

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

fall under any of the clauses of that act, because it was not for payment or security of a former debt but a *novum debitum*; and though the infestment was not taken for nine months, while Home was not himself distressed, they thought they could not split the heritable bond, and make the obligation to relieve of the true date it bore, and the disposition of the date of the infestment; yet being a *novum debitum*, it fell not under the sanction of that act, and as this last clause is relative to the former, it only concerns rights granted originally in security or for payment of an anterior debt, that it is not within the sanction of this clause; and of this opinion the President, as well as most of the Lords, was clear, notwithstanding the contrary judgment in the case of Colonel Charteris and Creditors of Merchiston. *2dly*, They also thought, that the infestment being on Moffat's disposition, and not on George Burnet's, it was not in the terms of that last clause, agreeably to the decision in the case of Colonel Charteris against Creditors of Blair, and of the Creditors of Prestonhall; but the President doubted of this last point. However, they assoilzied from the reasons of reduction, on my report.

No. 28. 1752, Nov. 16. CRAWFURD *against* STIRLING, &c.

A CHAPMAN at Hamilton having stopped payment when he was debtor to Stirling and Company, Stirling went to Hamilton and bought shop goods to the amount of the debt. An account of the goods bought was made out and discharged by the chapman, and Stirling discharged his bills to the Company; and some days after one of the partners of another Company to whom he owed money also went and bought goods to the value, and also to the value of a bill he owed another person, and who entrusted him with the bill, but without any indorsation, and he also got a discharge of the goods bought, and discharged both the Company's debt and that other person's; and all the difference betwixt the two sales was, that Stirling bought in name of the Company, but the partner in the other Company bought in his own name, and applied the price in payment of a debt due the Company, and to another. Robert Crawford, another creditor of this chapman, raised horning and caption and rendered him notour bankrupt in terms of the act 1696, and arrested in the hands of these Companies and pursued forthcoming; which coming before me I allowed a proof of the libel, and of the qualifications of the act 1696, without a formal process of reduction; and the proof being this day advised, the defenders insisted that sales of moveables, or giving them in payment of debts, fell not under the 1696, which only mentions dispositions and assignations, and other deeds, which must mean deeds in writing; *2do*, That the sale was not reducible being for an adequate price, and the debtor might lawfully apply his ready money for payment of debts, notwithstanding the act 1696, as we found 26th January 1751, Forbes against Brebner, (*supra*,) and much more where the purchase was by one person, and the money applied to pay a debt due to another, and quoted from the Dictionary a case in January 1733 of Bailie Arbuthnot.* Lastly, They objected that Stirling was dead and his heirs not called, therefore the process could not proceed against that Company till the process was transferred against his heirs. The Court had no difficulty but as to the last, the transferring the process against Stirling's heirs; and I observed, that if he was not in the field the Company was not in the field, that it was therefore necessary to call him in the process, as

* Dict. No. 198. p. 1228.