

1706. *January 1.* The CREDITORS of HENRY PANTON of HILTON *against* ROBERT PANTON, Factor at Campvere, his Brother.

IN the competition among them for the maills and duties; Robert craving preference to the litster hospital of Aberdeen and other creditors, for the sum of £47,000 Scots, both as infest and as donatar to his brother's liferent-escheat,—it was ALLEGED, That, besides the ordinary backbond given by him at obtaining of the said gift, upon an application of the creditors, representing the latency and suspicion of his debts, the Lords of the Treasury had taken a separate backbond, obliging him, in case it were found that any of the debts then acclaimed by him, as due by Hilton his brother, were collusive and fraudulent, that he should be excluded from the benefit of the escheat for the quadruples. And now it appears, that, by his stated accounts, he charges his brother with 4000 guilders; though, by a discharge subsequent to this article, *viz.* in May 1698, he declares the rumours spread abroad of his brother's being debtor to him were false; and therefore discharged him of all debts preceding that day: and yet this 4000 guilders is prior, and so he has incurred the penalty and certification of his bond; and they, as having taken a second gift, have right thereto, and are preferable to him.

ANSWERED,—This bond is of a very extraordinary nature; and has been impetrated from him ere he could obtain the gift, and ought not to be extended. And, to show that he could have no design of defrauding his brother's creditors, he had paid an infestment which Colonel Buchan had for 3 or 4000 merks, upon a simple discharge and renunciation, without so much as taking a positive right or conveyance for keeping it up.

The Lords found his bond, in so far as extended to those articles prior to the general discharge, was collusive and fraudulent; and brought him under the compass of his backbond to the exchequer. Then the debate arose, That this being penal, what should be its effect and extent? And it was CONTENTED for Robert Panton, That the most it could import was, to lay aside the said 4000 guilders, and three times more of his sums, which makes up the penal quadruple; and, *esto* that were done, he had still £23,000 of his debt of £47,000 to burden the escheat. And, his debt being so restricted, he behoved to be preferable to all his brother's creditors for that.

ANSWERED for them,—That expounding the backbond in that sense was, instead of winning, truly to make them lose both their debts and the cause; for the bringing him in for the remaining £23,000 Scots before them, did as much drown and exhaust the estate as when he had the whole £47,000 to burden it with. And, though he pretends that, when he gave the discharge, he had effects and goods of his brother's consigned to him worth the said 4000 guilders, yet it is evident that discharge was given with an affected design, to entrap creditors, and to induce them to trust his brother.

The Lords, by the President's vote, found Robert was only obliged to deduce the quadruple of that sum; and, being so restricted, that he might use the gift of escheat to give him a preference for the remainder of his sum. Some had a jealousy of the reality of his debts; they being *inter conjunctas personas*, and contracted in the space of eighteen months after the foresaid general discharge,

and that they might be quarrelled on the Act of Parliament 1621 ; but he offered to astruct them all by current accounts and bills betwixt his brother and him in the way of trade and correspondence. *Vol. II. Page 306.*

1706. *January 2.* NAPIER, *alias* MAXWELL, of KILMAHEW, and Mr WILLIAM COCHRAN of KILMARONOCK, *against* SIR JOHN HOUSTON of that ilk.

IT was a reduction of a bond of 28,400 merks, granted by the deceased Patrick Maxwell of Newark, to Houston's father in 1684, on this reason, That Newark stood then interdicted to four gentlemen, whereof Sir Patrick Houston, the creditor in the bond, was one ; and Sir John Houston represents him as heir.

ALLEGED for Houston,---That it is *res hactenus judicata* ; because, in the ranking of the creditors of Newark, this bond is produced and sustained, and no such objection of its being posterior to the interdiction being then made against it, it is competent and omitted, especially Kilmahew being called to the ranking. Likeas, Kilmaronock has homologated this debt, by being the highest offerer at the roup, and finding caution to pay the creditors as they are ranked. And it was found, in *Colonel Erskine's reduction and improbation against the Creditors of Lord Kincardine*, that he, as purchaser, might not quarrel the creditors' debts ; but how far he might do it *qua* creditor, was appointed to be heard in presence. And to what end are rankings ordained to precede the sale, if it was not to clear the creditors' interest on the estate ; and to what end are sales introduced, but that the creditors may be paid as they are ranked ? So Kilmaronock cannot be heard now to reduce this debt *ex capite interdictionis*.

ANSWERED,---That Kilmahew was minor the time of obtaining these decreets of ranking, and did not compear, so it is yet entire to him to object against any of the debts ; and *res judicata* or *homologata* cannot exclude him.

2do, ALLEGED for Houston,---That the voluntary interdiction was null, because there was no previous cognition taken of his lavishness and unfitness to manage ; and his confession of the same in the body of the interdiction is not sufficient, because persons capable enough may enter into such contrivances, and thereby entrap and defraud honest creditors contracting with them. And interdictions being *contra naturam dominii*, and a restriction on the freedom of commerce ; therefore, it is just that voluntary ones proceed *causa cognita* as well as judicial. And as the civil law provided *ne prætor civi Romano citra causæ cognitionem curatorem det* ; so does our old brief of the chancery, as Hope, *tit.* Interdictions, observes. And so it was decided by the Lords, 20th December 1622, *Campbell* ; 4th December 1623, *Gechan* ; and 12th February 1633, *Forbes* ; where the Lords sustained this reason for reducing an interdiction, that the party was *satis prudens et rei sue providus* : and there was no just impulsive cause for the interdiction prior thereto.

ANSWERED for Kilmaronock,---That, in voluntary interdictions, to require a previous cognition confounds it with the judicial ones ; and parties will voluntarily bind up themselves, who will never be persuaded to compear judicially, and acknowledge it, nor suffer a probation to their ignominy to be led thereon. It is not denied but an interdiction may be reduced, if it be proven that it was *sine causa*, or that the party is reclaimed, and turned frugal and virtuous ; yet