

tor-creditor to Mr Thomas, and *alleges*, That he ought to be preferred, because the assignation made to John Hume was an incomplete right, wanting intimation; so that the sum remained *in bonis* of Mr Thomas Ridpeth, and that he had followed the only legal way to affect it, by confirming himself executor-creditor to Mr Thomas; and albeit the assignee may force any other executor to pay him, yet not an executor-creditor, who is executor to his own behoof for satisfying his debt.—It was *answered*, That the assignation, though not intimate, being a special assignation, albeit it cannot have execution by horning, yet it is the undoubted ground of an action, even after the defunct's death, against the debtor, and no executor-creditor can have right thereto.

Which the LORDS found relevant, and preferred the assignee.

Fol. Dic. v. I. p. 180. Stair, v. I. p. 647.

* * * Gosford reports the same case :

In a competition betwixt John Hume and Pringle of Torwoodlie, who should have best right to a bond of 2000 merks, due by Rentoun of Billie, Hume craved preference, as being assignee made to the bond by the creditors, and payment of a part thereof, made conform; and Pringle craved to be preferred, as being executor-creditor confirmed to the creditor, who, albeit he had given an assignation to Hume, yet the same was never intimate during his lifetime; and so it remained *in bonis defuncti*.—THE LORDS preferred the assignee, and found, That an assignation, albeit not intimate during the cedent's lifetime, was not null, but the assignee might pursue the debtor after the cedent's decree; yet as to the quot due to the Bishop, the assignee was liable; and this was found in this case, in respect the assignee had intimate, by getting payment of a part of the bond before the executor-creditor was confirmed; otherwise it would have been altered.

Gosford, MS. p. 78.

1726. July 5.

Competition betwixt SINCLAIR of Southdun, and SINCLAIR in Brabsterdoran.

SINCLAIR of Southdun, executor-creditor to the deceased James Sinclair, clerk to the bills, confirmed a debt due by James Murray merchant in Leith, and upon this title competed with Sinclair in Brabsterdoran, to whom James Murray's debt had been conveyed by the creditor James Sinclair, but never intimated.

For the executor creditor it was *pleaded*, That an assignation without intimation, is like a disposition without infestment; they import equally a personal action against the author, but are by no means a conveyance; the author is not denuded until intimation or infestment; in demonstration whereof, the author can again assign or dispo the subjects; and the first intimation or infestment

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confirmed the subject, as still *in bonis defuncti*.
The Lords preferred the assignee.

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An assignee neglecting to intimate during the cedent's life, an executor-creditor of the defunct confirmed the subject as still *in bonis defuncti*. It was found to be a valid confirmation, and preferable to the posterior intimation of the assignee.

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will be preferred, which could not be, were the author denuded by the simple assignation or disposition ; for upon that scheme, the second would be *a non habente potestatem*, and consequently null. The subject therefore remains with the cedent, until intimation by the assignee, conveyable again by his voluntary alienation, and affectable by his creditors.

On the other side, it was *pleaded* for the assignee, That nothing can be understood as *in bonis defuncti*, but what belonged to him before his death, what in a strict sense he could call his own, and as such, dispose upon at his pleasure. Now, for this reason, a sum assigned, though there is no intimation, is not *in bonis defuncti*, the defunct did all in his power by the assignation to alienate ; and if the intimation was further necessary, that was the work only of the assignee. In a word, it is inconsistent that a subject be considered as mine, which I have done the utmost to alienate, and which I cannot therefore dispose of, or intromit with, without being guilty of a crime. That intimation is a ground of preference among assignees, makes no argument, for that is *in favorem* only of the diligent, contrary to the nature of the conveyances ; and were the nature of the rights only considered, the first assignation would undoubtedly be preferred. And this seems to be the plain import of the act of Parliament made in 1690, which declares, “ That special assignations, though not intimate in the life of the cedent, are good and valid rights and titles ; albeit the sums of money therein contained be not confirmed.” For if, notwithstanding such special assignation, the sums of money or goods specially assigned were *in bonis defuncti*, a confirmation by the analogy of our law would be necessary. In the *last* place, the decision 27th July 1669, Ridpeth *contra* Hume, was adduced, mentioned by Lord Stair, *l. 3. tit. 1. § 15*, No 39. p. 2792. ; where this case was determined.

It was *answered*, That the preference given to the first intimation, is from the nature of the thing ; the favour of diligence it cannot be, if it be allowed, that his case is less favourable in the way of diligence, who intimated yesterday an assignation he obtained a twelvemonth ago, than his who got but his assignation this day, and intimated the same moment, and yet the first intimation in all cases is preferred ; it can only be, therefore, that the cedent is not denuded until intimation ; notwithstanding the assignation, the subject remains in his person, which he can validly uplift or assign, as no assignation had been granted ; if, indeed, he use this right in prejudice of the assignee, he will be liable upon the personal warrandice in the assignation, which is all the assignee can in law affirm ; but he ought to reflect, these two are very compatible, a *right of property* in one's person, and an obligation upon him to transfer that property to another, which he cannot disappoint, without being liable *pro interesse*. *Answered* to the argument drawn from the act 1690, Though the subject truly continues *in bonis defuncti*, notwithstanding an assignation unintimated, it will not follow, that the assignee must be confirmed, the intimation without more, taking the subject out *ex hereditate jacente mobilium*, and establishing it fully

in the assignee : And in this, an assignation is similar to a disposition or adjudication, upon which infestment taken after the death of the disponent or debtor establishes the subject, which in the *interim* was *in hereditate jacente*, completely in the person of the disponent or adjudger. As for the decision cited, the circumstances are not the same ; there the assignee had got a bond of corroboration, and a partial payment after the cedent's death, which has been always reckoned equal to an intimation. To conclude, the subject in dispute remained *in bonis defuncti*, notwithstanding the unintimated assignation. The confirmation was the first completed conveyance, taking the subject out *e medio* ; and upon that title, the executor-creditor falls to be preferred.

' THE LORDS preferred the executor-creditor.'

Fol. Dic. v. 1. p. 180. Rem. Dec. v. 1. No 87. p. 175.

1775. March 8.

PEREGRINE CUST *against* FRANCIS GARBET and Company.

UPON the death of Ebenezer Roebuck merchant in London, one of the partners of the Carron Company, which happened at Carron on the 9th of October 1771, a competition ensued respecting his share in the co-partnery stock of the Carron Company, computed to be worth about L. 6000 Sterling.

Mr Cust founded upon an assignment from the said Ebenezer Roebuck, dated the 16th May 1770, to his share of the stock in the above Company, subject to the proviso, that the same should be redeemable upon payment of L. 3350 Sterling, and interest thereof, upon the 16th May 1771 ; but, if not paid before that time, the right was to be absolute. This assignment had not been intimated during the lifetime of Roebuck the cedent ; but, after his decease, was intimated on the 29th day of October 1771, to two of the residing partners of the Carron Company at Carron. And, upon the 30th October, betwixt the hours of eight and nine in the morning, it was intimated by Mr Cust's factor to Charles Gascoigne, for himself as a partner, and as acting manager for the Carron Company, within the Company's office at Carron ; where he attended for that special purpose, in consequence of his own proposal to Mr Cust's factor, and the notary, who were with him at his house at Carron-wharf, the preceding evening, in order to have intimated the same to him then.

Francis Garbet and Company of Carron-wharf, being also creditors, did, upon the 17th day of the said month of October 1771, take out an edict from the commissaries of Edinburgh, for confirming themselves executors-creditors to the said Ebenezer Roebuck ; and, after the preliminary steps, a confirmation was expedite in their favour, bearing date the 30th day of October 1771, in which they gave up, for the particular subject of that confirmation, the sum of L. 6000 Sterling, as the supposed value of Ebenezer's share of the co-partnery-stock of the Carron Company.

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A competition between an assignment intimated after the death of the cedent, and a confirmation of an executor-creditor, expedite upon the same day, was found to be regulated by priority of the hour.