

1686. *February.* ARTHUR FORBES *against* GORDON of PARK.

It being objected against the execution of a summons of reduction, That it was null by the Act 32, Parl. 5, James III ; Act 74, Parl. 6, James V ;—for that, though it was recent, it did not appear to be stamped ;—Answered, Sealing and stamping was then required, when few messengers could write their names, and when the stamp contained the initial letters in place of their subscription ; but now it is unnecessary, when all messengers do write : And by the Act 139, Parl. 12, James VI, executions are appointed to be subscribed by the executor : And sealing, in several other things, is now in desuetude, Act 117, Parl. 7, James V ; Act 29, Parl. 6, Queen Mary ; Act 80, Parl. 6, James VI : And the executions of summons seldom bear any vestige of stamping ; and many of them do not bear that they are stamped. Replied, Solemnities required by law, in executions, cannot be dispensed with, though some of them seem unnecessary and useless ; and all executions of summons ought to be stamped. And the Act 139, Parl. 12, James VI, seems to add subscribing to sealing of executions. The Lords inclined to find the execution null ; but did not pronounce their interlocutor.

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1685, *November* ; and 1686, *March.* The LAIRD of ARNISTON *against* LORD BALLENDEN.

THE Lord Preston having disposed his lands to his eldest son, with the burden of all his debts, in the same manner as if the son were served heir to him, which quality is repeated in the procuratory ; the son, a little while after his father's decease, granted a disposition to the Lord Arniston, in satisfaction of some cautionaries paid for his father, and for payment of some others of his father's creditors, mentioned in a subscribed list. The father's other creditors raised reduction of this last disposition, upon the late Act of Parliament, as in prejudice of them, within year and day of the common debtor's decease. 2. That the quality in the son's disposition was real *quoad* all his father's creditors, so as he could not prefer any. 3. *Esto* the son was infert upon his disposition before the father's death, yet he ought to be reputed as an apparent, *quoad* the effect of the late Act of Parliament, to hinder disposing within the year, and granting preference to the father's creditors for three years ; otherwise the Act would be eluded by persons on deathbed being prevailed with to give infertments to their sons, in prejudice of their own creditors ; and this extension is as rational as the extending of the Act anent apparent heirs acquiring rights of apprising against their predecessor's estate, after their death, to apprisings acquired during the predecessor's life. Answered, The Act prohibiting dispositions, within year and day of the predecessor's decease, in prejudice of their creditors, is not designed to make a party amongst them, but only to prefer them to the creditors of the heir. 2. The provision burdening the disposition with the debts due to the disposer's creditors is not real. 3. The Act is expressly in the case of apparent heirs disposing ; and the son being in the fee, cannot be served heir to his predecessor, who was deceased before his death ; and, as the father might have preferred such creditors as he pleased, there being no di-

ligence used against him, the son might do the like in the father's life, or immediately after his decease, the power of disposing being the effect of dominion. Replied, The Act is clearly conceived in favours of the defunct's whole creditors, as appears from the motives therein expressed, *viz.* That it takes some time before his death can come to their knowledge; and 'tis but just that, as the apparent heir is secure for year and day against all diligence at the instance of the defunct's creditors, so it should not be in his power to prejudge them during that space, by preferring some to others. The Lords found, that the son being infeft during the father's life, his case fell not under the Act of Parliament: and that the provision, though in the procuratory, was but personal; and assoilyied from the reduction: but waved to give answer to the first reason, *viz.* if any of the father's creditors could be gratified.—*November 1685.*

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The debate, (*supra*,) No. 137, being again resumed, it was alleged, That the Act of Parliament ought to be extended to dispositions made by the son, who had come to the estate *per præceptionem*; otherwise it might be eluded. 2. The father burdens the right to the son with all debts he should contract, even *in articulo mortis*; and the son is declared liable, as if he entered heir, and so cannot, more than an heir, dispoise within the year. Answered, The Act is *stricti juris*; and there can be no pretence of collusion in this case, where the son's disposition was fourteen or fifteen years before the father's death, and his infeftment expedite under the great seal. 2. The clause burdening the son, as if he was heir, is only intended to secure the creditor's debt, without any respect to the Act of Parliament. The Lords, having re-considered the debate, were divided in their opinions; but my Lord Ballenden, having consented to Arniston's preference, as to his proper debts, the first interlocutor stood as to him: but the Lords reduced *quoad* the other creditors, whom Arniston had, some time after his disposition, assumed.—*March 1686.* Which seems somewhat inconsequential. *Vide* No. 773, [Lord Ballenden against William Murray, March 1685.]

*Nota.* The defunct's creditors, doing diligence within the three years, are preferable, even where the heir dispoises after the year; otherwise the heir's creditors would have more advantage by a voluntary disposition, than they could have by a legal diligence, which were absurd. But a disposition within the year would be postponed to the defunct's creditors, though they do no diligence within the three years; such dispositions being prohibited, in so far as they prejudge the defunct's creditors, where no diligence or time is limited or required.—*Castlehill's Pratt. tit. Alienation, No. 81.*

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1686. *March.* OLIPHANT *against* SIR JAMES COCKBURN.

A REDUCTION, upon the Act 1621, of a disposition, by Mr Laurence Oliphant, advocate, of his whole estate to his near relations, and conjunct persons, for relieving them of cautionary, being raised, as done to conjunct persons, when he was *in lecto*, where creditors could have no execution against him, and he being curator to the pursuers, having the grounds of their debt in his own hands;—Answered, There was no diligence against Mr Laurence, nor was his condition suspected by any, and the pursuer's debt was not preferable or privileged as a pu-