beit it mentioned holograph, as written with the disponer's own hand, yet that could not prejudge a third party a lawful creditor, who had served inhibition, else it should be in the power of any to antedate writs at their pleasure, to prejudge creditors and others. No 27.

THE LORDS, before answer, ordained the defender to instruct the verity of the date by witnesses, *omni exceptione majores*.

And the defender having used two witnesses only, one of them being a procurator in the Sheriff-court of Coupar, and the other being a town-officer,

THE LORDS found they were not such witnesses as would astruct the verity of the date, their depositions being most suspected, in regard they declared they saw the disposition subscribed, and one of them, that he had dictated the same, whereas they might very easily have been subscribing witnesses, if their depositions had been without and above exception. THE LORDS also considered, That no infeftment had followed till near two years after the date, and long after the inhibition; and therefore they ordained Ferny to use further probation for astructing the date, with certification, they would reduce, notwithstanding of the probation of the two witnesses already adduced.

Gilmour, No 148. *p.* 106. No 28.

1665. *June* 29. RICHARD THORNTOUN *against* WILLIAM MILN.

THORNTOUN as assignee by Patrick Seaton, having obtained decreet before the Bailies of Edinburgh against William Miln, he suspends and alleges compensation, upon a count due by the cedent, and a ticket subjoined by him, acknowledging the count to be due, subscribed before witnesses, which must prove against this assignee. It was *answered*, That the ticket wanted a date, and so could not not instruct itself to be anterior to the assignation. It was *replied*, That it was offered to be proved by the witnesses inserted, that it was truly subscribed before the assignation.

Which the LORDS sustained.

Fol. Dic. v. 2. *p.* 215. *Stair, v.* 1. *p.* 291.

*** Gilmour reports this case:

1665. *June*.—RICHARD THORNTOUN an Englishman, as having right from Patrick Seaton to a ticket of L. 641 granted by William Miln to him, for certain merchant-ware, obtains a decreet before the Bailies of Edinburgh for payment, against the said William Miln, who suspends and intents a reduction upon this reason, that the Bailies had repelled a most relevant reason of compensation, founded upon a subscribed account, by which the said Patrick Seaton acknowledges himself debtor to the suspender for L. 126, for merchant-ware, also expressed in the count, dated in March 1663, whereas the assignation was

No 28.

not intimated till the seventh day of May thereafter. To which it was *answered*, That the Bailies did no wrong, because the ticket subjoined to the end of the count had no date, and consequently was null, especially being written with another hand than the count itself; and though the date of the furnishing was set down on the head of the count, yet that date could not be interpreted the date of the obligation subjoined. It was *replied*, and offered to be proved by the witnesses, subscribers of the ticket, That it was truly subscribed of the date of the count.

Which the Lords found relevant *hoc loco*, notwithstanding of the decreet.

Gilmour, No 149. *p.* 107.

Newbyth also reports this case:

1665. *June* 29.—In a pursuit betwixt Richard Thorntoun and William Milo, upon a ticket which wanted a date, the same being quarrelled as null, the Lords found the date of the ticket might be supplied, and proved by the witnesses inserted.

Newbyth, MS. p. 31.

No 29.

The maxim *chirographum apud debitorem repertum*, &c. extends not only to a bond found in possession of the debtor, but to an assignation found in possession of the cedent, and therefore, proof by witnesses to the contrary was rejected.

1666. *December* 14. Anna Fairly *against* Creditors of Sir William Dick.

Anna Fairly *alleging*, That she had obtained an assignation from umquhile Mr Alexander Dick, as factor for his father, in satisfaction of a sum due to her by his father, pursues for delivery of the assignation. The Creditors *alleged*, That the assignation being in the hands and custody of Mr Alexander, the granter, it must be proved by writ, he being dead, that it was delivered, and not by witnesses; for there is nothing more frequent, than parties, upon intentions, to subscribe bonds, assignations, and other rights, and yet do not, *de facto*, deliver them; or, if they have been delivered, to satisfy them and retire them. If witnesses were admitted to prove the delivery, or re-delivery of such writs, the lieges would be in extreme insecurity, contrary to our law, that admits not witnesses above an hundred pounds; and therefore chirographum apud debitorem repertum præsumitur solutum; which presumption cannot be taken away by witnesses. The pursuer *answered*, That though this holds in bonds, where there is a debtor, and no other adminicle to instruct the debt, yet this is an assignation, and the cause thereof otherwise instructed, and most likely to be truly done; and it is offered to be proved, that this assignation was delivered back to Mr Alexander, to be made use of as agent for the pursuer.

The Lords refused to sustain this member of the probation; but, because of the poverty of the poor woman, recommended the case to the creditors, to be favourable to her, and did forbear to write the interlocutor.

Fol. Dic. v. 2. *p.* 216. *Stair, v.* 1. *p.* 412.