, (from whom he had a general disposition to his count-book), and having referred the same to Sir John's oath, the term was circumduced against him, and a decree extracted, without the pursuer's confirming the debt. Sir John having suspended, and deceased before discussing, the pursuer insists in a process upon the passive titles against Ochiltree, as representing his father. And the question being, Whether the decree above-mentioned was valid, the pursuer's title being only a general assignation, and he never having confirmed the debt?

It was alleged for the defender: That the decree was null, the pursuer's title being only a general assignation, which was no complete title, and so could be no warrant for a decree; being at most but like a decree dative and a licence, which could never support a decree, unless a confirmation had followed before extract.

Answered for the pursuer: *1mo*, That the decree was still good, the pursuer's assignation being a sufficient title *ad fundandam litem*; so that the pursuer was at most obliged only to confirm before extract; and it was the part of Sir John's procurators, before taking a day, to have objected this. *2do*, The general assignation, as it gives *jus prosequendi*, so does it *jus exigendi* of all the accounts in his book. *3tio*, There is more in a general assignation than in a licence to pursue; for a general assignee may intromit, without hazard of a vicious intromission, which a person having only a licence would not do; so that the defender having suffered himself to be decerned, all he can contend for, after extracting, is, at most, That the assignee be obliged to confirm, without opening the decree; and this conform to the 18th Article of the Regulations 1695, whereby decrees *in foro* are not to be reduced upon nullities, further than to redress the party's prejudice by that nullity; but the rest of the interlocutors in the decree quarrelled are to stand *tanquam res hactenus judicata*.

Replied for the defender: *1mo*, That the defence being a nullity in the pursuer's title, appearing from the decree, the allegiance of "competent and omitted" cannot be sustained to support it; for till the title in the pursuer's person be complete, it cannot be understood a *res judicata*, because he is not a lawful contradictor, and so cannot plead the benefit of a *res judicata* in that subject. *2do*, As to confirming before extract, replied, That he cannot *cum effectu*; for though such a confirmation might be drawn back to the time of the sentence, if both parties were alive, yet Sir John dying before confirmation, it was *medium impedimentum* that hindered the confirmation to validate the prior sentence; which being in itself null till confirmation, it was never, in Sir John's life-time, an effectual sentence; and he was held as confessed at the instance of a party who had no right.

No. 54.

One having right by general assignation to the account-book of a party deceased, found entitled to sue for a particular debt, to be confirmed before extract.

No. 54. Further alleged for the pursuer : That it is not altogether clear that an assignation to a count-book needs confirmation ; for though there be many accounts in it, which makes the assignation a kind of general one, yet the book itself is one complete subject ; and though many persons be concerned in the several accounts, yet the book may be considered as *unum nomen* ; just as when a man assigns an account consisting of many articles, or a flock of sheep ; in neither of which cases is confirmation needful, since, though there may be many heads, yet there is but one subject.

Answered for the defender : That a special right behoved to condescend upon the debtor and the subject received ; for otherwise, by the same rule, an assignation to all debts might be interpreted a special assignation.

Replied for the pursuer : That the present case differs from that where several bonds are assigned, since each bond is a *distinctum nomen* and *species*.

The Lords sustained the pursuer's title, he confirming before extract.

Act. Col. Mackenzie.

Alt. Cochran.

Clerk, Gibson.

Bruce, v. 1. p. 144.

1716. June 20. SIR PATRICK HOME *against* The EARL OF HOME.

No. 55.

Found in conformity with Keith against Cathcart, No. 44. p. 16099.

The deceased Mr. George Dickson of Rughrig obtains an adjudication against James Earl of Home, this Earl's uncle, as he who stood infest in the estate under the Great Seal, and as charged to enter heir to James Earl of Home, his father, this Earl's grandfather ; and Sir Patrick Home adjudges the right of the said adjudication from Mr. George, and pursues reduction and improbation against the present Earl, producing for his title James the uncle's charter and sasine, and Dickson's adjudication, and Sir Patrick's adjudication from him, whereon nevertheless Sir Patrick is not infest.

Alleged for the Earl : That no infestment having followed upon Mr. George Dickson's adjudication, nor the pursuer's, these could only be sustained to force a production in an improbation of personal rights, but not of real ones, whereupon infestment had followed.

Answered for Sir Patrick : *1mo*, That the reason of reduction being falsehood, the defender must produce all rights called for, that it may be known if there be such rights or not, or if they be false or true deeds ; *2do*, Earl James the uncle being infest, the right of that infestment is carried by Dickson's adjudication ; so that, as the Earl might have pursued reduction and improbation, so also might Dickson, and consequently Sir Patrick, as coming in his place ; and seeing the foundation of Sir Patrick's right is by infestment, it does not import whether the infestment be passed upon the conveyances and mid-couples or not ; *3tio*, Mr. Dickson's adjudication is not only against Earl James, as infest, but likewise as charged to enter heir to his father, the Earl's grandfather, to whom this Earl is heir served and retoured.