brought against him before the Court of Session, a decreet of registration cannot be more effectual; and consequently execution upon that decreet is void. No 27.

Upon the *other* point it was *urged*, That though an assignment in England is only a procuratory *in rem suam*, as formerly in Scotland, which does not complete the transmission, yet that the assignee has the only equitable title, upon which he, and he only, can oblige the debtor to pay; that an arrestment can be no bar to the payment, because it only prohibits the debtor from paying to the cedent, or to any deriving right from him after the arrestment; but does not prohibit the debtor to pay to any person having right prior to the arrestment.

The assignee was preferred, without distinguishing upon what ground.

If it was upon the latter point, which appears to be well founded, it must overturn an established practice of preferring an arrestment to a prior assignation not intimated till after the arrestment.

Sel. Dec. No 80. *p.* 104.

1761. *July* 28.

ALEXANDER SHARP, Merchant in Edinburgh, *against* JOHN, ALEXANDER, ANDREW, WILLIAM, MARY, SUSAN, and CATHARINE WOOD, and their Trustees.

No 28.
This case was a competition betwixt an assignation and an arrestment, in which the assignee was preferred, on account of want of title in the arresters.

JOHN WALKINSHAW, late of Scotstoun, being attainted for his accession to the rebellion 1715, his estate was decreed, in virtue of the clan-act, to belong to the Earl of Eglinton his superior, who thereafter conveyed it to the Earl of Galloway, then Lord Garlies.

Mr Walkinshaw had granted a personal bond in 1728 to William Wood, for L. 751 Sterling; and as Lord Garlies had no intention of taking any advantage from his conveyance to the estate of Scotstoun to the prejudice either of Mr Walkinshaw or his creditors, his Lordship, after fitting an account with Mr Wood, from which it appeared that he was creditor to the extent of L. 20,000 Scots, including the foresaid bond, did, upon the 7th of August 1738, grant an heritable bond upon the estate for that sum, upon which infeftment immediately followed.

William Wood having died in March 1747, his eldest son, Captain John Wood, made up titles to the above heritable bond, and was infeft in April 1751, upon a precept of *clare constat* from the Earl of Eglinton the superior; but, prior to this, viz. upon the 30th of January 1749, a minute of sale had been entered into betwixt the said Captain John Wood as in right of his father, and William Crawfurd as in right of his father Matthew Crawfurd, (who was another very considerable creditor to Mr Walkinshaw, and had, in consequence of a decreet-arbitral betwixt Lord Garlies and him, got into possession of the estate), on the one part; and Richard and Alexander Oswald, merchants in

No 28. Glasgow, on the other part; whereby, in consideration of L 4450 Sterling, whereof L. 2650 were to be paid to William Crawfurd, and the remaining L. 1800 to Captain Wood, they became bound to convey the said lands of Scotstoun to the Messrs Oswalds, with all right or interest, debts and diligences, they had affecting them.

Ann Blair, the relict of William Wood, was decerned and confirmed executrix to him; and the inventory comprehended, *inter alia*, the bond for L. 751, which had been granted by Mr Walkinshaw in 1728.

In 1752, a contract was entered into betwixt Mr Wood's relict and children, whereby they agreed to settle their several shares of his succession in certain proportions; and as the whole of his subjects stood in the person of his eldest son the Captain, and Ann Blair the widow, it was mutually agreed that they should denude and convey the same in favour of certain trustees therein named, for the common behoof of all parties. This was done accordingly; and Ann Blair, by deed of assignment in February 1753, transferred to the trustees the several debts and sums therein mentioned, and particularly the above bond of L. 751 granted in 1728.

Upon the 16th of December 1758, Alexander Sharp merchant in Edinburgh lent L. 300 Sterling to the said John Walkinshaw late of Scotstoun, and for security thereof obtained an assignment to a bond for the like sum of L. 300, which had been granted to him by James Walkinshaw of Walkinshaw and his curators, bearing date the 10th of the same month.

This assignation was of even date intimated to Mr Archibald Campbell of Succoth, one of James Walkinshaw's curators; and the notary's instrument bears, that Alexander Sharp's procurator had protested, that Mr Campbell should intimate the assignation to the minor and his other curators, and procure a letter or acknowledgement from them, that they held the same as a legal intimation.

Mr Campbell transmitted the schedule of intimation by the same night's post to James Walkinshaw's mother, in order that she might notify the assignation to her son and the other curators.

Mr Campbell's letter came to the lady's hand upon the 18th of December, and next day she and her son signed a docquet at the foot of the schedule in the following words: 'Walkinshaw, December 19th 1758. We the above 'James Walkinshaw of Walkinshaw, and Mrs Margaret Walkinshaw his mo-'ther, and curatrix *sine qua non*, do hereby hold the above notification and in-'timation to the above Archibald Campbell to be equally sufficient to all ef-'fects as if made to ourselves; as witness our hand, date and place above men-'tioned.'

Upon the same day an arrestment was used in the hands of Mrs Walkinshaw and James Campbell of Blytheswood, in virtue of a horning at the instance of the trustees for the relict and children of the before-mentioned William Wood, upon the bond for L. 751 granted by John Walkinshaw in 1728; and a copy of

the arrestment was left with the lady to be delivered to her son, he not being then at home. No 28.

Mr Walkinshaw of Walkinshaw and his curators brought a process of multiplepoinding; and a competition arose betwixt Alexander Sharp the assignee, and the trustees of the relict and children of William Wood the arresters.

Pleaded for the arresters, *1mo*, The docquet at the foot of the schedule of intimation does not mention the hour when it was signed; therefore, supposing the intimation liable to no objection, the signing of the docquet by Mrs Walkinshaw and her son must, *præsumptione juris*, be held to have been in the last hour of the day, and consequently posterior to the arrestment, which was used between the hours of one and three in the afternoon; nor can this presumption be elided by the oath of the arrestees.

2do, The docquet is neither holograph of Mr Walkinshaw nor his mother; and, being destitute of all the legal solemnites, it is altogether improbative, and can afford no evidence of their accepting the schedule as sufficient intimation of the assignation; nor can their after acknowledgement be received to supply that defect to the prejudice of third parties, however available it might be in a question with themselves.

3tio, Intimation of an assignation, in whatever form, must be made to the debtor himself; and no intimation to third parties, however connected with him, can be sustained as an equivalent: But, in this case, the intimation was only made to one of his curators in Edinburgh, when he himself was in the west country; and though this curator transmitted the schedule to him, the assignation was not sent alongst with it; he could therefore have no proper knowledge of such assignation; so that, however well disposed he might be to give faith to the schedule, importing that the assignation had been intimated to the curator, that was no such intimation as the law can regard, which, to complete the right of the assignee, requires that it should be made to the debtor himself.

Answered for the assignee, *1ma*, The only end of intimation is to prevent latency, and to notify to the parties concerned that the debt is transferred; and though this be commonly done by the instrument of a notary, yet the law does not require that precise form, if the fact can be otherwise sufficiently ascertained. Thus the debtors granting a bond of corroboration to the assignee, or his signing witness to the assignation, will be sufficient; nay, an answer by a missive letter to one from the assignee, acquainting him of the assignation, has been sustained as equivalent to an intimation; M'Gill *contra* Hutchinson, No 64. p. 860. That it is not always necessary that the notification be made to the debtor himself, is also clear from the judgment of the House of Peers, in the case of Aberdeen against Creditors of Merchiston, No 73. p. 867. In that case, the Earl of Aberdeen had lent L. 1000 Sterling to Merchiston, and had got an assignation in security to a bond granted by Lord Blantyre, and some gentlemen who had joined in purchasing the estate of Keir. The Earl's doers neglected to intimate this assignation until Merchiston's affairs went into disor-

No 28. der, and arrestments were used by other creditors: But, in a competition with these arresters, it was pleaded as equivalent to an intimation, that the assignation had been shewn to Mr Hamilton of Dachmont, who was manager for the purchasers of the estate of Keir; and that he had entered the notification of the assignation in the book in which he kept the transactions relating to the purchase of that estate. The Court of Session over-ruled this plea, and found, that the private notification to the factor entered in his books was not equivalent to an intimation to the debtor; and therefore preferred the arresters: But, upon an appeal, this judgment was reversed, and the Earl was preferred upon his assignation. This case is surely much narrower than the present, in which the assignation was most regularly intimated to Mr Campbell, and immediate notification given by him to the debtor and his mother, who certified it under their hand the very next morning, several hours before the arrestment was attempted.

Nor can it have any influence, that the docquet containing the debtor's acknowledgement is not a deed probative in law. The question here does not regard the establishing a formal obligation requiring witnesses properly designed; but only the evidence of a fact, whether the assignation was truly notified. This fact has been allowed to be proved by missive letters, receipts of annual-rents, and other documents not attested by witnesses. Had the docquet been holograph of the debtor, the case would not have admitted of a dispute; and as both he and his mother concur not only in acknowledging their subscription, but also in attesting the truth of the fact therein set forth, it does not appear where the objection can lie; a writ of which the subscription is acknowledged must have the same effect with a holograph writing; and no other person can have a title to object nullity on account of its not being wrote by the signer.

2*do*, The debt due to William Wood became heritable by the security granted by Lord Garlies in 1738; it therefore belonged to Captain Wood the heir, and could not be taken up by his relict's confirmation; so of consequence the assignation granted by her to the trustees in 1753 was *a non habente*, and could not entitle them to use any diligence.

Replied to this objection, 1*mo*, The bond granted by John Walkinshaw was originally moveable; and though Lord Garlies in 1738 granted an heritable bond of corroboration, the nature of the original debt was not thereby altered. John Walkinshaw still remained debtor by the bond 1728; and it was competent to use diligence upon it as upon a moveable bond.

2*do*, Supposing the debt to have become heritable by the security granted in 1738, that security was extinguished by drawing the above L. 1800 out of the price of the lands of Scotstoun in 1751, and a renunciation granted to the purchasers; so that nothing now remains but the original bond to Mr Wood, upon which his representatives are entitled to sue as a moveable debt for the balance still due.

3*tio*, The agreement betwixt Mr Wood's relict and children in 1752, by which the heir and the relict were bound to denude in favour of the trustees, makes it the same thing to them, whether the right was supposed to be vested in the heir or in the relict. The assignation from her must, in consequence of that agreement, be considered as granted with the consent of the heir; and is therefore equivalent to a direct assignation from him. No 28.

Duplied for the assignee, 1*mo*, Nothing is more certain than that an heritable security granted to the creditor, at any distance of time, makes the whole debt heritable; nor does it create any difference, whether the subject over which such security extends be of greater or smaller value. If a creditor should adjudge a subject of L. 100 value for a debt of L. 1000, the whole will become heritable; neither is it necessary that the heritable security be granted by the principal debtor; a security of that kind given by a cautioner will make the debt equally heritable as if it had been given by the principal. This being the case, the security granted by Lord Garlies, who held the lands of Scotstoun for the debtor's behoof, and made his debts a burden upon them, must have the same effect.

2*do*, It can be of no avail that this heritable security was discharged or conveyed to the purchasers, upon their making payment of what could be drawn out of the price. Had this happend during the life of William Wood the creditor, it might have had some effect; but this was not the case; the heritable security subsisted in its full extent against the lands of Scotstoun, at the time of his death; and it is an established rule, that, in dividing a succession betwixt heirs and executors, *Tempus mortis defuncti solummodo est inspiciendum.* If the right was heritable at that time, no after change can make the succession, which has once devolved to the heir, to fall to the executor; no title could therefore be made to this debt by confirmation; and it might with equal propriety be said, that an heir could take by service, a debt which was left moveable by the defunct, because an heritable security had been granted to his executor after his death.

3*tio*, The contract 1752 will not support the assignation made by the relict to the trustees. It is true, that, by this contract, both the heir and the relict as executrix agreed to denude themselves of the heritable and moveable subjects severally vested in them. But there was no agreement that the heir should convey the moveables, and the executrix convey the heritage. Suppose that A and B, being each possessed of a land estate, should agree to dispone their respective estates to a trustee for certain purposes, and that A by mistake should dispone B's estate; such conveyance could not have the effect to vest the property in the trustee, or to entitle him to apply to the superior for an entry, or to maintain any action against a third party; yet this case is perfectly similar to the present. The assignation from the relict is therefore good for nothing;

No 28. as being granted *a non habente;* and the debt in question, to which the heir had made up a special title by a precept of *clare* and infeftment, could be conveyed by him only.

'THE LORDS preferred the assignee.'

For the Assignee, *Ferguson.* For the arresters, *Lockhart.*

N. B. THE LORDS seemed to determine this case upon the want of title in the arresters, the trustees of William Wood's relict and children.

A. W. *Fac. Col. No 50. p. 112.*

Douglas against Mason, *voce* TRUST.

*** *See* Douglas against Mason, 29th June 1796, *voce* TRUST, in which an arrestment and an assignation were ranked *pari passu*, where the execution of the former bore to have taken place between one and two, and the intimation of the latter between two and three of the afternoon of the same day.

SECT. IV.

Arresters with Annualrenters.

1670. *February* 1. WILSON *against* RUSSELL.

No 29.
Rents due by a tenant were arrested after his removal from the lands. Found that an annualrenter who had done diligence, by which he might have poinded the tenant before his removal, was preferable to the arrester.

WILSON being infeft in an annualrent of the lands of , and having obtained a decreet of poinding the ground thereafter, Russell being a creditor, did arrest the mails and duties in the tenants' hands which were due to the master; and pursuing to make arrested goods furthcoming, the tenant being removed off the ground with his whole goods, it was *alleged* for Wilson, That he ought to be preferred, because his decreet of poinding of the ground was before the arrestment, and being a real diligence, did affect the whole duties payable to the master. It was *answered* for Russell, That the tenant being removed with the whole goods, such decreets and letters being only to poind the ground and the goods thereon, could not affect him nor his goods.

THE LORDS did prefer Wilson the annuitant, and found, he having done prior diligence, whereby he might have poinded the tenant before he removed, albeit he did prejudge himself of all the execution against the tenant's goods, after they were off the ground; yet, *quoad* the duties payable to the master, for which he might pursue him *personali actione*, he was not prejudged from the benefit thereof by the tenant's removal; but, the decreet of poinding of the ground, and letters thereof, being a real execution prior to the arrestment, made him preferable to the arrester as to the duties for which he was liable to the common debtor.

Fol. Dic. v. 1. p. 178. Gosford, MS. No 241. p. 99.