

1709. December 27.

ARCHIBALD SMITH, Writer in Edinburgh, *against* JOHN VINT, or WENT,
Shoemaker in Calton.

THE deceased John Vint, cordiner in the Calton, granted bond to William Smith, one of the keepers of the Parliament-house, for the sum of L. 336 : 18s. Scots; and, for his further security and more sure payment thereof, assigned him to several debts due to Vint, partly by ticket, partly by accompt, with this provision, that William Smith being once paid of his debt, and necessary disbursed expenses, the assignation should be void, and he should hold compt for what more he received, than paid him; of the which assigned debts he signed an inventory, and granted receipt of the assignation thereto. About twenty-two years thereafter, Archibald Smith, as assignee by William Smith, pnsued John Vint, as representing the said John Vint his father, for payment of the debt in his father's bond.

Alleged for the defender; The debts assigned being prescribed, the pursuer must either impute them in payment, or shew that he has done diligence for recovering thereof in due time; since he did not retrocess the cedent, that he might have been in a capacity to sue for payment. For the assignation and receipt thereof, implied a mandate *utriusque gratia*, which obliged the assignee to diligence required in a mandatary. Yea, his obligation to diligence is expressed by the assigning not only in further security, but also for more sure payment.

Replied for the pursuer; An assignee in security is not liable, unless expressly obliged, to do diligence; because, such an assignation doth not loose the cedent's bond, especially when he never required the assignee to do diligence, or to denude. Nor was he bound to have retrocessed the cedent, though required, without an offer of payment; for no law obligeth a creditor to quit his pledge, unless the cause for which it was given be first satisfied, far less to expend certain money for recovering doubtful debts. 2. The assignation is not properly a mandate, but *pactum adjectum mutuo*, or rather a *pignus*, which obligeth the assignee to take care of the *ipsa corpora* of the writs impignorated, that they perish not through his neglect. He was under no greater tie to pursue for payment (albeit he might have done it) than an arrester is to prosecute a furthcoming, or an adjudger to pursue for mails and duties; for, any inconveniency through the debt's perishing *medio tempore*, may be obviated by the debtor's redeeming the subject assigned or arrested, by payment of the principal debt; and, if he sustain any loss through his failing to do it, *sibi imputet*.

THE LORDS found, That the pursuer was not obliged to do diligence for recovering the debts to which he was assigned in security; and, that these debts, though now prescribed, are not imputable in payment of the debt due by the cedent to the assignee.

Fol. Dic. v. 1. p. 238. Forbes, p. 378.

No 17.

An assignation to debts due to a tradesman being granted by him to his creditor for security, who suffered the debts to perish, by doing no diligence. The Lords found that the debts perished to the cedent.

* * * Fountainhall reports the same case :

No 17.

UMQUHILE John Went, cordiner in Calton, being debtor to William Smith, in L. 336 Scots, he grants him a bond of corroboration for the same in March 1687 ; and for his farther security and more sure payment, he assigns him in the same bond to sundry tickets and unsubscribed accounts exceeding the debt, with this proviso, that William being once paid of his debt, the assignation should be void, and if he recovered more, he should be countable to refund it to Went. Smith, at the same time, signs an inventory of the debts and counts assigned to him, and acknowledges the receipt, but neither of them bears any clause obliging Smith to do diligence. Went, the debtor's son is pursued by Smith on the passive titles to pay the L. 336 Scots, contained in his father's original bond. *Alleged*, Though the assignation do not bear an express obligement to do diligence, yet that is implied in the nature of the transaction, which is a *mandatum utriusque gratia contractum* ; and *quorsum* did I assign you against my debtors, but that you might recover your own payment. Law and reason dictate, that you should not have put them in your pocket, and suffered them to perish by the debtor's death, or prescription ; and, if you had no mind to do diligence and meddle, you should have demanded payment from my father, and retrocessed him, that he might have recovered his own debts, and not have been silent for 30 years, and now, by surprize, pursue me for that which either you got, or might have got, and by your negligence have lost it to us both, which is a degree of *lata culpa quæ dolo æquiparatur* ; and it is like a *depositum*, which must be as diligently gone about as your own affairs. *Answered*, By our law and decisions, an assignation given in security only, was never sustained to oblige the assignee to diligence, unless it were specially so provided, and here the accounts assigned being only drawn out of the shoemaker's count-book, without any written instruction, he was not obliged to pursue so many debtors for petty sums, and throw away certain money for uncertain hope ; and my assignation never being intimated, it did not hinder you to have pursued your own debtors, and taken decreets against them, you having as much to instruct the debt as I ; and, if you had offered payment, I would have retrocessed you into your own place ; and why is the clause of diligence adjected in some assignations, if it were implied *ex juri communi* ; and it is known, that an adjudger is not bound to enter to the possession of the rents of the adjudged lands, except he please. The LORDS thought it a hardship, that he had suffered the debts to perish, yet the plurality, from the principles of law, found him not accountable for diligence ; and that the debts perished to the cedent, and no ways to discount off his debt. Some thought, if the debts assigned had been instructed by writ, it might occasion some alteration in the decision.

Fountainhall, v. 2. p. 548.