

No 10. THE LORDS found, That she ought to renounce, reserving to her the foresaid provision, as accords.

Reporter, *Castlehill.*

Clerk, *Gibson.*

Dirleton, No 276. p. 134.

No 11.

1677. *January 24.* DICK *against* OLIPHANT.

AN assignation being granted for relief, and payment of certain sums mentioned in the assignation, for which the assignee was cautioner for the cedent; the same was questioned upon that head, that it was never delivered, but was still in the cedent's hands. THE LORDS found, That the said assignation was never delivered; and yet they found, That it was an effectual evident in favours of the assignee, in respect the cedent had made the same public by a horning thereupon. *In presentia.*

Sir George Lockhart, &c.

Alt. Cunningham, &c.

Dirleton, No 442. p. 215.

* * * Stair reports the same case :

1677. *January 18.*—TYRIE of Drumkilbo being debtor to Douglas of Kilspindie, in a sum of money, the same was arrested by Janet Mackmath; and, in a competition betwixt her, as arrester, and Sir James Douglas, as having right to the sum by translation from Douglas of Lumsdale, as assignee by Kilspindie, Sir James was preferred, because, before the arrestment, Lumsdale's assignation was intimated by a charge of horning; in which process, improbation was proponed against Lumsdale's assignation, which was not sustained by exception, but reserved by action, whereupon reduction and improbation was intented, yet Sir Lawrence Oliphant of Gask purchased the right from Sir James Douglas, and did defend it in the improbation, till at last the assignation was improven. There is now a reduction and declarator intented against Sir Lawrence and others, for reducing the decret of preference founded upon the false assignation, and for decerning Sir Lawrence, and all those having right from him, to refund the arrested sum, and the annualrents thereof. It was *alleged* for the Defenders, That there is now produced a true assignation intimated by a horning, which therefore did denude Kilspindie before the arrestment, and so must defend these defenders deriving right from Lumsdale. The pursuer *answered, imo,* That Sir Lawrence Oliphant having taken a right after the matter was litigious, and having most tenaciously defended in the false assignation, he cannot now make use of this true assignation. *2do,* This true assignation was never Lumsdale's delivered evident, and therefore, did not denude Kilspindie; for albeit delivery is presumed, and needs not to be proved where the writ is in the hand of him in whose fa-

vours it was granted; yet here the true assignation was produced by the arrester, gotten out of the hands of the successors of Alexander Douglas, writer; and it is evident by the horning raised upon the assignation, which is alleged to be the intimation thereof, that the keeper of the register marks the same, as produced, not by Lumsdale the assignee, but by Kilspindie the cedent. It was *replied*, that Sir Lawrence Oliphant being free of the suspicion of the forgery, his using of the false assignation cannot exclude him to make use of the *terce*, which being produced by the arrester, is emergent to him, and was not in his power or knowledge. *2do*, The evidences are not sufficient to instruct the not delivery of the assignation, seeing Alexander Douglas was writer, both to Kilspindie and Lumsdale. *3tio*, Though it had not been delivered, yet being intimated by a charge of horning, and granted by the cedent for relief of cautionry, wherein the assignee was engaged, it becomes effectual without delivery for the cautioner's relief, and he might have compelled the cedent to deliver it; for though it be true that any man may take bond, assignation, or other right, in the name of any other, and use all diligence thereon, and if he retain the same without delivery, he may compel that party to denude himself, or declare against him, that his name was used to the cedent's behoof, which cannot hold in this case, where the assignee has a proper interest of relief; and it is inconsistent that Kilspindie could pretend that the assignation made by Kilspindie to Lumsdale, for Lumsdale's relief of his cautionry, was in trust, for the behoof of Kilspindie the cedent, except in so far as exceeded the relief. And it is offered to be proved, that Lumsdale, or those deriving right from him, did pay the sums enumerated in the assignation.

THE LORDS found, that an assignation whereupon the cedent raised horning and charged in the assignee's name, being for the assignee's relief, was effectual without delivery, in so far as the cautioner was distressed, or made payment.

The defender further *alleged*, That that member of the libel concluding against Sir Lawrence Oliphant, to make payment of the sums, for which the arrestment was laid on *in quantum lucratus est* (in so far as he took right without any antecedent interest, after the matter was litigious, and by defending the false assignation for several years, did debar the arrester until Drumkilbo's estate was affected with adjudication for other debts, which excludes the arrester, whereby Sir Lawrence had gain, and the arrester had loss) that that conclusion was not relevant, because Sir Lawrence transmitted his right, and might lawfully make his best of it.

THE LORDS found the foresaid conclusion relevant against Sir Lawrence, in so far as he made profit in getting sums more than he gave out, having taken right after the matter was litigious, but ordained the arrester, upon payment, to assign an equivalent part of the sum to Sir Lawrence.

Stair, v. 2. p. 496.