

ANENT EXECUTIONS OF INHIBITIONS.

NEWTON annulled an inhibition, because it wanted the three several oyses at the market-cross, though it was positively offered to be proven that they were truly made; because the expressing them in the execution is *de forma ejus essentiali*, and cannot be supplied. *Vol. I. Page 64.*

1679. November 15. Bust against ———.

IN a case betwixt one Bust and ———, an assignee charges for a sum. The debtor suspends upon this reason, That he offered to prove, by the charger's oath, the assignation is to the cedent's behoof; which being confessed, then he proponed payment or compensation against the cedent. The assignee appears, and depones that it is to his own behoof, but that he had got an assignation to a debt on thir terms: that, if he could recover payment, then to pay himself therewith; if not, then the cedent was still to be his paymaster, and not to be exonered of the debt.

The Lords, at the advising of this oath, had some inclination to find this assignation was upon the matter to be reputed to the cedent's behoof, seeing it was not taken by him in satisfaction, but only as a collateral security, and in corroboration; but it was not fully decided. *Vol. I. Page 64.*

1679. November 15. GEORGE YOUNG of WINCHBURGH against WILLIAM NICOL, Trumpeter.

GEORGE Young of Winchburgh charges William Nicol, trumpeter, to count to him for the assignation he had given him to Kennoway's back-bond, and to the gift of Hugh Sinclair's liferent-escheat. Nicol's reason of suspension, with respect to the gift of the liferent-escheat, was, that he had done all legal and necessary diligence against the tenants, by imprisoning them; and they came out upon a suspension and multiplepoinding, wherein, at the discussing, many creditors of Hugh Sinclair's, who had real rights on the lands, were preferred to him, and he secluded and debarred by them, they having been clad with possession prior to Hugh Sinclair's denunciation to the horn.

ANSWERED,—Ought to be repelled; because it is offered to be proven, that the rent of the lands falling under the escheat are worth L.200 sterling *per annum*; and that the annualrents of the preferable infestments were within 2,400 merks yearly, so that there was an annual excrescence of 1,200 merks yearly, which Nicol might have uncontrovertedly affected; and so, not doing it, he was *in mora*.

Newton very justly appointed both parties to count and reckon, and George Young to prove the rental of the escheat lands, and William Nicol to prove what preferable rights debarred and secluded him from the possession, that, *ex eventu* of both probations, it may appear if there was any excrescence.

Then Nicol ALLEGED,—He could do no diligence on the back-bond, because Kennoway died shortly after, and the papers were not delivered to him ; and, when he spoke to Kennoway's relict to denude, she craved payment of the expense her husband was at for leading the said apprising, conform to an express quality and condition in the back-bond.

ANSWERED,—Oppones Nicol's obligation to do all legal and necessary diligence upon the back-bond, so that he should have pursued Kennoway's representatives thereon.

This being reported on the 21st of November thereafter, the Lords found, that Nicol, having accepted an assignation to the back-bond, he, by the quality of his assignation, was bound to have done diligence thereon.

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1679. *November 19.* ALEXANDER ARBUTHNOT, Minister at Arbuthnot, *against* SIR ALEXANDER FALCONER of GLENFARQUHAR.

In the charge, Mr Alexander Arbuthnot, minister at Arbuthnot, against Sir Alexander Falconer of Glenfarquhar, as donatar to the ward of Sybbald of Kair, (*vide* 26th Feb. 1678, *supra*, page 288,) for payment of the stipend due to him forth of these lands :

The Lords having this day advised the minister's oath, they found he had, by his oath, acknowledged he had intromitted with 54 bolls of victual of the rents of the lands of Kair, contained in the bond produced, granted by Robert Arbuthnot, tenant in Kair, to him ; whereof two chalders of victual, two parts meal, and third part bear, of the crops 1675 and 1676, being the years charged for. And find the oath proves the cause of the granting that bond by the said Robert Arbuthnot the tenant, was, because the said minister had granted a tack of the teind of these lands to Harie Guthrie, then possessing *qua* donatar ; and the said Hary had given the said tenant a discharge of his farm : and therefore find Glenfarquhar's reason of compensation against the minister is proven by the minister's oath ; unless the charger will condescend and instruct that Hary Guthrie had a right to the lands, by virtue whereof he might grant a discharge to the tenant, and exclude Sir Alexander Falconer's right ; or that Sir Alexander had uplifted these years' rents himself ; reserving to the minister charger, in case Sir Alexander or Hary Guthrie shall pursue upon the tack, to allege it can have no effect till the said composition of 54 bolls be repaid him ; and ordain Sir Alexander's discharges produced to be allowed *pro tanto*. And, in regard the minister is not clear in his oath as to the prices of the victual, find him liable for the prices thereof, conform to the sheriff's fiars of those years.

Then, by a bill, the minister, among other things, offered to prove, that Hary Guthrie acted as pro-tutor, and was holden and reputed in the country as donatar to the ward. The Lords refused this petition. *Vol. I. Page 64.*