No 19. Anniſtoun's name. John Muir of Anniſtoun, the aſſigney's ſon, ſought 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 diſponed 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 *nominis 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 conveenable *pro interesse et non principaliter*), the allegeance 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 allegeance 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 diſponed 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 Hugo Stirling of Gloret, his own creditor; who did thereupon arreſt a ſum due by the Earl of Callender to Parkley: Thereafter Captain Mon-

teith having right to Callender's debt by aſſignation from Parkley, obtained a decreet againſt the Earl; which being ſuſpended upon double poinding, it was *alleged* for Gloret, That he ought to be preferred, in reſpect of his aſſignation and arreſtment: Whereunto it was *answered*, That Kinglaſſie being obliged (as ſaid is) to pay the ſaid ſums, had paid them; and whereas he ſhould have taken diſcharges, he had taken an aſſignation blank in the aſſignee's name, and had filled up Gloret's name in the ſame; ſo that aſſignation being procured by him, and lying by him, and he being maſter of it, it was in effect his; and he was in the ſame caſe, as if the aſſignation had been granted to himſelf, and he had made a tranſlation to Gloret; in which the exception upon the obligement foreſaid to relieve Parkley, as it would have been competent againſt Kinglaſſie, would have ſecluded alſo Gloret, his aſſignee, by tranſlation. In this proceſs Gloret's oath being taken; and he having declared, that the aſſignation was procured by Kinglaſſie, and by him delivered to Gloret, and that he paid nothing to the cedent, but that the aſſignation was given to him by Kinglaſſie, that he might be ſatisfied of certain ſums due to him by Kinglaſſie, which he was to diſcharge if he recovered payment, by virtue of the ſaid aſſignation: No 20.

THE LORDS upon a debate *in præsentia*, preferred Monteith, and found the exception, which was competent againſt Kinglaſſie, if the aſſignation had been to him, and transferred by him to Gloret, is competent againſt Gloret; and that he is in the ſame caſe, as if he had right by tranſlation from Kinglaſſie. This is moſt juſt, and founded upon law and equity, ſeeing otherwiſe fraud cannot be obviate; and, in law, *plus valet quod agitur, quam quod ſimulate concipitur aut exprimitur:* And *fictione brevis manus*, though it appear that it is but one act, *viz.* The aſſignation made to Gloret; yet, in conſtruction of law, there are two acts, *viz.* The granting the aſſignation blank to Kinglaſſie, which, in the *interim* before it was delivered to Gloret, was his evident; and an aſſignation immediately made to himſelf, and thereafter the filling up Gloret's name, and the delivery of the aſſignation to him; which upon the matter is a tranſlation.

For Monteith, *Spottiswood.* For Gloret, *Lockhart, Cunninghame, Maxwell,* and *Weir.*

Dirleton, No 54. *p.* 22.

*** The ſame caſe is thus reported by Stair:

IN a competition between Monteith and the Laird of Gloret, it was *alleged* for Monteith, That he ought to be preferred to the ſums in queſtion, becauſe Gloret's aſſignation was obtained by Hamilton of Kinglaſſie, and was lying by him blank in the aſſignee's name, and by him filled up with Gloret's name, and delivered to him; ſo that Kinglaſſie being his true author, any diſcharge granted by him while the bonds were blank, and in his power, was relevant againſt Gloret, his aſſignee; *ita est* Kinglaſſie, while or before the bonds were in his power, did equivalent to a diſcharge, *viz.* obliged himſelf to pay this ſum, and relieve the principal debtor

No 20. thereof; and, inſtead of the diſcharge, he took this blank aſſignation, filled up by him in Gloret's name. *2dly*, The charge, though in Gloret's name, is for Kinglaſſie's behoof; and if he were charging, his obligement to pay the debt would exclude him: And therefore muſt exclude the charger.—It was *answered*, That Gloret was in *bona fide* to take this aſſignation, knowing nothing of the back-bond; and that an obligement to ſatisfy the debt was not equivalent to a diſcharge: Neither is the having of the aſſignation, though blank, equivalent to an aſſignation, unleſs the name of Kinglaſſie had been filled up and intimate.

The Lords having taken Gloret's oath before anſwer, wherein he acknowledged that he got this aſſignation from Kinglaſſie, and paid no money for it; and that it was on theſe terms, Kinglaſſie being owing him a greater ſum, he was to allow what he got by this aſſignation, in part thereof, but deponed he knew not if it was blank when Kinglaſſie had it or not:

THE LORDS found, That the aſſignation being accepted by Gloret, in terms aforeſaid, that it was but a corroborative ſecurity; and ſo found the aſſignation for Kinglaſſie's behoof; and found the back-bond relevant to exclude him, and therefore preferred Monteith.

Stair, v. 1. *p.* 403.

1745. *June* 11.

STEWART of Kincarachy *againſt* MARY HAY and her HUSBAND.

No 21. Diligence being once begun in name of the cedent, cannot be carried on in name of the aſſignee. Neceſſary for the aſſignee to raiſe new diligence.

THOMAS BLAIR of Newton being creditor by bill, and decreet of the Sheriff thereon, to the Lord Ruthven, charged him with horning; and having died, Mary Hay, his relict and executrix, gave up this debt in inventory, as contained in the bill, decreet and precept, which were the warrants of the horning; and thereon ſhe, with concourſe of Charles Foggo her ſecond huſband, arreſted in the hands of my Lord's tenants, without raiſing any new diligence.

David Stewart of Kincarachy obtained an aſſignation to the rents, which he intimated after the arreſtment.

Pleaded in a competition for the aſſignee, that by conſtant practice, diligence raiſed in any perſon's name is never put in execution after his death; Meſſengers are only executors of diligences not judges of the tranſmiſſions of rights, and therefore the will of the letters is their rule.

In caſes of poinding, the law has of neceſſity allowed Meſſengers to be in ſome ſort judges; but this is not to be extended to executions of other kinds, where no ſuch law or practice has intervened; and hence it is, that meſſengers in a poinding may, upon payment, diſcharge the debt, but the executor of a horning cannot, being no judge, but tied up to the will of the letters.

It is admitted, that the effect of the diligence led by the defunct, belongs to the executor; and it is only contended that it cannot be put to further execution in his name, but he muſt raiſe new diligence.