

1632. July 25.

A. against B.

No 17.

A BLANK assignation delivered to a party, infers not that it was delivered for the behoof of the receiver, except it be proven that it was delivered to that effect; although that a number of the LORDS thought, that the delivery to the party was sufficient, and ought to be understood it was given to be filled up, at the receiver's pleasure and for his behoof.

*Balmanno, MS. (ASSIGNATION.) p. 14.*

1634. January 9.

KNOWS against E. of MARR.

No 18.

THE Earl of Marr being addebted to Michael Elphinston the sum of 7000 merks, by two heritable bonds, which were apprised from the said Michael, by James Knows assignee constitute, by two of Michael's creditors: The Earl of Marr is pursued by the said James appriser, to make the said sums furthcoming.—In the action compares Thomas Bruce, provost of Stirling, for his interest, and *alleges* the said sum should be made furthcoming to him, because he was made assignee to the said sums, by the said Michael, and his assignation intimate, before any denunciation used by the compriser.—To which it was *replied*; That the assignation was null, because it was offered to be proven, that notwithstanding of the assignation, the cedent was in possession in uplifting the annualrents diverse times after the date of the said pretended assignation; and that Thomas Bruce himself had taken a factory since the said assignation, from the said Michael; and as factor, had given discharges to the Earl of the annualrent; whereby he had past from the assignation.—To which it was *answered*; That the assignee had given no discharges as factor, after the intimation of his assignation; and what he did before, cannot prejudge him; because his assignation was no perfect right, before it was intimate; but after the intimation became perfect.—To which is was *replied*, That the acceptance of a factory annihilated the assignation, and extinguished the same, and the posterior intimation could not make *non ens* to revive; which reply the LORDS found relevant.

The cedent retaining possession, and the assignee taking a factory from him, found to extinguish the assignation.

*Balmanno, (ASSIGNATION.) p. 14.*

1635. December 8.

MUIR against CALDER.

No 19.

UMQUHIL Henry Hunter was addebted to Thomas Barber in 300 merks: This Henry having left behind him only one daughter, that lived not long after, his means fell to two sisters, Janet and Bessie Hunters. John Muir, who married Janet, paid the sum to Thomas Barber, and took assignation of it in the Laird of

The assignee can be in no better situation than the cedent would have been.

No 19.

Annistoun's name. John Muir of Annistoun, the assigney's son, fought to have this bond transferred against Richard Calder, grandchild to Bessie Hunter, the other sister, and who had served himself heir to the said Henry Hunter his grandmother's brother. *Alleged*, No transferring; because offers to prove, that the said bond was paid by John Muir, husband to Janet; which John was debtor of the said sum, in so far as he having married the said Henry's sister, and apparent heir portioner, did intromit with his goods and heirship, and disposed certain of his lands and heritages, the price whereof, with the goods intromitted with by him, will be more than the bond libelled. *Replied*, That this ought to be repelled; because, any payment made by John Muir was not to the effect Henry his heir should be liberate, but rather to burden him; for he, seeing that he was such a party as might be burdened with the payment of the said bond, made payment of it, and took assignation in Annistoun's name, that he might lay it on upon the heir again, which was very lawful for him to do; so that it was not *solutio*, but rather *nomini emptio*: And as to his intromission, it was with his own goods belonging to him *jure mariti*; and although they came to him by his wife, yet he was not bound for that to undergo all her debts; and that although, perhaps, if he had been convened for it in his own time, he would have been found liable to it; yet, now he being dead, his interest ceasing, (seeing he was only conveyable *pro interesse et non principaliter*), the allegiance must be repelled specially in consideration of the assigney, who being a singular successor, cannot be obliged to pay this, whatever might have been said against the cedent. *Duplied*, The assigney can be in no better case than the cedent; and if the cedent's own name had been in the assignation, no question but it had been unprofitable to him, even so must it be where he borrowed another's. And it is most reasonable, that, this bond being paid out of the debtor's own gear, his heir should not be burdened with it again; and that the pursuer's cedent having reaped the benefit, should be liable to the burdens, *quia quem sequuntur commoda eundem sequi debent et incommoda*. THE LORDS found the allegiance relevant.

Spottiswood, (ASSIGNATION.) p. 22.

1666. December 7.

MONTEITH against E. CALENDER and GLORET.

No 20.

An assignation taken blank in the assignee's name, is liable to every exception that could affect the cedent.

THE Laird of Parkley Hamilton as principal, and Hamilton of Kinglassie, and certain others, his friends, as cautioners, being debtors in two bonds: Kinglassie, in consideration that Parkley had disposed to him a right of wadset which he had to the lands of Touch, by a contract, did oblige himself to satisfy and pay the sums contained in the saids bonds; and to procure discharges from the creditors to Parkley and his cautioners: And nevertheless having paid the said sums, he did not take discharges, but assignations to the saids bonds, which he filled up in the name of Sir Mungo Stirling of Gloret, his own creditor; who did thereupon arrest a sum due by the Earl of Callender to Parkley: Thereafter Captain Mon-