DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

ALEXANDER BRUCE, ADVOCATE.

1714. *November* 12. The Creditors of HAMILTON, Younger of Orbiston, *against* HAMILTON of Dalziel, and the Creditors of ORBISTON, Elder.

A DISPOSITION being granted in anno 1699, by William Hamilton of Orbiston, in favours of James Hamilton his son, of his whole lands: he also grants to him an assignation of the same date, to his whole debts and sums of money, or other rights, which was or could be interpreted in his favours; but reserving a faculty to burden the assignation with such conditions as the father should think fit. At granting these rights, Orbiston stood bound as cautioner for the Lord Glasfoord and his lady, for a considerable sum, to my Lady Semple, for which he had a bond of relief; and upon distress having paid the money, his son's creditors, after his decease, obtained themselves decerned executors dative to him, and upon a license raised a process against the Lord Semple; as also upon a *cognitionis causa*, adjudged from Orbiston, elder, this debt of the Lord Semple. When Orbiston paid the debt, he took an assignation in his own name, and thereupon adjudged the Lord Semple's estate, and his own creditors also adjudged from him. Whereby, in the ranking of the creditors of the father and son, a competition arose for the foresaid subject of relief.

The point in question being, whether the general disposition of all debts by Orbiston to his son, did comprehend the said bond of relief; it was contended for old Orbiston's creditors, that it did not. 1*mo*. Because the said assignation being general, could not be interpreted to include such singular obligements as claus-

es of relief, which by their nature are scarce assignable, at least not to be presumed conveyed under a generality; especially since old Orbiston took thereafter assignation in his own name, and granted a special assignation thereof to Dalziel. *2do.* Though the assignation should be found to carry the right of relief, yet it is to be understood *cum suo onere;* so that young Orbiston behoved to free and relieve his father of the debt, which he did not. *3tio.* The assignation being latent, and special, as to the subject assigned, and not intimated to the debtor, and old Orbiston having thereafter adjudged, and this adjucation adjudged from him by his creditors, and therefore legally intimated; they are preferable both to the son and his creditors. *4to.* The son's creditors cannot compete; because the assignation reserves a faculty to burden the assignation with such conditions as the father should think fit; which faculty he thereafter exerced in a posterior contract betwixt him and his son, with an express irritancy, *de non contrahendo debitum;* and this contract having intervened before contracting any of the son's debts, they were thereby excluded from any interest in the subject.

ANSWERED for the creditors of young Orbiston,—That the two above-mentiontioned rights, comprehending the whole estate, must comprehend this bond of relief; because nothing is excepted, especially since they are granted with the burden of debts; and seeing the son was subjected to the payment of this debt to the Lord Semple, the obligation of relief was undoubtedly conveyed with the rest of the estate. *2do.* Nothing hinders a bond of relief, even before distress, to be assigned; since every obligation may, and even such as are conditional, as an obligation of relief is. So that the cautioner being distressed, his assignee has the same action the cedent would have had; as was found in the case of the *Marquis of Tweeddale* contra *Earl of Lauderdale.* *3tio.* As to Orbiston's taking assignation to the debt in his own name, that was proper enough to shew the distress was incurred; and the right did accresce to young Orbiston, like all other supervening rights taken by the cedent, which doubtless accresce to the assignee. *4to.* As to old Orbiston's paying the debt himself, and not the son, that had only the effect to purify the bond of relief, and make it take place in the son's person. Nay, it is plain it was the son's means that paid it, the father being denuded, and so wanting means of his own; which also answers what was alleged of the son's being bound to relieve the father of the debt, since that was virtually an obligement of relief, that he undertook the payment of the whole debts. *5to.* As to old Orbiston's creditors, their denuding him by their adjudication; It was answered, that he was already denuded by the general assignation to his son, to which the adjudication led by the father did accresce, like an assignee carrying on diligence in his cedent's name. Besides that young Orbiston's right was first legally perfected, by his creditor's pursuing the Lord Semple upon a licence; which was equivalent to an intimation, which also takes off all pretence of latency. *6to.* To the last point, anent the innovating contract, it was answered, that the son never receded from the first settlement; nor was that contract an innovation, but a farther title given to the son. And it was *jus tertii* to old Orbiston's creditors, since it does not state them in a better case; there being nothing therein given to old Orbiston, but only some restrictions laid upon the son, such as not to contract debt, which could signify nothing to old Orbiston's creditors: for though the son's after debts could not affect the land, yet that would not extend to separate funds, such as this

right of relief; neither took that contract any effect, not being registrate in the record of tailyies: so that the son's creditors were in *optima fide* to contract.

The Lords found it relevant to prefer the son's creditors, that the debt was paid out of the son's estate and effects.

Boswel, for the father's creditors. *Alt.* Sir Walter Pringle. Durie, *Clerk.*

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1715. *Jan.* 21. DAVID COUPAR, Maltman in Perth, *against* The SHERIFF-DEPUTE of Perth.

A COMPLAINT being given in to the Lords by David Coupar, showing, that he being pursued before the Sheriff of Perth, and having presented a sist upon a bill of advocation, before any interlocutor signed in the cause, yet the Sheriff-depute refused to stop procedure.

ANSWERED for the Sheriff,—1*mo*, That the interlocutor was pronounced before intimating the sist; and the signing of interlocutors is no new judicial act, since it may be done out of court. 2*do*, It is known to be the custom of all inferior judges, to decline admitting advocations after sentence, whether signed or not. 3*tio*, It being the last session day, the Court was up some time before, and the bill presented in the clerk's chamber, when the depute was examining witnesses. 4*to*, All produced was a sist, before the expiration whereof the interlocutor was not signed; and though done thereafter, it was warrantable, unless the expede advocation had been intimated before signing the interlocutor.

REPLIED for the complainer to the first,—That though the pronouncing sentence is the act of the judge, yet it is not act or sentence till it is writ out by the clerk, and signed by the judge, since *forma dat esse rei:* thus 15th *December*, 1708, *Houston* contra *Lord Ross*, a decreet in absence of the Admiral was found null, because not signed, though by the custom of that court such were not in use to be signed, but only entered into the diet-book; and, therefore, the act of the judge being intrinsically null, when the advocation was presented, it was unwarrantable to cause write out and sign the interlocutor; which was the thing that gave being to the sentence, and therefore inferred contempt. To the second, that the custom of court ought not to free the Sheriff from damage and expense, though it may free him from a fine. For every man is liable in reparation, when his fact occasions the damage, whether the same be culpable or not; and that upon the head of natural equity, as in the case of *lex aquilia*. To the third, that it appears by the instrument produced, that the advocation was intimated the same day the decreet was pronounced, while the Sheriff was sitting in judgment. And whether this was a second diet of the court sitting the same day, or a continuance of the former sederunt in which the decreet was pronounced, does not import; for at presenting, the interlocutor was neither writ out by the clerk, nor signed by the judge. To the fourth, that, 1*mo*, the contempt was in not admitting the advocation when presented. 2*do*, The advocation being presented the last day of court, the signing the interlocutor in the vacance was an aggravation of the contempt. 3*tio*, The decreet bears date the same day whereon the advocation was presented; nor was