to the Lords. For, as no man should be compelled to pay a full and adequate price for lands where he gets not the writs of the same, and there may be better rights on the estate than what stood in the bankrupt's person; so, on the other side, neither the Act of Parliament 1681, anent such roups, nor the style in which they are conceived, oblige the creditors to give the buyer the charter-chest; but he gets some satisfaction as to the debtor's right before he offers at the roup; and he also receives the creditors' warrandice effeiring to their sums assigned,—though that may turn irresponsal and insufficient. On the other hand, a bankrupt, of purpose to obstruct the sale of his lands, may abstract and abscond his writs in such a manner that the creditors (who are strangers to him,) may not know where to seek them. Some proposed, that, if the buyer were not pleased with the security the creditors could make him, he was to cede the possession; for the paying their annualrents is not sufficient, seeing a man may stand in need of the principal sum. Others moved that he should renounce the whole roup in favours of the creditors. But then, a buyer, finding himself any ways lesed, might repudiate the bargain, and get himself reponed, and disappoint the creditors of their expectation of being paid; and might collude with the debtor to keep up the writs, and then pretend he saw no progress; and this would either bring it to a division of the land amongst the creditors, (which is very hard to be effectuated,) or expose it to a new sale at a less value, because of the lameness and defect of the progress; after which the bankrupt, by offering to discover where the writs were, might make a new bargain for himself, which would be so much of the price stolen from the creditors. However, the Lords saw no reason why a buyer should both keep possession of the lands and detain the price; but, if he would renounce, then it would be some check that he do it *re integra*, paying the annualrents of the price to the creditors, and not barely counting for the rent of the lands, which ordinarily is below the annualrent of the price. But, on the whole matter, the Lords desired information to be given them before they made a general rule in this case.

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1695. *December* 11. ALISON GOURLAY and MACMORRAN *against* URQUHART.

PHILIPHAUGH reported Alison Gourlay and Macmorran against Urquhart. A mother having alimented her son, who had an estate *aliunde*, and so not *ex pietate*, she and her assignee, after his death, pursue his nearest of kin before the Commissaries of Edinburgh, to cognosce and constitute the debt; and, probation being led, her oath is taken in supplement; and on this the heir is pursued for affecting the heritage.

ANSWERED,—That he denied the debt:—To which the decreet of cognition was opponed.

REPLIED,—He was not called thereto, and it was a known maxim,—*quod res inter alios actæ alteri non præjudicant;* and all parties having interest must be called; seeing I might have proponed defences against the debt, which the executor either knew not, or, by collusion, neglected.

DUPLIED,—There could not be two decreets of cognition; and, by the custom of the Commissariot, none were the contradictors in such processes but the nearest of kin.

The Lords found the design of these actions was principally to affect the moveables; and, therefore, none but such as would be executors are in use to be called. But, if it were stretched against the heir, he behoved to be also convened: and therefore sustained this decreet of cognition against the heir, *tanquam libellus* only, that he might be heard on his defences against the constitution of the debt.

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1695. *December* 11. JOHN CHANCELLOR *against* SARAH WILSON.

WHITELAW reported John Chancellor, bailie of Edinburgh, donatar to James Alston's escheat, against Sarah Wilson, wife to the said James, competing for a sum due by one Boswel, taken to her father and mother in liferent, and her in fee; which fee the donatar contended that it accresced to her husband *jure mariti*, and consequently fell under his escheat. ANSWERED,—The sum lent was never the rebel's, but the wife's father's; and the term of payment being his decease, and that existing before the Rebellion, it thereby became heritable *quoad fiscum et maritum*, and so no more could fall under the husband's escheat but the annualrents *stante matrimonio;* and the wife only bruiked the fee by a clause of substitution. Which the Lords accordingly found, and preferred the wife.

The donatar also contended, That 1000 merks, payable by the father-in-law to the said James Alston the rebel, at his decease, fell under the compass of his gift of escheat. ANSWERED,—His father-in-law had paid it to him two years before his decease, as appears by the discharge produced. REPLIED,—That anticipation was collusive, and done industriously to prejudge his creditors. DUPLIED,—That, terms of payment being introduced in favours of debtors, they may renounce the same. Then ALLEGED,—By the 75th Act of Parliament 1579, and 145th Act 1592, one at the horn can grant no bond to prejudge his creditors. ANSWERED,—This clause cannot extend to discharges of debts; for debtors are not concerned to try what condition their creditor is in; and *non refert* whether he be at the horn or not, unless it be arrested in their hands, or otherwise affected with diligence. The Lords found the payment warrantable and lawful, and repelled the donatar's claim.

Then he ALLEGED,—This transaction was null by the Act of Parliament 1621; Mr Alston being, the time of the discharge, bankrupt. ANSWERED,—They offered to prove he was then a trading merchant; and there was a correspondence then running between this same donatar and him. The Lords, in respect of the great favour of liberation, sustained the answer, that he was then habit and repute in a sufficient solvent condition.

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