

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.