

1697. January 13.

ALEXANDER ELPHINSTON *against* HENDERSON and the LAIRD of DALMAHOY.

PHILIPHAUGH reported Alexander Elphinston against Henderson and the Laird of Dalmahoy, for reducing a disposition of a brewery made by Hary Leggat, after he was inhibit at his instance. *Alleged, 1mo*, The inhibition was not registrate, which only puts the lieges *in mala fide*. *2do*, It was, by virtue of a factory, and a letter from Harry, prior to the inhibition, and so depended on an anterior cause. *3tio*, It was done *auktore pratore*, the lands being roup'd by order of the Lords. *Replied*, The publication and executing the inhibition is the rule, and after that my debtor may do nothing to my prejudice. *2do*, The factory and letter contained only a power to sell, so the actual alienation was subsequent to the inhibition; and, as to the third, the warrant of the Lords was *periculo petentis*, and the pursuer not called; and so *res inter alios acta* as to him; and not done in the terms prescribed by the act of Parliament 1681, anent such sales. The Lords reduced the disposition, especially considering that Leggat was bankrupt the time of granting thereof.

*Fol. Dic. v. 1. p. 77. Fountainball, v. 1. p. 753.*

1708. December 23.

BANK of SCOTLAND *against* KENNEDY.

MR DAVID DRUMMOND, as treasurer to the bank, competing for a sum upon an arrestment, and craving preference to an assignee who had intimated after his arrestment, he *objected*, That the arrester shewed no sufficient title, in so far as he produced nothing but the copy given to the debtor, with an unsubscribed note on the back of the horning; wrote by the messenger's hand; bearing, he had laid on an arrestment that day, with the witnesses names; but no execution of arrestment was produced. *Answered*, They have not an extended execution under the messenger's hand upon the arrestment, because he and they were both prevented by a sudden death shortly after, being stabbed in a quarrel in October last, in the street of Edinburgh under night, which accident could not be foreseen; so they cannot lose their diligence by this *casus fortuitus et damnum fatale*, seeing they produce the equivalent, viz. the copy given by him, with his note, though unsubscribed. *Replied*, The execution of an arrestment, cannot be made up no more than the tenor of a charge of horning, which, by the 94th act 1579, is expressly prohibited; and *esto*, He had died a natural death the same day he arrested, if you got not his execution immediately, you was *in mora*, which must *tibi nocere et non alteri*, I having a competent right by intimating my assignation. —THE LORDS found they could not supply the defect, and so preferred the assignee. See EXECUTION.

No 148.

A disposition reduced, because of an inchoate inhibition (in particular circumstances,) but the disponent was bankrupt at the time.

No 149.

A charge of horning was given without proceeding further. Afterwards the debtor assigned a moveable subject. Posterior to this, denunciation and registration followed on the horning. The assignation found reducible on the act 1621, unless proof could be brought, that the granter of it was at the time reputed solvent.