

was sufficient, and there was no need of a formal intimation; 7th January 1681, Ewing *contra* Burnet, Stair, v. 2. p. 828. *voce* LETTER OF CREDIT.

No 58.

THE LORDS found the verbal intimation sufficient.

Reporter, *Lord Cullen*.

*Edgar, p. 20.*

1724. *February 13.*

ALEXANDER STEWART, Merchant in Edinburgh, *against* WILLIAM ELLIOT of London, Merchant.

In a multiplepounding, raised at the instance of Alexander Naughton, merchant in Rotterdam, as factor for Scot and Co., the creditors of William Scot, merchant in Edinburgh, were called, and, among others, Alexander Stewart and William Elliot, to dispute their several interests, in the subjects, effects, or money, belonging to Scot and Haliburton, his partners, which were in Naughton's hands.

No 59.

A bill protested for non acceptance, found to denude of the subject for which the bill was drawn.

Stewart's interest was a bill of exchange for 4,800 guilders, drawn by Scot upon Naughton, in April 1708, and payable, the first of July thereafter, to Haliburton, and indorsed by Haliburton to Stewart, that he might have both the partners bound to him. When the term of payment of Mr Stewart's bill came, he presented the same to Naughton for acceptance and payment; but Naughton refusing, in respect there was not so much in his hands, of the produce of wool, and other effects of the drawers, which had been consigned to him, Mr Stewart protested for non-acceptance, 5th July 1708.

Mr Elliot's interest was bills for L. 500 Sterling, accepted by Scot in February 1708; upon which he had used diligence; and denounced Scot the 4th May thereafter; and, upon the 13th of that month, he obtained a gift of his escheat, which passed the seals the 22d of November following; and, upon the 13th of December, said year, he obtained a general declarator in absence; but pursued no special declarator, nor made any use of his gift, till this competition.

Mr Stewart craved to be preferred, in respect that the draught was a virtual assignation to what effects were in Naughton's hands, and the protest equivalent to an intimation, which completed his right: That the draught was before the rebellion or denunciation, and the protest prior to the declarator, or even to the gift of escheat; for, though the gift was signed the 13th of May, yet it was not presented to the seals (by which the King speaks,) till the November following; which period only is to be considered as its date. In support of this ground of preference, the authority of Sir George M'Kenzie was brought, B. 2. tit. 5. of his Institutes; where he lays down rules in the case of single escheats. And Mr Stewart further contended, That he was even in a stronger case than that of a common assignation which needed intimation; because orders, among merchants, to pay, need no intimation, but are of themselves complete rights, as my Lord

No 59.

Stair observes, title ASSIGNATIONS, § 12., and Sir George Mackenzie, *eodem titulo* of his Institutes.

It was *contended* for Mr Elliot, That he ought to be preferred; *imo*, Because the bill, or assignation, was to a liquid sum, which could not carry the *corpora* of wool, &c. in the factor's hands, and which could only be carried properly by the *escheat*. *2do*, By the act 145, James VI. Parl. 12. the debt, in the horning, was preferable to all assignees, donatars, &c. so that he had a legal preference upon his denunciation. *3tio*, The creditor, in the horning, was preferable to a posterior arrester, though prior to the gift; and, in competitions betwixt arresters and assignees, the dates of the arrestments and intimations give the preference: So that in the present case, the intimation being posterior to the denunciation, the donatar ought to be preferred.

Stewart *answered* to the *1st*, That by Naughton's oath, it appeared that the effects were sent to him *anno* 1707; and they were converted into money long before the draft; and, though the draft had been next day, after receipt of the goods, yet that moment he came in Scot's place, who was the only person that could call Naughton to an account. To the *2d*, it was *answered*, That the argument from the statute, could only hold when the assignation was posterior to the denunciation; but, in the present case, Scot was fully denuded prior to the denunciation. And, as to the *3d*, The denunciation might prefer to a posterior arrester; because, till the date of the arrestment, the creditor arrester had no manner of interest; but here Stewart had effectually established his right prior to Elliot, whose title was not completed till declarator.

THE LORDS found, That the goods of Scot, sent upon his account to a factor in Holland, to be disposed of for his behoof, and the product thereof to be returned to him, fell under the *escheat* of Scot, to whom the goods belonged: But found, that the creditor in the bill, upon the factor, protested for non-acceptance, was preferable to Elliot, the donatar to the *escheat*; seeing the drawer of the bill was, by the draft, denuded of the subject for which the bill was drawn; and that the said bill was drawn before denunciation, and protested before the gift of *escheat*: And, therefore, preferred the creditor in the bill. *See ESCHEAT.*

For Stewart, *Ja. Fergusson*, sen.

Alt. *Sir Jo. Elphinstone.*

*Fol. Dic. v. 1. p. 97. Edgar, p. 32.*

1734. November 27. MITCHELL against MITCHELL.

No 60.

Protest for non-acceptance, is equivalent to an intimated assignation.

JAMES GRAY, in 1729, drew a bill upon the Earl of Dundonald, for L. 17: 10s. payable to William Mitchell on demand. The bill was next day protested for non-acceptance. An action for payment was raised against his Lordship. His Lordship brought a multiplepinding; a James Mitchell, having, as creditor of Gray, used arrestments in the Earl's hands, and obtained decree of furthcoming.