1702. *February* 12. DURHAM of LARGO *against* MERCERS and the EARL of LEVEN.

IN a competition between Durham of Largo, and Mercers, and the Earl of Leven, their assignee, all creditors to Young of Kirkton; Largo having founded on two inhibitions, it was objected against the [execution of the] first, that it was null, because it neither designed the inhibitor nor the person inhibited, but only related to the letters, and bore "the within designed." *2do.* The execution against the lieges at the market-cross does not bear the letters to have been read after open proclamation.

Against the *second* inhibition it was OBJECTED,---That it only bore the general terms, to have inhibit them, to the effect and with certification within written, but wants the special prohibitory words,---to sell, annailyie, wadset, or contract debts.

ANSWERED to the *first*,—The Act of Parliament 1672 appoints the designation of parties in executions of summonses; but there is no law nor custom requiring it in diligences. Next, The execution bears open and public reading of the letters and three oyesses, which is the same thing with proclamation; and though want of solemnities may annul inhibitions as an unfavourable diligence, stopping commerce, yet they must not be cast up for omission of nicety, where they have the equivalent.

As to the objection against the *second* inhibition, ANSWERED,—That the execution bears, he discharged all the lieges with certification, conform to the command of the letters in all points, and affixed a copy; and executions of hornings only bear the party to be charged for the causes and to the effect within specified, and yet none will call such a charge of horning null.

Some thought the style was to be followed *in terminis specificis*, without any mitigation or dispensation by equipollents. Others inclined to sustain the inhibitions, who had the Lord Stair of their opinion, *Book* 4. *tit.* 50: But, at last, the Lords, before answer, resolved to try the custom by inspecting the registers.

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1702. *February* 17. WILLIAM DOUGLAS *against* BAILIE TELFER'S HEIRS, WILLIAM FULTON, and MARGARET ALCORN.

THE Lord Arbruchel reported William Douglas, chamberlain to the Earl of Roxburgh, against the heirs of Bailie Telfer, William Fulton, their tutor, and Margaret Alcorn. John Telfer having granted bond for £800 to Janet Potts, relict of Thomas Alcorn, she grants him a receipt and obligement of the same date, declaring she had borrowed up the papers assigned by her to him, and obliged herself to make an assignation thereof to Margaret Alcorn her daughter, and to cause her transfer the same to the said Bailie Telfer. Douglas being a creditor to Janet Potts, he arrests the £800 in Telfer's representatives' hands; and pursuing a forthcoming, they ALLEGE,—That Telfer's bond was but *surrogatum* in place of what Janet was to assign of Lanton and Cockburn's bond; and Janet having given a back-bond of the same date, and before the

same witnesses, this was a correspective obligation, and of the nature of a mutual contract, and so behoved to be implemented, either before, or at least *simul et semel* with Bailie Telfer's heirs' fulfilling the bond, seeing it was the true and immediate cause of his granting that bond.

ANSWERED,—Telfer had given a clear simple bond for a liquid sum to Janet Potts, her heirs, executors, or assignees, without any clog, quality, or condition; and he, as Janet's creditor, having arrested it, was not concerned to notice any private latent obligement she had given, seeing the bond had no relation thereto, nor made any mention thereof; otherwise simple bonds were never secure, because a back-ticket might qualify, annul, and restrict them; which was a great inconvenience and stop to commerce, seeing there was no register of such back-bonds to certiorate us; and such back-bonds ought to have no more force than an assignation, which, if not intimated, does not affect the right.

REPLIED,—*Surrogatum sapit naturam ejus in cujus locum subrogatur*; and therefore Margaret Alcorn not having transferred Lanton and Cockburn's bond, Bailie Telfer's obligement is *causa data causa non secuta*; and till he get that right, he cannot be forced to pay: and as to the inconvenience, parties in such cases must rely on the warrandice of the parties against whom only they have recourse. And Dirleton, in his Doubts and Questions, *voce Correspective Obligements*, states this question,—How far such back-bonds may prejudge an assignee or an arrester? but does not determine it: But Stair has two decisions that such back-bonds militate against singular successors;—*13th December* 1672, *Lord Lion* against *the Feuars of Balvenie*; and *5th February* 1678, *Mackenzie* against *Watson*.

The Lords generally thought a back-bond militated against singular successors, where the right was personal without infeftment, (albeit this proves very hard and uneasy:) but in regard it was not clear that the one was the cause of the other in this case, therefore, before answer, they ordained the writer and witnesses to be examined what was *actum et tractatum* at the time: and if he granted bond on the account of the said Janet Potts's obligement to him.

It were both clearer and sincerer in all such transactions to make them relative to the other. *Vol. II. Page* 146.

1702. *February* 21. The EARL of NORTHESK *against* CARNEGY of KINFAUNS.

PATRICK Carnegy of Kinfauns having engaged in sundry debts for the late Earl of Northesk, his brother, and having paid the same, and acquired right thereto, there is a declarator raised by the present Earl of Northesk against this Kinfauns and his mother, for extinction and restriction of these rights; and, in the *first* place, he craved a communication of all the eases and compositions he got of the debts he paid, in respect he was one of the trustees and managers of his fortune, by a commission to him and sundry other friends; and which he not only accepted, but, by many missive letters produced, he declared the bargains he was making with the creditors were for his nephew's behoof, and so he was plainly *negotiorum gestor*, and could exact no more than he gave.

ANSWERED,—The Earl has no prejudice; for as the creditor might have ex-