

No 59.

Stair observes, title ASSIGNATIONS, § 12., and Sir George Mackenzie, *eodem titulo* of his Institutes.

It was *contended* for Mr Elliot, That he ought to be preferred; *imo*, Because the bill, or assignation, was to a liquid sum, which could not carry the *corpora* of wool, &c. in the factor's hands, and which could only be carried properly by the *escheat*. *2do*, By the act 145, James VI. Parl. 12. the debt, in the horning, was preferable to all assignees, donatars, &c. so that he had a legal preference upon his denunciation. *3tio*, The creditor, in the horning, was preferable to a posterior arrester, though prior to the gift; and, in competitions betwixt arresters and assignees, the dates of the arrestments and intimations give the preference: So that in the present case, the intimation being posterior to the denunciation, the donatar ought to be preferred.

Stewart *answered* to the *1st*, That by Naughton's oath, it appeared that the effects were sent to him *anno* 1707; and they were converted into money long before the draft; and, though the draft had been next day, after receipt of the goods, yet that moment he came in Scot's place, who was the only person that could call Naughton to an account. To the *2d*, it was *answered*, That the argument from the statute, could only hold when the assignation was posterior to the denunciation; but, in the present case, Scot was fully denuded prior to the denunciation. And, as to the *3d*, The denunciation might prefer to a posterior arrester; because, till the date of the arrestment, the creditor arrester had no manner of interest; but here Stewart had effectually established his right prior to Elliot, whose title was not completed till declarator.

THE LORDS found, That the goods of Scot, sent upon his account to a factor in Holland, to be disposed of for his behoof, and the product thereof to be returned to him, fell under the *escheat* of Scot, to whom the goods belonged: But found, that the creditor in the bill, upon the factor, protested for non-acceptance, was preferable to Elliot, the donatar to the *escheat*; seeing the drawer of the bill was, by the draft, denuded of the subject for which the bill was drawn; and that the said bill was drawn before denunciation, and protested before the gift of *escheat*: And, therefore, preferred the creditor in the bill. *See ESCHEAT.*

For Stewart, *Ja. Fergusson*, sen.

Alt. *Sir Jo. Elphinstone.*

Fol. Dic. v. 1. p. 97. Edgar, p. 32.

1734. November 27. MITCHELL against MITCHELL.

No 60.

Protest for non-acceptance, is equivalent to an intimated assignation.

JAMES GRAY, in 1729, drew a bill upon the Earl of Dundonald, for L. 17: 10s. payable to William Mitchell on demand. The bill was next day protested for non-acceptance. An action for payment was raised against his Lordship. His Lordship brought a multiplepinding; a James Mitchell, having, as creditor of Gray, used arrestments in the Earl's hands, and obtained decree of furthcoming.

THE LORD ORDINARY preferred Mitchell the arrester, in respect of his diligence, to the interest produced for William Mitchell.—William Mitchell, in a petition, *pleaded*, That there was no competition between *creditors* of James Gray. The petitioner is not Gray's creditor, but the Earl's; having paid Gray full value for the draft on the Earl. Having intimated his right by the protest taken; he became as effectually possessed of the debt, as if the Earl had granted a bond for it to Gray; which Gray had assigned to the petitioner; and which the petitioner had intimated. James Mitchell's diligence, therefore, commenced after Gray was denuded, and must be utterly ineffectual.

Answered: A protest for non-acceptance, ought not to be accounted equivalent to an intimated assignation; for the drawer of the bill continues liable; whereas the assignee has no recourse on the cedent. Besides, Gray was bankrupt in terms of the statute of 1696; so that whatever the Earl owed to him, was subject only to the diligence of his creditors, not to his own arbitrary disposal.

THE LORDS altered the Lord Ordinary's interlocutor; and preferred the holder of the draft to the arrester.

Lord Ordinary, *Lord Justice Clerk*. For Petitioner, *P. Wedderburn*. For Respondent, *P. Boyle*.
Fol. Dic. v. 1. p. 97. Session Papers in Advocates' Library.

1737. February.

KER against CHALMERS.

RICHARD BURN of Clarkston, drew a bill dated 30th July 1731, upon Sir James Dalziel of Binns, for L. 800 Scots, payable to Ker of Houndwood, or order, betwixt and Martinmas then next. This bill was presented, and protested for non-acceptance, 6th May 1732.

Burn drew another bill, dated 6th August 1731, upon Sir James, for L. 25 Sterling, payable to John Parkhill, or order, against Whitsunday thereafter; which was indorsed to Alexander Chalmers; and protested for non-acceptance upon 7th August 1731.

Ker, the pursuer of this action, representative of Ker of Houndwood, to whom the first-mentioned bill was payable, in a competition before the Sheriff, *pleaded* preference on the debt due by Sir James Dalziel, as having the first bill drawn upon him. The Sheriff preferred Chalmers, holder of the second bill; as having the first protest for non-acceptance.

Ker raised advocacy. Lord Elchies Ordinary 'repelled the reason of advocacy; found no iniquity; and remitted the cause.'

In a petition, *pleaded*, Intimation has not been considered as a necessary solemnity towards establishing a right by bill; *Stair, Inst. b. 1. tit. 11. § 7.*; and *b. 3. tit. 1. § 12.*

Let it be supposed the debt due by Sir James Dalziel were constituted by bill. A simple indorsation would carry the right to it; and the indorsee could not be excluded by arrestment or assignation; neither could he run any risk for want of

No 61.

Though a simple indorsation on the back of a bill makes a full conveyance, without necessity of intimation; a draught upon a debtor must be intimated; so as to give preference, if not accepted.