

1697. January 13.

ALEXANDER ELPHINSTON against HENDERSON and the LAIRD of DALMAHOY.

PHILIPHAUGH reported Alexander Elphinston against Henderson and the Laird of Dalmahoy, for reducing a disposition of a brewery made by Hary Leggat, after he was inhibit at his instance. *Alleged, imo*, The inhibition was not registrate, which only puts the lieges *in mala fide*. *2do*, It was, by virtue of a factory, and a letter from Harry, prior to the inhibition, and so depended on an anterior cause. *3tio*, It was done *auktore pratore*, the lands being roup'd by order of the Lords. *Replied*, The publication and executing the inhibition is the rule, and after that my debtor may do nothing to my prejudice. *2do*, The factory and letter contained only a power to sell, so the actual alienation was subsequent to the inhibition; and, as to the third, the warrant of the Lords was *periculo petentis*, and the pursuer not called; and so *res inter alios acta* as to him; and not done in the terms prescribed by the act of Parliament 1681, anent such sales. The Lords reduced the disposition, especially considering that Leggat was bankrupt the time of granting thereof.

*Fol. Dic. v. 1. p. 77. Fountainball, v. 1. p. 753.*

1708. December 23.

BANK of SCOTLAND against KENNEDY.

MR DAVID DRUMMOND, as treasurer to the bank, competing for a sum upon an arrestment, and craving preference to an assignee who had intimated after his arrestment, he *objected*, That the arrester shewed no sufficient title, in so far as he produced nothing but the copy given to the debtor, with an unsubscribed note on the back of the horning; wrote by the messenger's hand; bearing, he had laid on an arrestment that day, with the witnesses names; but no execution of arrestment was produced. *Answered*, They have not an extended execution under the messenger's hand upon the arrestment, because he and they were both prevented by a sudden death shortly after, being stabbed in a quarrel in October last, in the street of Edinburgh under night, which accident could not be foreseen; so they cannot lose their diligence by this *casus fortuitus et damnum fatale*, seeing they produce the equivalent, viz. the copy given by him, with his note, though unsubscribed. *Replied*, The execution of an arrestment, cannot be made up no more than the tenor of a charge of horning, which, by the 94th act 1579, is expressly prohibited; and *esto*, He had died a natural death the same day he arrested, if you got not his execution immediately, you was *in mora*, which must *tibi nocere et non alteri*, I having a competent right by intimating my assignation. —THE LORDS found they could not supply the defect, and so preferred the assignee. See EXECUTION.

No 148.

A disposition reduced, because of an inchoate inhibition (in particular circumstances,) but the disponent was bankrupt at the time.

No 149.

A charge of horning was given without proceeding further. Afterwards the debtor assigned a moveable subject. Posterior to this, denunciation and registration followed on the horning. The assignation found reducible on the act 1621, unless proof could be brought, that the granter of it was at the time reputed solvent.

No 149.

February 24. 1709.—In the competition mentioned 23d December 1708, betwixt Mr David Drummond, treasurer of the Royal Bank, and Kennedy of Glenour, and John Reid, assignees to the sum of L. 32 Sterling, the Bank having succumbed as to their arrestment, they now repeat their reason of reduction against Paxton's assignation to them of that sum; because posterior to a charge of horning given him at the instance of the Bank, and so reducible on the act of Parliament 1621, as in prejudice of their anterior diligence. *Answered*, A single charge of horning does not make a debtor bankrupt, the standard settled by the act 1696 requiring, besides insolvency, absconding, retiring to the abbey, resisting of messengers when they come to execute a caption, &c. none of which can be alleged here; and *esto* a horning was sufficient, it can never be the simple charge to put the lieges *in mala fide*, for no record can tell me that; but it must be a registrate horning whereupon denunciation has followed, and not an inchoate diligence, which of its own nature is not habile to affect moveables. Besides it is denied, that the cedent was insolvent the time of the assignation, and so it can never fall under the case of the act of Parliament, seeing the denunciation and registration is long posterior to the intimation of their assignation; and so the *mora sibi non alteri nocere debet*. *Replied*, That in the construction of law he must be reputed insolvent, and to have made this assignation in defraud of my inchoate diligence, by charging him with horning, that after getting the said charge, he made this assignation in plain defraud of my current diligence; and though I did not denounce for some months after, yet that was occasioned by my relying on my arrestment, which was accidentally disappointed by the messenger's sudden murder, before he had subscribed my execution of arrestment, after which, I immediately renewed it, though posterior to your assignation; and a single charge is asserted by Sir George Mackenzie, in his Observations on that act, to be sufficient to put a creditor in the terms of the act of Parliament, which requires only the using of a horning. Now to charge, is certainly in all grammar an using; and a single charge was sustained in 1686, at the instance of Chaplain, against the other Creditors of Sir George Drummond, (*infra, b. t.*) as sufficient to interpel the cedent, and put him *in mala fide* from granting any posterior voluntary assignation, though he be an onerous creditor, and no way *particeps fraudis*; for law does not so much regard the *bona fides* of the receiver, as the quality and condition of the granter of the assignation; and if he be now insolvent, he is presumed *retro* to have been such at the very date of his assigning, and who could not by a voluntary gratification prefer one creditor to another.—THE LORDS found, that the assignation fell under the compass of the act 1621, against rights in defraud of anterior creditors, unless the assignees would prove, that at the time of his granting the assignation, he was holden and reputed to be solvent.

*Fol. Dic. v. 1. p. 78. Fountainball, v. 2. p. 475. 497.*