1703. *February* 16. LEITH *against* GARDEN.

No 70.
An assignee wrote to the debtor, and shewed him his assignation. The debtor, nevertheless, paid to the cedent. The payment found unwarrantable, there being no third parties in the field.

THE Laird of Troup being addebted to Anachy in 197 merks by ticket, this is assigned to Leith of Leith-hall, who writes a letter to Troup, signifying his right, and afterwards shows him the assignation, but does not legally intimate it by a notary and instrument. Troup being pursued by the assignee, produces a discharge from Anachy, the cedent: Against which it was *objected*, That he was *in mala fide* to pay the cedent, and rely on his discharge, after he had shewed him his right by assignation.—*Answered*, Private knowledge *non relevat*, law having fixed on the solemnity of an intimation by way of instrument, and intimations not made in that manner are not to be regarded; as was decided 30th November 1622, Durham against the Lady Winton, No 56. p. 855.; 15th June 1624, Adamson *contra* Macmitchel, No 61. p. 859.; and 14th March 1626, Nisbet and Williamson, No 62. p. 859.—*Replied*, That holds in a competition betwixt co-creditors, as where two assignees, or an arrester and assignee are competing, there no intimation is sustained, but what is made by form of instrument; but here there is no competition, but the question singly stated betwixt the assignee and the debtor, who, by colusion, goes and agrees with the cedent, after the assignation was shewed to him; and, on getting an ease, pays and recovers his discharge.—— THE LORDS found the payment unwarrantable, and that it could not defend him against the assignee, though it was not legally intimated, there being no co-creditor *in campo*.

Fol. Dic. v. 1. *p.* 64. *Fountainhall, v.* 2. *p.* 180.

1707. *March* 28.

Competition of the CREDITORS of the deceased LORD BALLENDEN, and the COUNTESS of DALHOUSIE, his relict.

No 71.
A bond contained an assignation to an annuity, and was subscribed by the party by whom the annuity was payable: This found equivalent to intimation, in competition with assignations formally intimated.

IN a competition of the creditors of the Lord Ballenden and the Countess of Dalhousie, his relict, Sir Robert Sinclair of Stevenson craved preference upon a bond granted by the said Lord Ballenden and the Earl of Dalhousie, for the principal sum of three thousand merks, containing an assignation by the Countess of Dalhousie, with consent of the Lord Ballenden her husband, to her jointure-rents subjoined to the bond; which bond and assignation are subscribed by the Earl of Dalhousie, the Lord Ballenden, and the Countess.

THE LORDS found, That the Earl of Dalhousie's subscribing the bond and assignation did supply the necessity of an intimation, to prefer Stevenson to the other creditors whose rights were of a posterior date.—Albeit it was *alleged* for them, That the Earl's subscribing the writ containing the assignation, can only be considered in so far as it concerns the assignation, as if he had been witness to the

No 71. paper; ſeeing the Earl is only bound in the obligatory part of the bond, and the Counteſs aſſigns.—In reſpect it was *answered* for Stevenſon, That though the uſual way of making intimations is by inſtrument, that is not the only way, January 22. 1630, M'Gill, No 63. p. 860.; Stair, Inſtit. lib. 3. tit. 1. § 9. And the Earl of Dalhouſie, debtor in the jointure, was ſufficiently certiorated by his ſubſcribing the bond in which the aſſignation was contained.

Fol. Dic. v. 1. p. 65. Forbes, p. 166.

1718. *July* 25.

The FACULTY of ADVOCATES *againſt* SIR ROBERT DICKSON.

No 72.
A communing with a debtor was found not to ſupply the want of intimation; promiſe of payment not being alleged.

THE Faculty of advocates, as aſſignees to Mr Matthew M'Kell, having charged Sir Robert Dickſon upon his bond; he ſuſpended, and produced certain receipts granted by the cedent, whereof he craved deduction.

It was *alleged:* That the receipts wanted writers name and witneſſes; and though they be inſtructed holograph, they could not prove their dates.

It was *answered:* He offered to prove, that they were holograph, and of the true date they bear, by the cedent's oath; which he contended was receiveable againſt the aſſignees the chargers; becauſe he had rendered the matter litigious before intimation of the aſſignation.

It was *replied:* That there being a communing betwixt the Faculty and Sir Robert, upon the ſubject of the aſſignation, and theſe payments, in order to a tranſaction, Sir Robert took the advantage to raiſe a proceſs before intimation, which can afford him no advantage; becauſe it was a point of civility in the Faculty, not to intimate or charge, but to acquaint him in the diſcreeteſt manner of an onerous right, in order to obtain payment, and then Sir Robert entered as fairly into a communing, and, taking the advantage of a delay, did execute the ſummons; ſo that the preciſe queſtion is, Whether he was in *mala fide* ſo to do? The chargers admit, that private knowledge does not prejudge the debtor, or take off the neceſſity of intimation, and that a ſecond aſſignee or an arreſter would have been preferable; but do contend, that Sir Robert having entered into a communing, was *in mala fide* to take the advantage.

It was *duplied:* That an aſſignation not intimated was incompleat; and the ſuſpender was *in bona fide ſibi vigilare;* he had made real and true payment to the cedent, and it was but juſt to uſe all lawful means to obtain allowance thereof; and adduced ſeveral deciſions, the laſt of November 1622, Murray *contra* Durham, No 56. p. 855.; 15th July 1624, Adamſon *contra* Mitchel, No 61. p. 859.; and 14th March 1626, Laird of Weſtraw againſt Williamſon, No 62. p. 859.

It was *triplied:* That none of the deciſions did meet this caſe; and albeit private knowledge does not put the debtor *in mala fide*, yet an aſſignation may be