

PERSONAL PROTECTION:

10471

pecially in general actions of compt and reckoning, protections ought to be granted;

No 7.

*Fal. Dic. v. 2. p. 83. Dirleton, No 313. p. 153.*

1678. November 7. WHITEHEAD against JOHNSTON, &c.

WHITEHEAD of Park having supplicated the Lords, shewing that James Johnston writer to the signet had executed a caption against him, notwithstanding that the Lords had given warrant to the Lord Gosford, auditor in the compt and reckoning, to supersede personal execution, upon any debt or other civil cause against Whitehead, for such time as the auditor found reasonable for his attendance on the account, and accordingly the auditor, upon the 27th of July last, superseded all personal execution till the 5th day of November; yet the said warrant being produced to James Johnston and the messengers, at a meeting of the creditors, he, in contempt thereof, put the same into execution, and therefore craving that he might be set at liberty without caution or consignation, and that they might be punished for their contempt; the LORDS, upon the second day of November, having called and heard the parties, ordained Whitehead to be set at liberty, and James Johnston and the messengers to appear again, and the LORDS would consider what punishment to impose for their contempt. So having this day appeared with both their procurators, they did *alleged, imo*, That they had done no wrong in executing the caption, in respect of the act of Parliament against protections, which, though it contain an exception for superseding execution by the Privy Council and the Lords of Session, as they should find just for attendance of parties upon processes, yet that could only be extended against captions for liquid sums; but this caption was for exhibition of writs, which the same auditor had ordained to be put in the clerk's hands, and alleged a practise, by which the Lords declared they would extend supersederes only as to liquid debts; *2do*, That the auditor had no warrant in the vacant time to give stop to execution.

THE LORDS repelled these defences, after consideration of the act of Parliament, which is general for stopping execution upon any civil action, for parties to attend processes, and that by sentences of exhibitions as well as others, whereby the attendance of parties are hindered; and albeit the Lords, or auditor, upon application, might have restricted the protection, nor to extend to the delivery of writs, which were not in the party's power, yet no party might, *via facti*, without the Lords' warrant, proceed to execution, after a stop shown, especially it being intimated in session time, when the party might apply to the Lords for remeid, as the auditor reported to have been done in this case, and that of consent of all parties they had desired the compt to proceed in the vacance, as appears by the stop, being to the fifth day of November, or sooner, if the compt and reckoning were sooner closed. Neither was there any prac-

No 8.

The Lords of Session grant personal protection, not only when the execution is for a liquid debt, but also *ad factum presentandum*.

No 8.

tique shown or known to the Lords in the contrary; nor was this execution upon any warrant of the auditors to produce in the clerk's hands; and therefore the LORDS suspended James Johnston from his office, as writer to the signet, and the two messengers from their office, and sent them to prison, and ordained James Johnston to pay to Whitehead L. 100 Scots for his nine days wrongous imprisonment. In this the LORDS were the more severe, that it was done by a Member of the College of Justice, who might better know his duty.

*Fol. Dic. v. 2. p. 83. Stair, v. 2. p. 645.*

\* \* Fountainhall reports this case :

In the compt and reckoning depending at the instance of Whitehead of Park *contra* James Johnston, writer to the signet; James, having a caption against Park, the LORDS authorised Gosford the auditor to grant him a protection for attending the diets of the said compt and reckoning, which Gosford did, and prorogated it to him from time to time. Notwithstanding this was intimated to James Johnston, yet he caused two messengers take him upon the caption. This being complained of to the Lords, by a bill given in by Park, as an invasion and infringement of their privilege and powers, James, by his answers, and by his advocates at the bar, *alleged, imo*, No particular Lord could grant any such protection, and that they were contrary to 1663, c. 4.; and yet that act allows the Lords to give protections for some short time, to such as are summoned to appear personally before them; *2do, Alleged*, The caption was only against him for production of a paper which Whitehead kept up, and protections reached only to save men from performance of deeds imprestable, but not of things that were in their power, as his deponing and exhibiting a writ was. To this they *answered*, He declared that it was not in town, but offered to go for it; which they rigorously refused, and would have him to prison. THE LORDS found their authority touched and concerned in this, and found he had despised their protection, and after showing it, he should not have put his caption in execution, and therefore suspended him from his office as a writer, and sent him to prison during their pleasure, and fined him in L. 100 Scots, and imprisoned the messengers; though they excused themselves, that they did no more than James Johnston had ordered them to do. I hear Sir Thomas Nicolson caused one of his clients take the Laird of Cluny, though he had the King and Council's protection, and being quarrelled for it, he owned it before the Lords, and they imposed no censure at all, but caused some deal with the parties to agree. See November 1673, Home against Craw, and Somerville against Beg, (See General List). Yet in a case before the Secret Council pursued by Alexander Swinton against —, the LORDS found a protection did not save a man from exhibiting writs he had. But the LORDS thought in this case, that James Johnston being a Member of the House, might have complained of Gosford's renewing the protection, if he thought he was

wronged by it, and in not applying, it was a tacit contempt. Like as it was evident that he had retarded the compt and reckoning, whereby Park sought to prove James's rights were all satisfied and paid; upon all which singularities the Lords proceeded in manner foresaid, and in other cases it would be no rule to countenance protections. Within a day or two James Johnston having paid his fine, and given in a bill to the Lords, he was thereupon liberated, and in June 1679, reopened again as a writer to the signet. The Lords are become very cautious and wary in granting their protections, as a wresting of the sense of the act of Parliament, unless there be a very manifest necessary cause for their appearance; as that something is referred to the rebel's oath, or the like, as they did in Mr Alexander Auchencmoutie's cause in June 1679 against John Hamilton, and frequently they refuse bills craving such supersederes.

*Fountainhall, v. 1. p. 48.*

1704. February 16. CHALMERS against BROWN.

ANNA CHALMERS pursues Alexander Brown, servant to the Duke of Queensberry, before the Commissaries of Edinburgh, for adherence, as being his lawful wife, owned by cohabitation and otherwise; and he having a counter process, to have her discharged from asserting herself to be his wife; and she finding a material witness lately come from London, called Marjory Forrester, who can prove sundry matrimonial acts, but being under caption, so that she dare not appear, therefore craved the Lords may give her a protection for a few days, to come in and depone before the Commissaries. Some thought the Commissaries, being a Sovereign Court *in prima instantia quoad* adherence and divorces, they might grant protection to witnesses cited to appear before themselves; others thought it was more proper to apply to the Privy Council for a protection; but the LORDS refused the desire of the bill, as not proper for them to interpose in the Commissaries jurisdiction, except it came in, either by advocacy or suspension. But there seemed to be an easy remedy here, seeing the witness might go to the sanctuary of the Abbey, and there the Commissaries might take her oath, when she was out of all hazard of captions.

*Fountainhall, v. 2. p. 224.*

1773. March 11.

JOHNSTON and SMITH late Merchants in Edinburgh, and WALTER COSSER, Trustee for their Creditors, Petitioners for a protection to the former, against ALEXANDER CHISHOLM, and Others.

UPON an application for a personal protection to the bankrupts, on the footing of the statute, 12th Geo. 3. c. 71. after the effects were vested in a trustee, and

No 8.

No 9.

No 10.  
The Court is  
*functus* as to  
the power of