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preceding, as the act expresseth, if that part of the allegiance required any probation, viz. bearing, that it was made without any true or necessary cause for which the same was made; seeing Denniston *alleged*, That the act appointed that that should be proved, either by writ or the party's oath;—the LORDS found, that the same was not necessary to be proved, seeing it was a negative which proved itself, and that the party, in whose favour the writ was granted, ought to qualify and allege the just and necessary cause preceding, for the which the same was made to him by the bankrupt to the confident person, otherwise that the same could not be sustained against a true creditor.

Act. Stewart.

Alt. Mowat.

Clerk, Gibson.

Durie, p. 17.

* * * Kerse reports a subsequent part of this case :

1622. *February 27.*—IN an action of double pointing, the LORDS sustained an assignation made to a confident person by a bankrupt, upon the assignee's declaration, that he took it to the behoof of a third person, who was a creditor; albeit the declaration was disconform to the assignation, and clause therein contained, bearing, that it was made for sums addebted by the cedent himself.

*Kerse, MS. fol. 56.*1625. *January 28.*LIVINGSTON *against* ABERNETHY and LORD KILSYTH.

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An assignation, expressing that it was made for sums of money addebted by the cedent, was found to afford evidence of its own onerosity.

IN an action Livingston *contra* Abernethy and Lord Kilsyth, whereof the case was, that the Lord Kilsyth being addebted to one Lennox in the sum of 500 merks, to which sum Lennox makes Balfour his assignee, and in the assignation it is expressed, that it is made for sums of money addebted to him by the cedent; and which assignation is intimated to the Lord Kilsyth, and that same day of the intimation it is arrested by Abernethy, creditor to Lennox, conform to his bond; which bond was long before the date of the assignation made to Balfour; upon the which arrestment and assignation, so made by the said two parties, the Lord Kilsyth suspends upon double pointing; wherein the two parties compearing, and disputing which of them had best right to the sum, the arrester *alleged*, That he should be preferred to the assignee, in respect of the bond for debt owing to him before the assignation, and that he offered to prove, that his arrestment, albeit executed the same day of the intimation, was yet executed that day preceding the hour and time of the said intimation, and so was before the intimation affected to him, by his arrestment, as a lawful creditor, verified by the bond produced; whereas, the assignee ought not to be preferred, there being no preceding cause in writ before the assignation extant, which might constitute the cedent debtor to the assignee.

nee; and so the said assignation fell under the statute of dyvoury, seeing it is made in his fraud and prejudice, who is a true and lawful creditor, and done to a conjunct person, the cedent being the assignee's sister's son, and no writ being extant to qualify the cedent his debtor, and the cedent being otherways altogether unanswerable to pay the arrester's debt, being now fugitive, and the assignee having acquired, beside this assignation, all other means and estate, pertaining to the cedent his debtor. This allegiance was repelled, and the assignee was preferred to the arrester; because the arrester had not done any more diligence upon the arrestment, and the assignee had charged upon his assignation; albeit the arrester *alleged*, That he could do no more diligence, seeing, immediately after the arrestment, the Lord Kilsyth had drawn in the matter, by suspension and double pointing, the dependence whereof made all further process and charges to cease; which was not respected. And the LORDS found, that it was sufficient to the assignee, to qualify the cause of his assignation, viz. that it was made to him, for sums owing to him by the cedent, by the assignee's own oath; which oath of his the LORDS found sufficient to instruct the debt, and cause of the making of the assignation; and found, that it was noways necessary to instruct or qualify the same by any preceding writ, made by the cedent to him; but that it was enough and sufficient, if he should swear by his oath, that he was addebted to him at the time of the assignation in as great sums, as the sum whereto he was assigned; and repelled the allegiance proposed for the arrester, in respect thereof.

Nota.—This decision is contrary to that made betwixt Duff and Kellie, 23d March 1624 (see APPENDIX); and to another betwixt Young and Denniston, 12th February 1622 (*supra*), and to other cases; see APPENDIX.

Act. Per Se.

Alt. Nicolson, elder, & Primrose.

Clerk, Gibson.

Fol. Dic. v. 2. p. 250. Durie, p. 160.

1626. November 24.

GLEN against BINNIE, &c.

IN a double pointing raised at the instance of some tenants of burgh-land in who were distressed for their mails, at the instance of Glen on the one part, and by Binnie on the other part; Glen's right was a tack set to him by his own son, who shortly after the date of the tack became bankrupt; and which son, by his contract of marriage, was appointed to be infeft by his said father (who was also party-contractor in the said contract of marriage) in the same land, and according thereto was infeft therein. This tack bore, in the narrative thereof, that notwithstanding of the provision made to the son by the father, conform to the foresaid contract, yet, at the date and time of the said contract, it was convened verbally betwixt the father and the son, and the son promised that the father should retain the possession of the said lands, wherein he was appointed to be infeft, during all the days of his lifetime, not

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A lucrative tack let by a bankrupt to his father, bearing to be in implement of a promise made when the lands were disposed to the bankrupt, in his contract of marriage, found not to prove its onerous cause against a creditor.