

in no formal process, but in an extraordinary trial; and that Russel, the pursuer now, had then no tile to these debts; therefore they found it was not *res jurata* so as to assoilzie Mr Baird; for though what he swore might be true, yet the law did not authorise the judges to believe it, but he must prove the quality of his oath some other way.

*Fol. Dic. v. 2. p. 347. Fountainhall, v. 2. p. 553.*

No 21.

1711. January 19.

Sir DAVID DALRYMPLE of Hailes, Baronet, Her Majesty's Advocate, against Sir GEORGE HUME of Kello, and WILLIAM BLACKWOOD, Merchant in Edinburgh.

THE deceased Sir James Stamfield having, for onerous causes, assigned to the deceased James Scot of Bristo, the stock and bygone profits of his share in the Newmills Manufactory; James Scot transferred the stock (which was heritable by destination to heirs, secluding executors) in favour of Sir George Hume and William Blackwood for onerous causes, reserving the profits to himself. After Sir James's death, two of his executors creditors pursued the managers of the manufactory before the Commissaries of Edinburgh, *in anno* 1689, for payment of these profits. James Scot compearing for his interest, craved to be preferred upon his assignation. The pursuers *replied*, That no regard could be had to the assignation in competition with them; because they offered to prove by his oath, that it was never delivered, but lying by Sir James at his death, and the cause happening to be advocated, in the year 1691, James Scot deponed that the assignation was not delivered before Sir James's death. Thereafter my Lord Advocate, as having right by progress to an adjudication of the stock of Sir James Stamfield's share in the manufactory aforesaid, pursued Sir George Hume and William Blackwood, as intromitters therewith, who defended themselves with the anterior translation made to them by James Scot.

*Alleged* for the pursuer; It being proved by James Scot's oath, that the assignation to him was never a delivered evident, and so null, the translation to the defenders falls in consequence; which oath doth militate against them, in respect their author's rights was rendered litigious by the process before the Commissaries advocated to the Lords, wherein the oath was craved two years before the translation, and emitted before intimation thereof.

*Answered* for the defenders; Nothing is litigious but what is *deductum in judicium*, and the process before the Commissaries concerned only what fell under Sir James Stamfield's executry, in relation to which only they could judge upon the validity of the assignation, and could not consider it with respect to the stock and heritable part of the subject assigned belonging to the defenders, which, not being then under debate, cannot be understood to have been ren-

No 22.

A party in a process acknowledging on oath that the writ he was using had never been a delivered evident, but lying by the granter at the time of his death. This oath was found probative against him, in a separate process at a third party's instance.

No 22. dered litigious by a judicial competition for the profits; consequently, the cedent's oath therein emitted cannot prejudice them.

*Replied* for the pursuer; It is a manifest absurdity to pretend, that the same individual *corpus* of an assignation comprehending moveables and heritage, may be delivered as to the one, and not delivered as to the other, and consequently, as to the individual allegiance of not delivery, be delivered and not delivered.

*Duplied* for the defenders; Though, in fact, a writ cannot be delivered in part, and undelivered in part, yet, where it concerns different subjects, it may in a legal sense admit this separation, that it may be cognosced and determined as to one, and not as to another. The question here is not whether the assignation to Scot was truly delivered or not, but whether his oath be sufficient proof against his assignees, that the same was not delivered, which it is not. Many instances of this could be given; as the nullities or objections against an heritable bond, sustained in a pursuit at the instance of the creditors of an executor for the bygone annualrents, would not be *res judicata* against the heir not called nor pursuing; and discharges or receipts were not found good against an onerous assignee, though sustained against the cedent, by whose oath the verity of the subscriptions were instructed, in the case of David Hume and the Lord Saline.

*Triplied* for the pursuer; Though sentence against an executor would not be *res judicata* against the heir, quia inter alios acta aliis non nocent; yet, if the same person, being both heir and executor, pursue as executor for the annualrents of an heritable bond, which happens to be improved in that process, and thereafter assign the principal sum and annualrents subsequent to his predecessor's death for onerous causes; the assignee insisting and competing upon that right, would be excluded by the improbation in the first process. So here the whole subject assigned, both heritable and moveable, standing in the person of James Scot, when the allegiance of not delivery was proponed, and no other person then interested to be called, the allegiance proved by his oath, must militate against all deriving right from him afterwards.

THE LORDS found, That Sir James Stamfield's assignation to James Scot, was rendered litigious by the process first intended before the Commissaries of Edinburgh, and thereafter advocated before the date of the translation in favour of the defenders, wherein the assignation to James Scot was quarrelled as not a delivered evident, and his oath craved thereupon, which was given before the intimation of the translation in favour of the defenders; and therefore found, that James Scot's oath must militate against the defenders, and doth sufficiently prove, that the assignation by Sir James Stamfield to James Scot, was not a delivered evident; and therefore preferred my Lord Advocate.

*Fol. Dic. v. 2. p. 348. Forbes, p. 482.*