

five was before the arrestment; and the other *answering*, That that missive was not a legal intimation, and could not be respected against him, who was a co-creditor, and had done lawful diligence to affect the money; for the said missive being a private deed, and which betwixt them might be of any date they pleased. Seeing there is no means to improve the same, wanting witnesses, it may have what effect it can against the writer, but ought not to work against him, who cannot be prejudged thereby.—THE LORDS found, that this missive, dated before the arrestment, was as sufficient as any intimation: Therefore preferred him to the arrester; for if the writer of the missive had at that time given bond to that assignee, to pay him that sum, the arrestment thereafter would not have prejudged the assignee, and the missive was alike, wherein he had promised to pay him; but it appears not alike, for the bond behoved to have witnesses, whereby the manner of improbation was extant, which was not so in the letter. *See PROOF.*

No 64.

Clerk, *Hay*.*Fol. Dic. v. 1. p. 64. Durie, p. 484.*

The same case is thus reported by Kerse:

INTIMATION sustained, given by an letter written by the assignee to the debtor, and by his answer making days of payment, *idq. contra tertium cessionarium.*

Kerse, MS. fol. 53.

Also by Spottiswood:

JAMES TURNBULL being addebted to Captain Semple in L. 300, the Captain assigneth it to William M'Gill in Edinburgh, who, upon his assignation, acquainteth James Turnbull, the debtor, of it, and desireth payment of it conform to his assignation, without making any other legal intimation thereof. James writeth back to the assignee, that he hath no money at present, but promised to pay him at Martinmas next. Before payment, Mr John Hutchison, a creditor of Captain Semple's, arrests the same sums in James Turnbull's hands. The question falling out betwixt the assignee and the arrester, which of them should be preferred, the assignee leaned to his assignation for an onerous cause, and the debtor's letter, whereby he acknowledged the debt, and promised payment, which was equivalent to an intimation. The arrester *alleged*, That the assignation, without intimation, gave him no right, and the debtor's letter might prejudice himself, but none else. THE LORDS preferred the assignee, in respect of the assignation and letter foresaid.

*Spottiswood, (ASSIGNATION.) p. 21.*1664. November 18. THOMAS GUTHRIE *against* SORNBEG.

GUTHRIE pursues Sornebeg, *alleging*, That there being a first wadset of the lands of Thriplandhill, and certain tenements in Edinburgh, to Alexander Veitch, or

No 65.
Infeftment in
a second wad-
set conveying

No 65.
the reversion
of a first,
found to be
equivalent, to
the registra-
tion of a for-
mal assigna-
tion to the
reversion,
and to super-
cede the ne-
cessity of in-
timation.

his authors; and a second wadset of the lands of Thriplandhill, granted to the pursuer's father; and by a posterior contract, the pursuer's father's wadset was confirmed, and a certain sum added thereto; and for both, some tenements in Edinburgh were disposed with this provision, That Guthrie should possess thereby, and should be accountable for what was more than his annualrent; and Sornbeg having redeemed the first wadset, and taking a renunciation thereof, and having right to the reversion of the whole, entered to the possession of the tenements in the town; whereupon Guthrie craves that Sornbeg may compt and reckon for the mails and duties uplifted by him, and possess him in time coming, to the hail mails and duties, aye and while he be paid off his principal sum and annualrents, or satisfied by intromission.—The defender *alleged, 1mo*, That he having the right of reversion, though posterior, yet having first redeemed and made use thereof; his right of reversion by his disposition being in effect an assignation to the reversion; and Guthrie's second wadset being a prior assignation to the reversion; the second assignation, with the first diligence or intimation, must prefer the defender.

This the LORDS repelled, and found no necessity of an intimation or diligence to consummate Guthrie's right to the reversion of the first wadset; seeing Guthrie was infeft by his second infeftment, which was equivalent to the registering of a formal assignation to the reversion.

2do, The defender *alleged*, That being singular successor, and having redeemed the first wadset, which is now extinct, he possesses by an irredeemable right, and so must have the benefit of a possessory judgment.

THE LORDS repelled this defence, seeing seven years possession was not alleged.

3tio, The defender *alleged* absolvitor from the bygone mails and duties, before intending of this cause; because, albeit he had not possessed so long as to attain the benefit of a possessory judgment, which would defend him, not only for by-gones, but in time coming, till his right were reduced; yet before citation, he was *bona fide* possessor, *et fecit fructus consumptos suos*, which the LORDS found relevant.—*4to*, The defender *alleged*, That by the pursuer's contract he was to be countable for the superplus of the mails and duties of the lands, more than paid his annualrent; and now the defender coming in place of the heritor, the pursuer is countable to him for the superplus.—The pursuer *answered*, That albeit he was countable, he might detain those annualrents, and impute them in his principal sum.

THE LORDS having considered the contract, found the pursuer ought to be repossessed; but that he could not detain the superplus; but that he behoved to be countable yearly to the defender conform to the contract.

Stair, v. I. p. 226.