

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

that will operate to liberate him only *pro futuro* ; but all deeds without the interdictor's consent, prior to the decret of reduction, will be void and null.

*3tio*, HOUSTON ALLEGED,--The execution of the interdiction was null, because, being wrote on a paper apart, and not on the back of the bond and letters, it did not specially design the parties, but only related to the within designations ; which might agree to any Patrick Maxwell in the kingdom as well as Patrick Maxwell of Newark. Neither are the interdictors designed otherwise than relatively, " the within designed," and, by the 6th Act, Parliament 1672, such indefinite executions on summonses are declared void and null.

ANSWERED,---There was no hazard of mistake here, seeing the bond, letters, publications, and executions were all duly registrate ; which fixes the executions to such particular persons, and clears the ambiguity, if any be ; and the Act 1672 being a correctory law, cannot be extended beyond its precise case.

*2do*, OBJECTED,---That the execution is still null ; for though its warrant requires three oyeses, open proclamation, and public reading of the letters, yet the messenger executor has omitted the word " proclamation," which is an essential requisite of the solemnity.

ANSWERED,---The execution is opposed, bearing the three oyeses, with open and public reading ; and what could that be other than open proclamation.

A third nullity objected was, That the letters required a schedule to be left and affixed on the market-cross ; whereas the execution bears, that only a double and copy of the letters was left : and the style of such writs should be inviolably kept. See the *22d December 1622, Seton against the Creditors of Atchison*.

ANSWERED,---This seems but to be a quibble on words ; for a copy seems to be the equivalent of a schedule, and only another word signifying the same thing.

The Lords thought the points so perplexed, that they declared they would hear the cause in their own presence.

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1706. *January 8. JAMES CORBET against WILLIAM COCHRAN of KILMARONOCK.*

JAMES Corbet, merchant in Glasgow, charges Mr William Cochran of Kilmarnock, on a bond of £300 sterling, as the price of his twelfth part of a ship sent with a cargo to Guinea, and for £30 sterling as the premium of insurance.

ALLEGED,---The obligation was conditional, payable only in case the ship should arrive safe in any harbour of Scotland or England ; which it never did.

ANSWERED,---That though the obligation was simple, yet he offered to prove, by the comuners present at the bargain and communing, that the obligation was in place of the policy of insurance ; and though the ship never returned, yet the condition was implemented by the equipollent, in so far as Kilmarnock's supercargo sold the ship in some of the West India plantations, and remitted the price and effects to Scotland ; which succeeding *loco rei*, the ship, in construction of law, returned, and so, the condition being purified, the obligation takes effect.

REPLIED,---Whatever the Lords may do *ex officio nobili*, in examining the writer and instrumentary witnesses present at the time of perfecting and signing of the bargain, yet it is against the known principles of law to take away writ by extrinsic witnesses ; which can allenarly be convelled *scripto vel juramento*