

No 20.

disposed and sold of the hats. And this being admitted to the pursuer's probation, and coming in this day to be advised; Boick *alleged*, No process at Arnould's instance, because, being a subject of the French King's, with whom we are at war, they can pursue no action during the dependence and continuance of the war; for *hostes publici*, as they have not *jura commerciorum*, so neither have they *legimam personam standi in judicio*, nor *jus persequendi actiones*. And, if this were the cause of a Scotsman pursuing a Frenchman before the Parliament of Paris, he would not only be denied action, but the sum would be confiscated to the public; which is not here craved. *Answered*, Whatever the authors of the war may deserve, or merchants may suffer by captures of their ships and goods at sea, yet it is hard to extend it to private persons craving their just debts, the denying whereof is against the faith of trade; and by the late act of Parliament 1703, allowing an indirect trade with France for importation of wines, this rigour seems to be dispensed with. THE LORDS refused to sustain process at the French merchant's instance. Then Gordon produced a bill of exchange giving him right to the sum, which the LORDS likewise repelled; because the summons was not pursued in his name on that proper right of his own, but only as factor for Arnould, and would not let him transform his summons thus by way of reply.

Fol. Dic. v. 2. p. 84. Fountainhall, v. 2. p. 230.

1706. July 10.

WALTER YOUNG *against* GEORGE YOUNG, Merchant in Edinburgh.

No 21.

Assignment to a plea granted for the cedent's behoof, after he had been debarred *ab agendo* by a registered horning judicially produced; sustained to allow process to proceed at the assignee's instance, without regard to the personal objection against the cedent, who continued unrelaxed.

WALTER YOUNG having charged his brother George upon his back-bond, to denude of some bonds that were in trust in his person, he suspended, and at discussing of the suspension, the charger being debarred *ab agendo* by a registered horning, he then assigned his charge to James Dundas of Breistmill. When the assignee insisted, it was *alleged* for the suspender, That the horning against the cedent must debar the assignee *quia pendente lite nihil innovandum*, and the *jus quasitum* to the suspender, by the sustaining his defence upon the cedent's not having *personam standi* could only be taken away by a relaxation; especially considering, that the assignation to Breistmill is gratuitous for the cedent's behoof.

Answered for the charger; The debarring *ab agendo* by a registered horning being odious, and merely a personal objection, affording no advantage to the proposer, cannot meet the assignee who has *personam standi*. Nor has the suspender any prejudice by admitting the assignee to supply the fictitious legal incapacity of the cedent; since the suspender is not excluded from any defence or manner of probation competent against the cedent; and so *nihil innovatur* by the assignation to the suspender's disadvantage, as he could pretend *no jus quasitum* by debarring of the cedent except a delay.

THE LORDS repelled the objection against Breistmill, that his cedent was debarred, and sustained process at his instance, though the assignation was for the cedent's behoof.

No 21.

Fol. Dic. v. 2. p. 85. Forbes, p. 120.

* * * Fountainhall reports this case.

WALTER YOUNG of Winterfield, pursues George Young merchant in Edinburgh his brother, for L. 1000 Scots, he had uplifted of his. *Alleged*, The debt was owing by Campbell of Lawyer's father, and he had got as much for it as any other of his creditors; but seeing he refused to stand to that transaction, but rigidly craved him to hold count for the whole, he was necessitate to use any remedy law gave, and so he produced a registered horning, and debarred him *ab agendo*. Upon this, Walter assigned the debt to Dundas of Breastanbrea; and he insisted; it was *alleged*, That this was *fraudem legi facere*, to make an assignation *pendente lite*, especially being gratuitous, and without any onerous cause, and contrary to that brocard of law, that *lite pendente nihil est innovandum*; and there being a *jus quasitum* to him, it could not be taken away by any such collusive deed, else that effect of civil rebellion taking away their *personam stanti in judicio* is not worth a rush, but can be eluded by assigning the next moment after it is objected; and the only remedy law knows is relaxation, and if he will not follow that method which law prescribes, *sibi imputet*, and till that be expedite, the defender is free from that instance, and not obliged to answer his gratuitous assignee. *Answered*, Debarring by horning is odious, and founded on feudal delinquency, where oft-times it is impossible for the poor debtor to obey the will of the letters; and is only a personal objection that meets the rebel himself, but not his assignee; and the defender shall have no prejudice, for the assignee declares, that whatever can be said against his cedent shall malitate against him, and if he have any thing to prove by his oath, he shall get it. THE LORDS found the objection personal, and could not meet the assignee, but he might carry on the process notwithstanding. Some of the LORDS thought the regular way was by letters of relaxation, which may be got without suspending the debt, and so does little wrong to the creditor; but the plurality sustained the assignation, in respect of his declaration, that whatever was competent against the cedent, either *in causa* or *per modum probationis*, should meet the assignee; only the assignation is much cheaper than by expediting letters of relaxation, which burdens him with paying 20 merks to the treasury for the escheat goods.

Fountainhall, v. 2. p. 341.