

No 43.

twenty-five or twenty-six years syne, the noblemen of Scotland use not to keep the procuratories or mandates frae the time the turn be done; for the procuratories are made in paper, and the readier to lose and consume.—THE LORDS found by interlocutor, the intimation made by the instrument not sufficient, because the procuratory was not produced, *licet bona pars dominorum fuit in contraria sententia ratione predicta mota, et fuit factum antiquum*, and procuratories and mandates that are made in paper, use not to be kept so long in paper.

*Fol. Dic. v. 1. p. 63. Colvil, MS. p. 42.*

1558. July 31.

The QUEEN and the ABBOT of COUPAR, donatour, against The LAIRD of DUFFUS.

No 44.

Intimations of rights and titles must be by delivering a copy, and taking instruments in the personal presence. Verbal intimation would not be sufficient.

GIF ony persoun havand be gift of the superiour, the marriage of ony air, he sould lauchfullie intimat the famin to him, viz. he, or his procurator, sould come to the personal presence of the air, and ather reid his gift, or give and deliver him ane copie thairof, and tak instrument in the handis of ane notar thairupon; for, gif he or his procurator pass to the personall presence of the heritour, and expone to him be word, that he hes the gift of the marriage dispoit to him be the superiour, or that he is cessioner and assignay lauchfullie constitute be the donatour thairof, and makis intimatioun to him of the famin; the famin verbal intimatioun maid *nuda voce*, is not sufficient; and thairfoir, albeit the air marie without consent of the said donatour, or his assignay, he sould not be compellit to pay to him the doubill avail of the marriage, bot the single avail allendarlie. And the like to be observit in all intimatiouns of ony uther rights, evidentis, or titillis.

*Balfour, p. 169.*

1623. July 3.

SCOT against L. DRUMLANRIG.

No 45.

In a competition betwixt an arrester and an assignee, the assignee's intimation was found null, because the same person who was procurator also acted as notary.

IN a double pointing, Scot *contra* L. Drumlanrig, wherein the two parties contending for the preference of a sum, acclaimed by both the parties, from a debtor of their common debtors: The L. Drumlanrig seeking the same as arrester, for satisfaction of some debt owing to him by their common debtor, and the other seeking the same as assignee made thereto; which assignation was both made and intimate before the L. Drumlanrig's arrestment: Likeas both the parties had obtained sentences upon both their rights foresaid, against the complainer:—THE LORDS preferred Drumlanrig, notwithstanding of the other parties prior assignation and intimation, because the intimation was found null, seeing it was made by a procurator for the assignee; which procurator was notary to the same intimation, made by himself as procurator; and the Lords found, he could not be both

procurator and notary ; but that it ought to have been perfected by two distinct persons ; and that one and the same person could not be both procurator to intimate in the assignee's name, and also notary to take instruments on the doing thereof ; and the assignation unintimate, albeit prior to the arrestment, was not a cause of preference to the said subsequent arrestment, where the question was with a third party, and not betwixt the cedent and the debtor to the cedent only ; but that a third person claimed the same, who contended, that the assignation, unintimate, could not derogate to his subsequent arrestment and lawful diligence, done before any lawful deed made by the assignee, to affect the sum libelled : And so it was also found, and the Lords sustained the decret obtained by Drumlanrig, against the said person who was decerned to make the arrested money, owing to the said common debtor, furthcoming, albeit it was quarrelled as null, being given before the term of payment of that money which was arrested, which was not come the time of the said sentence. Which allegiance was repelled, and the decret sustained, which was only *declaratoria juris* ; for therein all execution was suspended while the terms of payment were past and come. (See LEGAL DILIGENCE.)

Act. Nicolson.

Act. ———.

Clerk Scot.

*Fol. Dic. v. 1. p. 63. Durie, p. 381.*

1629. January 8.

KINLOCH against FINLAYSON.

JAMES KINLOCH being made assignee by Robert Finlayson, to the mails of a house for certain years, pursues the indweller for the mail, who *alleging* payment to one who arrested the same for the cedent's debt, and who had obtained decret thereupon against him : And the pursuer *alleging*, That the payment was made *mala fide*, his assignation being both made and intimate before the arrestment ; it was questioned if this intimation was sufficient, to put him in *mala fide* to have paid thereafter, seeing it was only made at his dwelling-house, and a copy delivered to his wife, at which time the defender was out of the country ; whereby he *alleged*, that the said intimation should have been made at the market-cross of the head burgh of the shire within which he dwelt, and at the pier and shore of Leith, as in all citations of persons who are out of the country : This intimation being alleged to be more material, and to require more strict formality than citations, and the danger being greater ; but this was not decided. See EXECUTION.

*Durie, p. 412.*

No 45.

No 46.

Questioned, but not decided, whether a party being out of the country, intimation ought to have been made at the market-cross, or at his dwelling-house.