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

compleated, without a formal intimation, No 63. p. 860. where an aſſignee having writ a letter to the cedent, and having got his anſwer, was preferred to an arreſter; and 11th December 1674, Home and Elphingſton *contra* Murray, No 66. p. 863. a promiſe of payment was found ſufficient. No 72.

It was *quadruplied:* An intimation cannot be ſupplied without a document in writ, or at leaſt a promiſe of payment upon a communing.

'THE LORDS found a communing did not ſupply the want of intimation, and no promiſe of payment being alleged, the ſuſpender was *in bona fide* to render the matter litigious.'

Fol. Dic. v. 1. *p.* 64. *Dalrymple, No* 179. *p.* 246.

1729. *July* 30.

EARL of ABERDEEN and CREDITORS of MERCHISTON, Competing.

No 73.
Found, that private notification made to a factor, which he entered in his books, was not equivalent to intimation to the debtor. But this reverſed on appeal.

IN a competition betwixt a prior aſſignee and poſterior arreſters of the ſame ſum, the aſſignee *pleaded* preference upon a private notification given to the debtor's factor, who had accordingly, by a memorandum in his compt-book, mentioned the ſaid aſſignation; which memorandum was urged equivalent to a formal intimation, as inferring the debtors knowledge of the conveyance.—It was *contended* on the other hand by the arreſters, 1*mo*, That in point of relevancy nothing which is extrajudicial can ſupply an intimation, but what implies the debtor's undertaking an obligation to the aſſignee. 2*do*, In point of proof, That in competition the debtor's undertaking ſuch obligation can only be proved by a formal writ, or by the competing arreſter's oath of knowledge. 3*tio*, An intimation made to a factor was never reckoned equivalent as if made to the debtor himſelf. ——THE LORDS found, That the private notification made to the factor, and entered in his book, is not equivalent to an intimation to the debtor; and therefore preferred the arreſters.

Fol. Dic. v. 1. *p.* 64.

*** In this caſe the LORDS had found, on 2d June 1729, 'The qualifications of the notification, made to Dackmont, (the factor) and marked in his book, relevant, and proven to be equivalent to an intimation to the debtors; and therefore preferred the Earl of Aberdeen, the aſſignee.'

By a ſubſequent interlocutor, of 30th July 1729, they 'found the qualifications of the notification made to Mr Hamilton, (the factor) and marked in his book, and other qualifications pleaded upon by the aſſignee, were not equivalent to an intimation to the debtors; and therefore preferred the creditors-arreſters.'

The caſe was appealed; and the following is an extract from the Journals of the Houſe of Lords, of their deciſion.