

1683. February. JOHN MUIR *against* SCHAW of Grimmet.

IN a count and reckoning, at the instance of a second appriser against the first, whom he was not within year and day of, the pursuer pretending, that the defender was satisfied, and paid by his intromissions; it was *alleged* for the defender, That, since his entry to possess, the tenants in such and such rooms had not paid all the years' duties, although he had done reasonable diligence against them by horning and denunciation, and had raised caption, though he had not executed the same.

Answered for the pursuer: The defender ought to have poinded.

Replied: Comprisers are not obliged to poind.

Duplied: The defender having, in a competition, excluded the pursuer, he ought to do more than ordinary diligence.

THE LORDS found, That, seeing the defender excluded the pursuer, he ought to have poinded, unless he allege and prove, that the poinding would have endangered the laying the lands waste, though in the case of no exclusion, denunciation was a sufficient diligence.

Fol. Dic. v. 1. p. 237. Harcarse, (COMPRISING.) No 287. p. 67.

NO 10.
What is sufficient diligence.

SECT. II.

Diligence prestable by Assignees.

1664.

BRUCE *against* MORISON.

SIR George Morison of Dairsey made an assignation to umquhile Mr Robert Bruce of Broomhall, to a sum of money contained in a bond granted to him by the Earl of Seaforth, Lord Sinclair, Lairds of Murkle, Lugtoun, and Blackburn; which assignation he did oblige himself to warrant at all hands, and that he should recover thankful payment of the sums assigned, otherways that he should pay to him what sums he should not recover from the debtors. Alexander Bruce, son and heir of Mr Robert, pursues registration of this assignation against Sir George, to the end he may have execution against him for warrandice and payment, payment not being recovered from the debtors. It was *alleged*, absolvitor, because the assignation being dated *anno* 1647, the clause of warrandice and repayment could import no such thing as repayment,

NO 11.
An assignation being granted with absolute warrandice in case payment was not obtained, and the assignee having done no diligence to recover payment, the Lords found the granter liable in payment.

No 11. unless diligence had been done *debito tempore*, against the debtors; who, if they have now become irresponsal, it should only prejudice the pursuer, being his own and his father's *mora*, and not the defender's. It was *answered*, That in the assignation, it was not provided that the receiver should do diligence, but that he should recover timeous payment; but so it is that he did not recover timeous payment: Likeas after the granting the assignation, the troubles of the country having grown, and sinsyne the pursuer having used diligence against the Lord Sinclair by horning, caption, &c. he has done more than he was obliged to do, he not being tied to diligence by the assignation.

THE LORDS repelled the allegiance.

Fol. Dic. v. 1. p. 238. Gilmour, No 99. p. 75.

1678. February 7.

STUART against MELVILL.

No 12.
An assignation being granted with absolute warrandice, in case payment should not be obtained, and the assignee having done no diligence, the Lords found he had no claim against the granter of the assignation.

JOHN MELVILL being debtor to umquhile Henry Stuart, he gives him an assignation to a bond due by Patrick Scot, second son to Langshaw; which assignation bears warrandice at all hands, and that the assignee shall recover payment thereby. Patrick Scot being dead, Henry Stuart as heir to his father, pursues John Melvill for payment of the sum assigned, because he had not recovered payment from Patrick Scot. The defender *alleged*, that by this assignation and clause of warrandice, there was necessarily imported, that the assignee should have done diligence, it bearing expressly, that he should recover payment by the assignation: *Ita est*, Though the debtor, Patrick Scot, lived six years after the assignation, the assignee did no diligence against him; and it cannot be thought, that if the assignee had forborne for 39 years to pursue upon his assignation, that he could have returned upon his cedent, seeing the assignation was not granted in corroboration of any debt, but in satisfaction of a prior debt. The pursuer *answered*, that this clause must import the solvency of the debtor the time of the assignation, and therefore the cedent must prove at least that he was then solvent, and had a visible estate, which might be affected. It was *replied*, That solvency is presumed, unless notour irresponsality were proven, for after so long time the cedent was neither obliged, nor took notice to instruct the condition of his debtor, which should have appeared by the assignee's diligence, whereby if he had incarcerate him, it would have discovered his condition.

THE LORDS found, that this clause imported the solvency of the debtor, but that the same was presumed, unless it were proven that he was a notour Bankrupt; or that the assignee using diligence, did not recover; and if responsality be alleged, allows the cedent to condescend upon any visible estate he had to affect the same.

Fol. Dic. v. 1. p. 238. Stair, v. 2. p. 611.