

*beneficium.* DUPLIED,—*Qui habet incommodum, viz. the pains, debet et habere commodum.*

My Lord Advocate found the letters orderly proceeded; only ordained them to have suspension upon the two Schoolmasters' competition, without caution or consignation.

*Advocates' MS. No. 152, folio 92.*

1670. June 14. BYRES, &c. against The BAILIES of Hamilton.

LYLL, bankrupt, after he has disappeared, having made a disposition of his whole goods and Merchant ware to some of his creditors, those who were prejudged thereby made their application to the bailies of Hamilton, (in which burgh the said bankrupt had his house and shop,) entreating them, notwithstanding of the said disposition and instruments of possession taken thereon, to secure and sequestrate the said bankrupt's goods till such time as they might see who had best right thereto; which the bailies thinking they might warrantably do, they caused nail some plates of iron on the bankrupt's door. Upon fact they are convened by the creditors, in whose favours the disposition was made, to re-deliver the goods or prices thereof, with 1000 merks, wherein they were damnified by the bailies their impeding them to take possession of these goods, and so to perfect their disposition. The first calling we did cast, in regard there was no inventory produced, conform to which though they libel.

At the next calling I alleged no process while the bonds for which the said disposition was granted, and to which it relates were produced. This was repell-ed. Then we proponed a formal defence, that this being a disposition made by a bankrupt after he had fled, gratifying some of his creditors *in fraudem* of others his just and lawful creditors, the same was *ipso jure* null, by way of exception or reply, as the very act of Parliament 1621 bears; especially thir pursuers having been upon the contrivance of the said disposition with the bankrupt, (for the which we craved their oaths of calumny,) and so can never furnish them an active title to pursue on.

This my Lord Newbayth repelled, because there was no reduction at any other creditor's instance, and that it was not competent to the bailies. And for the act of Parliament, he answered, the same appoints many things to be received by way of exception, to which the Lords require a reduction: Sir J. Harper offered to produce practiques where the Lords had found such dispositions by way of reply null, which he was ordained to do.

Then we ALLEGED,—That the bailies had done nothing in this case but what *ratione officii* they were bound to do, the creditors prejudged having made their address to them. The Lord Newbayth found, though the same might have been lawfully done by magistrates of a burgh royal, yet he found it unlawful in bailies of a burgh of regality as Hamilton was; notwithstanding it was pressed by Sir John, that the disponder being bankrupt and *in fuga*, (as it would have been lawful to any creditor to have arrested at his own hand the person of any such bankrupt, being his debtor,) so it was most warrantable for the bailies to seques-

trate his goods, to the end the same may be made furthcoming to all his creditors proportionally; of which my Lord doubted exceedingly if a creditor at his own hand might with us arrest his debtor bankrupt; yet that is clear by the civil law, and Sir John was appointed to produce practiques thereof.

*Act. Dinmuire.*

*Alt. Harper and Lauder.*

*Advocates' MS. No. 15, folio 73.*

*June 18.*—In the foresaid action, *Byres, &c.* against *Bailies of Hamilton* at *No. 15, referente Domino Newbayth*,—The Lords before they would give answer upon the relevancy of the summons, ordained the bailies to depone upon the points thereof, reserving to all creditors their particular interests.

*Advocates' MS. No. 22, folio 74.*

*1671. February 25.*—The bailies having deponed upon the points of the pursuer's summons, conform to the interlocutor marked *No. 22*, in this manner, that upon the address of sundry creditors within their town they had caused secure the door by nailing iron plates upon it; and that notwithstanding thereof the bankrupt *Lyll's* wife, with his good-brother, entered in the night at a hole they made in the wall without their knowledge or authority, and clandestinely conveyed away all the goods and ware that was in the shop, &c. (See *Mackenzie's Observations on the act 1621*, page 149.)

This deposition coming to be advised, the Lords found the bailies had power to secure and close the doors upon the application foresaid; only assign them to the 1st of June to prove how the merchant ware and other goods were carried away furth of the house and shop, notwithstanding of the close doors, whether by their authority or by force in the night time. *Vide Hip. de Marsil. singul. 43 and 243, 282, 284.* This was very just, and in such cases of necessity the law will allow every private man to secure the person of his debtor fleeing; *ergo multo magis* his goods, because in cases that cannot admit of delay, or if delayed, then the opportunity loseth, the law makes every man a magistrate, and invests him with a public power; for if in that case a creditor were put to implore the office of the judge for arresting his debtor whom he finds fleeing, he would be gone ere he could get his concurrence. *Item*, where a man is assaulted that he must either kill or be killed, then the law puts the sword in every private man so stated his hand, because the magistrate who *regulariter* bears the same cannot then be had, to preserve himself, and in so doing to avenge the wrong done to the public peace. (*Satius est enim occurrere in tempore, quam post vulneratam causam remedia quærere, L. 5 C. in quibus causis in integrum restitutio, &c. L. 1 C. Quando licet unicuique sine iudice se. Vide etiam L. 5 C. de jure fisci et L. 4 C. ad legem Corneliam, de sicariis.*) *Vide T. C. Quando liceat unicuique sine iudice se vindicare; vide l. 10, p. 16, D. Quæ in fraudem creditorum.* *Sheidivinus ad principium Tit. Instit. de actionibus, in verbis In iudicio.* *Baptista Caccialupus in tractatu suo de debitore suspecto et fugitivo, p. 413.* *Harprechtus ad d. princ. Instit. de actionibus, No. 35, et seq. et Peresius ad Tit. C. de in Jus vocando.*

*Advocates' MS. No. 153, folio 93.*