No 6.

p. 859. 2*do*, His citing Mitchell in his reduction and declarator, and calling for his assignation and intimation is no acknowledgement; because it is very well known, that writs are called for at hazard, and oft-times summonses are not libelled at the first raising, but are left blank, and this was not filled up till after Mitchell's intimation, and so might very well mention the same. *Duplied*, That though private knowledge alone be not sufficient to supply the defect of an intimation, or to finish and complete the assignation in law, yet being conjoined with the circumstances in this case, it is more than sufficient; for the assignation is long prior to Johnston's executing his declarator, which is acknowledged to have been blank, and what can be applied to any other extrinsic subject can never render this bond litigious; and the posterior libelling, and filling of it up, can never be drawn back to the prejudice of his assignation, either to put Sloss *in mala fide* to give it, or him to take it; for the *exceptio rei litigiosæ* is not competent in every subject, but only that, the alienation whereof is craved to be restrained. 2*do*, Many deeds have been sustained as equipollent to intimation; as the treating with the debtor and offering terms, Dunipace *contra* Sands, No 60. p. 859.; the writing a missive to the assignee, or promising payment, M'Gill, No 64. p. 860., and Home against Murray, No 66. p. 863; or a citation at the assignee's instance against the debtor; and the assignation being before citation is sufficient, as has been found in the case of denunciation of apprisings, to which assignations unintimated have been preferred, Smith *contra* Hepburn and Barclay, No 47. p. 2804; and Robertson *contra* Brown, No 64. p. 2820; and therefore the assignation must exclude the cedents oath. Yet the LORDS found the executing the summons against the cedent before the assignation was intimated, did make the subject litigious *ad hunc effectum*, to give him the benefit of the cedent's oath against the assignee.

Fol. Dic. v. 1. *p.* 551. *Fountainhall, v.* 2. *p.* 184.

1707. *July* 23.
DAVID BURTON Glazier *against* WILLIAM HAMILTON of Monkland.

No 7.
A debt being assigned after a bill of suspension thereof had been past against the cedent, it was found that the passing of the bill without intimation,

DAVID BURTON Galzier having charged William Hamilton of Monkland to make payment of 2000 merks assigned to the charger by Hamilton of Dalziel, he suspended upon this ground; that he offered to prove by the cedent's oath, that the sum assigned was only in trust in his name; for the behoof of John Hamilton of Bogs; which being proved, no charge could be sustained therefore against the suspender, because Bogs was his tutor, and had not cleared accompts.

Alleged for the charger, The debt being assigned for an onorous cause, the suspender could not have the benefit of the cedens's oath.

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't 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. 1. 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-