

1638. *December 6.* • DOUGLAS *against* MITCHELL.

No 22.

An assignation, though intimated after an arrestment, was preferred, the arrestment being upon a dependence, and no decreet yet recovered against the common debtor.

MR HUGH DOUGLAS, cautioner for Mr Andrew Lermonth, minister at Libberton, being decerned to pay the debt ; the said Mr Hugh receives for his relief from Mr Andrew an assignation to certain bolls of victual, to be paid by certain tenants, off the lands of \_\_\_\_\_, for his stipend of the crop 1638, which was not sown on the ground the time of the assignation ; and after the said assignation, The said Mr Hugh arrests the said victual in the tenant's hands, and thereupon intents action against them, to make arrested corns furthcoming : In the which action William Mitchell, another creditor of the said Mr Andrew, compears, who had arrested the same corns, and claimed to be preferred to Douglas, in respect of his anterior arrestment before the arrestment executed by Douglas ; and albeit the assignation to Douglas be prior, yet the same ought not to be respected, except it had been also intimate before his, which was not done, and the arrestment made by Douglas is after his arrestment. Attour, it cannot be respected as an intimation of the assignation, but in effect is a passing from the assignation, seeing he hath arrested the corns as the cedent's corns, and not as pertaining to him as assignee, and no ways making mention of the assignation ; so that it cannot be respected as an intimation of the assignation, but rather that it is a confession that the corns still pertained to the cedent ; and further, the assignation can give him no right, being of corns which were not then extant, neither being sown nor growing, and of the law *non entis nulla est obligatio*. THE LORDS repelled the allegiance, and sustained the arrestment as sufficient intimation of the assignation, albeit of corns not then growing, but being for a stipend of a year ensuing, seeing the minister lived while it became due to be paid to him ; especially the arrestment was sustained as a sufficient intimation against this other defender, who had not obtained as yet sentence against Mr Andrew Lermonth, constituting him his debtor, and so who could not be a just party, to claim arrested goods to be made furthcoming, before he had obtained sentence for his debt.

Act. Hope.

Alt. Elter.

Clerk, Gibron.

*Fol. Dic. v. 1. p. 178. Durie, p. 864.*

1642. *June 22.* NISBET *against* WILLIAMSON, FOULIS, and NISBET.

No 23.

An assignation intimated before arrestment is preferable.

IN a triple poiding, Foulis being debtor to Nisbet in a sum, for which the said Foulis being charged by another Foulis, assignee to the said Nisbet ; and Nisbet compearing as another of his creditors, who had arrested the sum in Foulis's hands, for satisfying of the debt owing to them by their common debtor ; and Williamson compearing as another of the said common debtor's creditors ; the assignee claiming preference to the arrester's creditors of the common

debtors, in this sum controverted, because he was made assignee before these other parties arrestments, and had done diligence before them, the common debtor being his lawful debtor, as is confest by him in his assignation; and the arresters *answering*, That they should be preferred to the assignee, seeing the assignation was made by a bankrupt *in meditatione fugæ*, there being no debt which the assignee can instruct was owing to him; likewise, he was then the cedent's servant, and so presumed a confident person; and the assignee opposing his assignation thereto; the LORDS preferred the assignee to the arresters, the assignee giving his oath that the cedent was his true debtor the time of the assignation, in as great sums as that money assigned; and he giving so his oath, the LORDS found no necessity, that the assignee should be holden to qualify by any other writ, that the cedent was his debtor, in respect of the act of Parliament, which admits that probation by the parties oath; for, as when any party buys lands, or goods, from any person who becomes bankrupt, the alienation cannot fall, albeit the buyer cannot instruct, by a preceding writ, that the seller was his debtor in any sums of money, the alienation being done *bona fide*; even so in this case.

No 23.

Clerk, Hay.

*Fol. Dic. v. 1. p. 178. Durie, p. 895.*

1687. July.

ADIE against SCRIMZEOR.

THE Earl of Seaforth being debtor to James Clerk of Wright's Houses, in a certain sum by bond, which was assigned to Mr David Scrimzeor; and, at the same day that the assignation was intimate, Bailie Adie, another creditor of James Clerk's, arrested the sum in the Earl of Seaforth's hands. And it being *alleged* for the assignee, That he ought to be preferred, because the intimation did condescend upon a particular hour and day upon which it was intimate; whereas the arrestment is only general, that it was laid on that day, but did not condescend upon the hour. *Answered*, That the arrestment being general, it might have been as well before as after the intimation; and he produces a declaration by the Earl of Seaforth, the common debtor, that the arrestment was two hours before the intimation of the assignation, and therefore he ought to be preferred.—THE LORDS ordained the arrester and assignee to come in *pari passu*.

No 24.

An arrestment and the intimation of an assignation being on the same day, only the intimation mentioning the hour; and the common debtor having declared, under his hand, that the arrestment was two hours prior to it, the Lords ordained them to come in *pari passu*.

*Fol. Dic. v. 1. p. 178. Sir P. Home, v. 2. No 949.*