

1674. December 11. HOME and ELPHINSTON *against* MURRAY of Stenhope.

IN a competition betwixt an assignee and an arrester, it was *alleged*, That the assignee should be preferred, because the assignation was anterior to the arrestment; and, though it was not intimate, yet the equivalent was done, in so far as, the debtor being desired to make payment to the assignee, and shewing his assignation, did promise to pay the same; which, upon the matter, was like a bond of corroboration, which certainly would prefer the assignee, notwithstanding he had not intimate his assignation.

THE LORDS found, That if the said promise were verified by writ, it should exclude the arrester; but that it could not be proven by the debtor's oath, in prejudice of the arrester: And even as to the debtor, the said promise could not bind him, being made in contemplation of a right supposed to be in the person of the assignee; which being found not to be a valid right, there were no reason that the debtor should pay twice.

And whereas it was pretended, That if the debtor had not accepted the debt, and promised payment, the assignee would have done diligence, so that he would have been preferable to the arrester:—THE LORDS thought, that *sibi imputet* that he had not perfected his right, as was found before in the case of Pitfoddell's *contra* Donaldson.

Reporter, *Forret*.

Clerk, *Gibson*.

*Fol. Dic. v. 1. p. 64. Dirleton, No 201. p. 89.*

No 66.  
It was alleged that the debtor had promised payment to the assignee. Found that this promise, if proven *scripto*, but not otherwise, would be equivalent to intimation.

1679. November 29.

MR JOHN BAIN of Pitcairley *against* CUNNINGHAM McMILLAN, &c.

FOUND the writing a letter to the debtor not a sufficient intimation of an assignation.

*Fol. Dic. v. 1. p. 64. Fountainball, MS.*

No 67.

1681. December.

OGILVIE *against* OGILVIE.

THE Lady Airly having disposed her liferent to Sir David Ogilvie her son, and he thereupon having taken out an decret against the tenants in an Baron Court; which being suspended upon double poiding, there was compearance made for Thomas Ogilvie of Logie, who craved to be preferred upon the ground, That he having pursued the Lady for a sum due by her, he did arrest the rents in the tenants hands upon the dependence; which having taken effect by a sentence, he had raised a summons to make arrested goods forthcoming. *Answered* for Sir

No 68.  
A disposition to a Lady's jointure, found sufficiently intimated, so as to exclude an arrester, that either the tenants were cited at the

No 68.  
 assignee's instance, to pay to him, or the disposition was produced in the Baron Court, and intimated to the tenants, although the decree given on it, was afterwards turned into a libel.

David, That he ought to be preferred, because his mother had granted a disposition to him of her liferent, for onerous causes, long prior to Logie's arrestment, which was produced and intimate to the tenants when the decret was obtained before the Baron Court; and accordingly they had actually made payment to him of their rents. *Replied*, That the decret being turned in a libel upon several informalities, it was null *quoad omnes effectus*; and so could not be sustained to have the effect of an intimation of Sir David's disposition; and the tenants were *in mala fide* to make payment to Sir David, after Logie's arrestment. *Duplicated*, That albeit the decret was turned in a libel, yet the disposition being produced in Court, it was a sufficient intimation to the tenants; and, therefore, they did warrantably make payment of their rents to Sir David.—THE LORDS preferred Sir David Ogilvie upon his disposition, as being sufficiently intimate, he proving either the tenants were cited at his instance, to make payment to him of their rents, or that the disposition was produced in the Baron Court, and intimate to the tenants.

*Fol. Dic. v. 1. p. 65. Sir P. Home, MS. v. 1. No 23.*

1682. *March.*

ALEXANDER JOHNSTONE *against* JOHN SPEVIN.

No 69.  
 A discharge which contained a narrative, mentioning an assignation, was found, in a competition, not equivalent to intimation.

ONE having assigned a bond with the bygone annualrents, and afterwards granted a discharge, by two notaries, of some of these annualrents that had been truly paid before the assignation, though not discharged before intimation of the assignation, which was subscribed by one notary, at the date, and by another, some months after the discharge;

It was *alleged* for the assignee, in a competition, That, though his assignation be not formally intimated, the narration of the assignation in the discharge is equivalent to an intimation. *2do*, The discharge acknowledging the assignation, though it had but one notary, as it had two, is equivalent to the cedent's oath, that he gave command to the notary, which supplies the want of the other notary; and, being *in gremio* of the discharge, is as good as if it had been acknowledged in writ before the granting of the discharge.

*Answered*: Intimation in a competition of creditors must be formal by instrument, which the narrative of the discharge is not equivalent to; nor does the narration of the assignation supply the legal solemnities. *2do*, The debtor, who received the discharge, being truly creditor for an onerous cause, upon the warrantice thereof, would have got the cedent's oath, the assignation being for love and favour; and the assignation is reducible on the act of Parliament 1621, as *in fraudem creditoris*.

THE LORDS found the assignation was not validly intimate, and preferred the debtor on that head, without giving answer to the other points.

*Harcarse, No 103. p. 20.*