

1795. November 17.

Mrs JANE ANN DOUGAL, Executrix of Dr DOUGAL *against* JOHN GORDON.

Dr DOUGAL, in 1789, granted to John Gordon, for value, two bills, one for L. 200, and the other for L. 145. He likewise accepted a bill payable to John Innes, for L. 145: 18s.

In security of these bills, Dr Dougal and his wife executed, in favour of Mr Gordon, an assignation, *ex facie* absolute, of a bond, due to them by Alexander Seton, for 3500 rix dollars of Sweden, equal to L. 777: 15: 6 Sterling.

Mr Seton, the debtor in the bond, was a Scotsman, but had lived chiefly in Sweden for many years before. He had, however, a considerable estate in this country, where he occasionally resided.

Of the same date with the assignation, Mr Gordon granted a letter, acknowledging that he had received it in security of the debts above-mentioned.

The two bills granted by Dr Dougal to Mr Gordon, were afterwards twice renewed, and the interest and expence of stamps included in new bills. These renewals took place on the 15th May 1790, when the original bills fell due; and, on the 22d November 1790, when a further advance of L. 12, made by Mr Gordon to Mrs Dougal, on the 6th August, was included in them; and, on the 2d December following, Mr Gordon advanced Dr Dougal a further sum of L. 12 Sterling.

In July 1791, Dr Dougal died insolvent.

Upon the assignation there was the following note, holograph of John Dundas, writer to the signet.

6th December 1790.

I hold this assignation intimated to me as agent for Alexander Seton of Preston.

JOHN DUNDAS.

It appeared, that Mr Dundas, besides managing Mr Seton's law affairs, received and paid away large sums on his account, and was in all respects his confidential man of business. He acted, however, without any written authority, while Mr Taylor in Linlithgow, Mr Seton's factor, who paid his rents to Mr Dundas, had a written commission from him for managing his affairs, containing very ample powers, but which he had never exercised to any greater extent than as an ordinary factor in the country.

It further appeared, that on 16th April 1790, Mr Dundas wrote Mr Seton, then in Sweden, informing him, that the bond had been assigned to Mr Gordon; and Mr Seton having himself come to this country in autumn 1791, Mr Gordon, in October, wrote to Mr Dundas, expressing a wish, that Mr Seton would pay the bond at the following Martinmas. Mr Dundas on the 5th November answered, that Mr Seton would do so; and accordingly, in February 1792, a discharge of it was made out by Mr Dundas, which was signed both by Mrs Dougal and Mr Gordon.

No 53.
Is it sufficient to intimate an assignation to the confidential man of business or the debtor, when he himself is abroad?

No 53.

Before payment, however, James Saunders, a creditor of Dr Dougal, brought an action against Mrs Dougal, libelling on the passive titles; and on 16th and 17th February 1792, he used an arrestment, on the dependence, in the hands of Mr Seton and Mr Dundas, of part of the sum contained in the bond.

Mr Saunders failed in intruding any passive title against Mrs Dougal, and only obtained a decree against her *cognitionis causa*.

Mrs Dougal, on the 10th April 1792, got herself confirmed executrix of her husband *qua* relict; but the inventories given up by her contained only some medicines and household-furniture.

Mr Seton, in May 1792, bought a multiplepinding, in which he called Mrs Dougal, and all the parties having interest in the bond.

Mr Gordon having, in May 1793, produced, as his interest, the bills above-mentioned, and his assignation, Mrs Dougal, as executrix of her husband, and in behalf of his other creditors,

Objected, 1st, Assignations must be intimated to the debtor personally, if within the kingdom, and edictally when he is abroad; Ersk. b. 3. tit. 6. § 14. The assignation in question is therefore incomplete, from its not having been intimated to Mr Seton, the debtor in the bond, but merely to his agent Mr Dundas.

It is true, Mr Dundas seems to have informed the debtor of the assignation, but this could not supply the want of actual intimation, which is essential to complete the right of the assignee. Private knowledge has not even the effect of putting the debtor in *ma'la fide* to pay to the cedent; Fount. v. 1. p. 281. Castles, *voce* EXECUTION, Earl of Aberdeen against the Creditors of Merchiston, No 73. p. 867. (*This last reversed on appeal.*)

2dly, Although the note by Mr Dundas were held to be sufficient evidence of intimation, yet, as holograph writings do not prove their dates, it must be held to have been granted after the arrestment used by Mr Saunders. *See* No 66. p. 863.; and Fount. v. 2. p. 456. 22d July 1708, Earl of Selkirk against Gray, *voce* FOREIGN.

3dly, Even admitting the assignation to have been in all respects duly intimated at the date of Mr Dundas's acknowledgement, it would give no preference to Mr Gordon. It appears from his missive to Dr Dougal, that the assignation was granted to him in security of the bills which he and Mr Innes got from the Debtor in 1789. But, by the subsequent renewal of these bills, there was a complete novation of the debt; and it is an established rule of law, *novatione legitime facta liberantur hypothecæ et pignus*; 30th June 1752, Duke of Norfolk, Fac. Col. No 16. p. 33. *voce* SURROGATUM; besides, in this case, a new debt of L. 12, and the bygone interest on the old bills, are included in these now founded on; so that there is here not merely a change of one obligation for another, but a radical alteration in the nature and substance of the debt.

Answered, 1st, The intimation of an assignation to the debtor's factor has been sustained, even where the debtor was in this country; Decision in House of Lords, Earl of Aberdeen against Creditors of Merchiston, No 73. p. 867.; and much

more ought it to be so where he is abroad. Besides, any step taken by the assignee by which the debtor is put in *mala fide* to pay the cedent, has the effect of completing his own right; Durie, 31st March 1624, Dunipace, No 60. p. 859; Stat. b. 3. t. 1. § 7.; and the assignation was virtually intimated to Mr Seton by the subsequent transactions.

2dly, The rule, that holograph writings do not prove their dates, admits of various exceptions; and, in particular, the holograph acknowledgement of an intimation has been repeatedly found probative of its date; Durie, 22d January 1630, Macgill against Hutcheson, No 64. p. 860.; Earl of Aberdeen against Creditors of Merchilowen, No 73. p. 867.; 23d November 1785, Newton and Company, No 52. p. 850.; besides, the assignation was sufficiently intimated by its production in this action, which is enough to secure Mr Gordon's preference, as the bond assigned has not yet been habilely attached by any competing diligence; for Mr Saunders's arrestment is inept, as proceeding on an action against Mrs Dougal before her confirmation, and which, accordingly, resulted in a decree *cognitionis causa tantum*; Erik. b. 3. t. 6. §. 8.

3dly, There was no *novatio debiti* in this case. The original debt due by Dr Dougal still remains unextinguished, although the vouchers of it were changed for his accommodation. It is evident, that novation was not intended by either party; and the law is so far from presuming it, that even an *animus novandi* is not sufficient, unless it be explicitly declared; Voet, lib. 46. t. 2. § 4, 5, 6.; 1st March 1781, Bank of Scotland against Bank of England, Fac. Col. No 41. p. 72. *voce* RIGHT IN SECURITY; 2d August 1781, Ranking of the Creditors of Cult, Fac. Col. No 78. p. 134. *voce* CREDITORS OF A DEFUNCT; 25th February 1785, Rutherford, Fac. Col. No 205. p. 320. *voce* INNOVATION; 24th July 1785, Douglas, Heron, and Company, Fac. Col. No 223. p. 349. *voce* INNOVATION.

Besides, although a *novatio debiti* had taken place, as the assignation is *ex facie* absolute, Mr Gordon would have been entitled to retain it till he was paid this new debt. Mr Gordon held Dr Dougal's residuary interest in the bond, after the debts mentioned in the letter were satisfied, in trust for his behoof; and a trustee, coming under engagements for the trustor, cannot be compelled to denude till he be repaid or relieved.

Or, even admitting that the original contract between the parties was that of pledge, and that a novation of the debt took place, still the rule of law, *liberantur hypotheca et pignus*, only applies where there is a second creditor, to whom the same thing has been pledged; but the debtor himself, or his personal creditors, cannot demand back the pledge, till not only the original debt, but every other debt due to the *creditor hypothecarius* is paid, Voet. l. 20. t. 6. § 16.; Cod. l. 8. t. 27.; Forbes, p. 240. 14th February 1708, Fount. v. 2. p. 509. 1st July 1709, Strachan, *voce* COMPENSATION, RETENTION.

THE LORD ORDINARY 'found no sufficient grounds for sustaining the claim of preference made by John Gordon.'

On advising a reclaiming petition and answers, the Court were clear, that Mr Saunders's arrestment was inept, and that, as Mrs Dougal had not confirmed the

No 53. bond, the production of the assignation in the multiplepointing, which was equivalent to intimation, gave Mr Gordon a preferable right to either of these parties. They consequently had no occasion to determine as to the legality of the intimation to Mr Dundas.

Neither had they occasion to decide how far the renewal of the bills operated as a *novatio debiti*; a great majority of the Judges being clear, that admitting the renewed bills to be a debt contracted subsequent to the assignation, yet as the assignation was *ex facie* absolute, and as the bond had not been attached by any of Dr Dougal's creditors, before the renewal of these bills, Mr Gordon was not bound to reconvey it till they were paid.

The Court, (11th June 1794.) 'in respect the assignation founded on by the petitioner (Mr Gordon) is absolute in favour of Mr Gordon, preferred him for the payment of his debt upon the fund *in medio*.'

And, on advising a reclaiming petition for Mrs Dougal, with answers, &c. the LORDS adhered. See COMPENSATION, RETENTION. See INNOVATION. See PROOF.

Lord Ordinary, *Craig*.

Act. Dean of Faculty Erskine, Tait.

Alt. Solicitor-General Blair, Mat. Ross, John Clerk.

Clerk, Gordon.

R. Davidson.

Fac. Col. No 134. p. 439.

Intimation by what equivalents suppliable.

1586. *June.* MACKALZEAN *against* MACKALZEAN.

No 54. WHERE intimation is necessary as a solemnity, the party concerned, though inserted as a witness, in an instrument of intimation, was found thereby not to be put in *mala fide*, but only by a formal intimation. (See The conclusion of Haddington's report of No 56. p. 855.)

*Colvill, MS.**

See Haddington, No 2075. Graham against Livingston, *vocce* PUBLIC OFFICER, where the party was made witness to an assignation.

1622. *March 22.* ANTOYNE WHYTE *against* NEISH.

No 55. IN an action betwixt Antoyne Whyte writer, *contra* Neish, for registration of a bond; the defender *alleging*, That he had paid the cedent before intimation of the assignation:—THE LORDS found, That the summons of registration being lawfully execute against the defender, by an officer of arms, before the payment made to the assignee, was a lawful intimation.

Haddington, No 2621.

* See note under page 840.