

1711. July 11.

ALEXANDER NAIRN of Drumkilbo *against* ROBERT M'CLELLAND and JAMES  
BETSON of Kilry.

No 312.

Debtor's ac-  
knowledge-  
ment as being  
held as con-  
fessed, found  
good against  
an inhibitor.

IN the competition of the creditors of the deceased William Liddel, for the mails and duties of some tenements and land in the North Queensferry, which were adjudged by them from him;

*Alleged* for Drumkilbo; Since M'Clelland's adjudication adjudged but one tenement in special, and all other lands and tenements belonging to the common debtor, lying within the North Queensferry, Drumkilbo's adjudication (which doth more specially design and point out the whole tenements by the particular boundings and extent thereof, denoting what they are, and where they lie) though year and day posterior to M'Clellan's adjudication, ought to be preferred as to all other lands except the tenement particularly designed. For in toto jure generi per speciem derogatur, et illud potissimum habetur, quod ad speciem directum est. So it was decided November 21. 1673, Fairholm against Renton, No 1. p. 182; July 21. 1680, The Competing Adjudgers upon the estate of Enoch, No 3. p. 183. To adjudge in general all lands lying within a burgh wherein the debtor is infest, is no better than to adjudge in general all lands within Scotland, wherein such a debtor stood infest; since *majus et minus non variant speciem*.

THE LORDS repelled the objection against M'Clellan's adjudication, that it was in general terms; in respect the houses adjudged are circumscribed within the town of Northferry, and the debtor is designed to have lived there.

Then it was *alleged* for Drumkilbo, That his adjudication ought to be preferred to Kilry's adjudication; because William Liddel was no otherways Kilry's debtor, than by Kilry's obtaining a decret in absence against him, for a debt of his uncle's, holding him as confest upon the passive titles, after he William Liddel stood inhibited at Drumkilbo's instance; of which decret Drumkilbo repeted a reduction *ex capite inhibitionis*.

*Answered* for Kilry; Inhibitions strike only against voluntary and extra-judicial positive deeds, and not against judicial deeds, or deeds of omission.

*Replied* for Drumkilbo; if a debtor *vergens ad inopiam* could allow the constitution of a debt to be made up against him by his oath, or circumduction of a term, whereupon a diligence might ensue to compete with lawful creditors, it were easy to make up such a mass of debts in the name of confidents, as might in a competition reduce the interest of a lawful creditor to a very small share of his debtor's effects; and this is plainly a voluntary deed of the debtor, which he might have prevented by signing a renunciation.

*Duplied* for Kilry; If a debtor insolvent collusively suffer a decret upon lame and defective proof to be patched up against him, such a decret might be reduced upon the act of Parliament 1621 at the instance of a creditor, but

inhibition is effectual only against positive real deeds of the debtor, and not against his omissions, which are but privations of deeds;—nor is *fraus ex re ipsa* by William Liddel's not renouncing and deponing, sufficient in law to reduce the decret upon the act 1621;—especially considering, that William Liddel is now dead without offering a renunciation or deponing, and Kilry's mean of probation by his oath perished.

THE LORDS found, that the inhibition took no effect against the decret holding the person inhibited as confest.

*Fol. Dic. v. 2. p. 237. Forbes, p. 520.*

\* \* \* Fountainhall reports this case :

1711. July 12.—WILLIAM LIDDEL in North Queensferry being debtor to Nairn of Drumkilbo, he adjudges some houses and acres from him. Liddel's uncle being debtor to Beatson of Kilry, he charges William to enter heir to him, and pursues him on the passive titles as representing him, and obtains a decret in absence holding him as confest; and on this he likewise adjudges within year and day of Drumkilbo; and both pursuing for mails and duties, in the competition Nairn objects against Kilry's debt and adjudication, that not being Liddel's own proper debt, but his uncle's, and only constituted against him by holding him as confest on the passive titles, after he was duly inhibited at his instance, and so ought to have suffered no decret to have passed against him by omission and collusion, to the prejudice of his anterior diligence, therefore craves the said decret of constitution may be reduced as a deed posterior to his inhibition. *Answered*, However inhibitions may hinder the common debtor from granting voluntary deeds, such as bonds, discharges, alienations, conveyances, &c. yet it cannot hinder necessary and judicial deeds, such as constituting a debt by his oath, and proceeding in other legal diligences, a debtor being obliged by the laws, both divine and human, to declare the truth when the verity of the debt is referred to his oath; and if he neglect, and decline to come in and depone, then law presumes he cannot deny it; and therefore absenting himself, he is holden as if he confessed it, which is a necessary involuntary deed, against which the stile of inhibitions can never militate. *Replied*, If debtors verging *ad inopiam* be permitted to let decreets pass against them, on their oaths, to the prejudice of creditors who have them standing inhibited, they may muster up a mass of debts to compete with these anterior lawful creditors; the design of an inhibition being, that no posterior deed of his debtor can prejudge, yea not his oath, much less when he is only holden as confest. For I suppose, he is overtaken by his predecessor's debt for meddling with the writs, heirship, or part of the lands, or for intronitting with his moveables without a title, and these posterior to my inhibition, will any deny but these are voluntary deeds of my debtor, and so cannot prejudge me? Sir

No 312. George M'Kenzie, in his Observations on the act against bankrupts 1621, says, such decreets may be reduced, if collusion appears, or competent defences be omitted; which is plainly Liddel's case; for he omitted to give in a renunciation as heir to his uncle, which would have saved the adjudging his own estate; and then Drumkilbo's adjudication would have been infallibly preferable, and Kilry could never have competed with him. And he cites a case for it betwixt Haliburton, Wat and Morison. THE LORDS considered, that this case had oft occurred, where debts were constituted against parties inhibited, by referring the same to their oaths, and yet they were never quarrelled *ex capite inhibitionis*, which silence and acquiescence seemed to be an evidence that our lawyers never thought such constitutions of debts fell under these inhibitions; and therefore, by plurality, found debts so constituted could not be quarrelled, though their debtor stood inhibited before. Which was looked upon as the first decision this case had met with.

*Fountainball, v. 2. p. 658.*

1713. December 2.

ALEXANDER NAIRN of Drumkilbo *against* JAMES OGILVIE, Bailie depute of the Regality of Cupar in Angus.

No 313.

JAMES OGILVIE having commenced a reduction and declarator of extinction against Mr John Ogilvie his brother, when out of the kingdom, of two bonds granted by the former to the latter, upon a ground of compensation referred to his oath; Alexander Nairn, Mr John Ogilvie's creditor, did thereafter, before any act was extracted, arrest in James Ogilvie's hand and pursued a furthcoming against him as debtor to Mr John by those bonds.

THE LORDS found it relevant for James Ogilvie to prove by Mr John's oath, that he was debtor to James to extinguish the debt due by him to Mr John, the matter being rendered litigious before the arrestment, with this quality, that James should report Mr John's oath; for Mr John not being within the kingdom, and he and his brother conjunct persons betwixt whom there might be collusion, the LORDS would not allow James to prove against his brother by holding him as confest to the prejudice of the arrester.

*Fol. Dic. v. 2. p. 237. Forbes, MS. p. 7.*

No 314.  
In a process  
of forthcom-  
ing, the pur-  
suer produced

1725. November 25.

Sir WILLIAM NAIRN of Dunsinnan *against* Captain LAURENCE DRUMMOND.

SIR WILLIAM NAIRN, as creditor to Mr Thomas Crichton of Tullifergus, then a bankrupt, used arrestment in the hands of Captain Laurence Drummond, and