

**No. 26. 1751, Jan. 26. FORBES *against* BREBNER, &c.**

FORBES, a merchant, being creditor to Emslie, also a merchant in Aberdeen, by decret of forthcoming, used diligence by horning, denunciation, and caption, and 10th May 1748, Emslie, by a missive-letter, offered payment on certain conditions, which were refused; and on the 17th of May was taken and imprisoned; but before his imprisonment and after his diligence, he paid three other creditors, two in the beginning of May, and the third the very morning of the day that he was imprisoned; and Forbes alleged, that from the time of raising the caption, Emslie lurked and absconded. On getting notice of these voluntary payments, Forbes arrested in these three persons hands and pursued forthcoming, and referred to their oaths. They deponed that they owed nothing, but acknowledged the payments made to them as above; and he insisted in reduction of these payments and repetition of the money on the acts 1621 and 1696. The Sheriff gave the cause against him, and therefore he brought it before the Court by advocacy; and coming before me, I also on the 25th sustained the defence and assoilzied. There are no words in the act 1696 that can apply to payment of money, which is not in the sense of law a deed, and if it could apply, the law was monstrously unjust in making it retrospect 60 days before bankruptcy; and the only difficulty was on the second branch of the act 1621, which has the words "voluntary payment," but then it is restricted to effects that the pursuer has lawfully affected by legal diligence, whereas no diligence can affect the cash in the debtor's pocket, nor has there, these 130 years that have run since that act, been any precedent of such an action; and the pursuer having last night reclaimed, I am told, (for I was in the Outer-House) that this day the Lords refused the petition without answers.

**No. 27. 1751, Jan. 29. JOHNSTON *against* HOME of Manderston.**

IN May 1747, George Burnet, brewer, was imprisoned on a caption by Mansfield, but soon paid the debt and was liberated. In July his brother-in-law Thomson got credit in a cash-account with the British Linen Company, Home of Manderston joining with him in a bond for the money; and of even date he and George Burnet gave Home an heritable bond of relief on a brewery and some houses to which he had right, but was not himself infest, Moffat being the last person infest, who disponed them to Burnet of Logie, and who transferred them to George Burnet. 6th October 1747 George Burnet was imprisoned by Johnston on a caption for a bill of £.55 sterling that was payable at Lammis 1747, and George Burnet took the benefit of the act of grace; and Thomson having also failed, Home took infestment on the procuratory on Moffat's disposition to Burnet of Logie in April 1748, and at Martinmas thereafter paid the debt to the British Linen Company. Johnston now pursues reduction of the heritable bond of relief, first on the act 1621 as without any onerous cause given to Logie; *2dly*, on the act 1696, because George Burnet became notour bankrupt, first by his imprisonment by Mansfield in May 1737, and next by his imprisonment by the pursuer 6th October thereafter, and though the disposition is more than 60 days before, yet by the statute it was to be accounted as of the date of the infestment in April 1738. The Lords made no difficulty of assoilzieing from the reduction on the act 1621; and as to the act 1696, they thought it did not at all