

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.

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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.

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cuted a reduction of the bond, long prior to his assignation; and, in that case, all defences competent against the cedent are receivable against his assignee. And, as to the proving by witnesses, it is confessed, that payment, compensation, &c. are not so probable, but matters of fact, resulting from fraud and circumvention, have been tried and expiscated by witnesses, as appears, 15th December 1671, Duff, *voce* PROOF; and 22d February 1676, Brown, *IBIDEM*. *Duplied*, No regard to the reduction, so as to infer litigiousity, for it is raised in September 1704, and suffered to sleep ever since, without any judicial act following thereon, save that lately there is a summons of wakening raised thereon. If Fitzgerald had immediately assigned her bond when he saw her quarrel it by the reduction, there might have been some pretence or suspicion; but the assignation is three years posterior to the executing the reduction, so it could never put him *in mala fide* to take an assignation to her bond for an onerous adequate cause. *Triplied*, The sleeping of a cause does not extinguish its being litigious; and, when the cause is wakened, the litigiousity awakes with it, otherwise sleeping would be equivalent to a total extinction of the process, and be an absolutor upon the matter, which is downright contrary to the Lords daily practice. If any judicial act had followed on the process, there is no doubt but that it might be wakened; but the doubt is, where it lies over year and day, without being called, if, in that case, it dies, as a charge of horning does; or, if our law knows any resurrection in that case, though it were hard to make it perish totally: Therefore, in respect of its preparative and importance, the LORDS ordained it to be heard in their own presence.

Another point will occur in this process, that she being now *vestita viro*, no personal execution can pass against her, during the standing of the marriage, and that the husband can only be liable for the annualrents, and not for the principal, unless the bond carries only annualrents, to commence after her marriage, which is made the term of payment; and so, if it was a moveable debt at the marriage, it may be urged, that the husband must be subject to the whole, as he who, by the matrimonial conjugal society, undertakes all her moveable debts, it being a communion of moveable goods; and, consequently, of all debts of the same kind.

1709. *January 21*.—THE cause mentioned *supra*, 29th December 1708, between Houston and Lady Kincaid, being heard in presence, was this day decided. The point was, if her raising summons, and executing it against Fitzgerald, the cedent, did so far hinder him, that any posterior assignation he made to James Houston can deprive her of the cedent's oath, as being rendered litigious, though, for three or four years, she suffered it to sleep, without insisting. *Alleged* for her, That the summons simply executed, without any more, was sufficient to secure her against his assigning it; or, if he did, it must

transmit *cum sup onere*, seeing she fully intimated her intention to quarrel that bond, which stops prescription, by the 10th act 1669, by which it lasts for seven years; and Justinian, Novel 112. c. 1. makes the *vitium litigiosi* to be contracted by a naked citation; so the exception *rei litigiosæ* must take place from the date of the execution, though there be no calling or judicial signature upon the process. *Answered*, No regard to this summons, for it is altogether blank, both as to the writs called for, and the reasons of reduction, and not one syllable of this bond in all the four corners of it; so it may be any other thing as well as this, and bears no marking by a clerk, or any calling in judgment, so that instance is plainly perished; and the 112th Novel is expressly restricted by Lawyers only to real actions. And, in our own practice, *penult.* July 1635, Richardson *contra* Sinclair, No. 34. p. 3210. a summons only executed without any farther procedure, was found not to render the case litigious; and let her blame herself in not prosecuting her reduction; for, *vigilantibus non dormientibus jura subveniunt*. THE LORDS found this summons, so deserted, could not make the cause litigious against Houston, an onerous assignee, so as to give Lady Kincaid the benefit of the cedent's oath, whom she might pursue as accords, but the same did not meet the onerous assignee.

*Fol. Dic. v. 1. p. 551. Fountainhall, v. 2. p. 476. & 483.*

\* \* \* Forbes reports this case.

1709. January 21.—JAMES HOUSTON having charged Agnes Nisbet and her husband with horning upon a bond of L. 125, granted by Agnes Nisbet before her marriage, payable to David Fitzgerald, some time merchant in Glasgow, and assigned by him to the charger: They suspended, and raised reduction upon this ground, that, though the bond bear money resting owing by Agnes Nisbet to Fitzgerald, yet truly she owed him no money, but granted the bond to him *intuitu matrimonii*, which was offered to be proved by his oath; and she had reason not to marry him, when she discovered him to be an Irish Papist.

*Alleged* for the charger, The cedent's oath cannot prejudice him, an assignee for an onerous cause.

*Answered* for the suspender, The charger can be in no better case than his cedent, in respect, before the assignation, the bond was rendered litigious by an executed summons of reduction thereof. For a citation makes a thing litigious, being a challenging of one to a trial at law; as is clear from the civil law, Novel 112. cap. 1. and cap. 3.; and, by our law, citation interrupts prescription, and makes a depending plea, Arg. act 54. Parl. 7. James III.

*Replied* for the charger, No respect to the executed summons, seeing it was never called nor libelled; for, by the civil law, *lis*, whence *litigiosum* comes, is never understood in a proper sense, till after *res in judicium est deducta*, L. 31. § 1. D. De Novat. L. Un. C. De Lit. Con.; 2do, The summons of reduc-

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tion not having been called within a year after elapsing of the last diet of compearance, it expired, and the instance perished; for my Lord Stair; Institutes, *Lib. 4. Tit. 34. No. 4.* allows wakening after the year only, when the process has been called within the year; and denunciation cannot proceed upon a charge of horning after year and day. It was decided 27th July 1708, Drummond against Stewart, *voce* PROCESS, that a summons not called within a year of the day of compearance expired, so as it could not be awakened; and November 7th 1684, Belshes *contra* Earl of Loudon, *IBIDEM*, the LORDS found no process upon a summons not called within year and day after the days of compearance, and found that the instance perished, and could not be wakened; *3tio*, The LORDS will sustain a summons for interruption, upon which they would not sustain process, as was lately decided in the case of Forbes of Tolquhon, *See* PRESCRIPTION.

*Duplied* for the suspenders, If *vitium litigiosi* were only contracted after a summons is called, he who is master of an unjust bond may, how soon he finds himself attacked by a citation, assign the bond, and so disappoint the debtor's just objections against the cedent; *2do*, The 9th act, Parliament 1669, supposeth that every citation that would have made an interruption may be wakened within five years.

*Triplied* for the charger, *imo*, *Incommodum non solvit argumentum*; besides, it would be a greater *incommodum* to commerce, to make an assignee for an onerous cause lose his money upon such a pretext; *2do*, The act 1669 must be understood *in terminis juris habilibus*, *viz.* that the causes to be so wakened were called in due time; and the stile of a summons of wakening is, that the Judge should proceed where he left off; but *in simplici postulatione*, or citation, *nulla pars judicis*.

THE LORDS found, that a summons executed only, and lying over for year and day, without a calling, was not competent to found the exception of *res litigiosa* against an assignee for an onerous cause.

*Forbes, p. 308.*

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1713. July 23.

JOHN BLACK, Merchant in Dumfries, *against* AGNES LINDSAY, Relict of  
JOHN LAWSON of Bilbow.

No 10.

IN a process at the instance of John Black against Agnes Lindsay, as vitious intromitter with the moveables of John Lawson, her deceased husband, for payment of L. 40 Sterling, owing by him to the pursuer; the LORDS found the defender, who intromitted by virtue of singular titles, liable *in valorem*, her intromission having been by virtue of no valid title; and that she could not affect the subject, *pendente lite*, by confirmation, in prejudice of the pursuer.

*Fol. Dic. v. 1. p. 552. Forbes, p. 708.*