

1681. February 17. ROBERTSON against GRAY.

No 13.
The Lords,
*ex proprio mo-
tu*, appointed
two of their
number to be
interditors to
a person who
was evident-
ly lavish.

ONE Menzies being born and residing in Holland, coming to Scotland to pursue for his father's means, consisting of considerable sums in several person's hands, he made application to Gray of Scheives his kinsman, to whom he assigned the whole, and got from him a back-bond, 'to do diligence to recover the sums, and to be accountable to Menzies for the one half, deducting the expenses, but excluding Menzies's assignees, and all others but the heirs of his body.' But Scheives did no diligence, and refused to advance any thing to Menzies, whereupon he gave a second assignation of the same sums to William Robertson, who advanced him several sums for his necessity. He gave also a several assignation to William Robertson of Scheives' back-bond, whereupon William Robertson pursues a reduction of Scheives' assignation upon fraud and circumvention, Menzies being a simple young man, and not understanding the Scots language, was abused by Scheives; but the LORDS sustained no circumvention without more pregnant grounds. Robertson then insisted for declaring, that he had the best right to the bonds in question; because, though Scheives' assignation was prior, yet there was no intimation thereon, and the cause of it being for doing diligence, it was *causa non secuta*, Scheives having done no diligence.—It was *answered*, That Scheives' back-bond, excluding assignees, could give no title to Robertson as assignee.—It was *replied*, That an assignation being a procuratory *in rem suam*, so the assignee, as procurator, might insist for his cedent to recover payment, and to retain his own advancements and expenses *actione contraria mandati*.—This the LORDS sustained.—But Menzies having recalled any procuratory granted to Robertson, and discharged Scheives of the back-bond, it was *alleged* that Robertson could not now insist.—It was *answered*, That the assignation importing a procuratory or mandate, it could not be recalled *nisi re integra*, and therefore Robertson having advanced sums, and been at great expenses, Menzies could not recall the same. *2do*, Menzies hath granted a distinct procuratory, bearing 'to be irrevocable.' THE LORDS found, That it was inconsistent with a procuratory to be irrevocable; but found, That Robertson had sufficient title to insist for so much of the sums as he had expended upon the account of the mandate; but they found that Robertson's assignation to the sums being first intimated to the debtors, and being insisted on by this process, that the same is preferable to Scheives' prior assignation, whereupon he did no diligence conform to his back-bond; but Robertson declaring that he would make no use of his assignation, but for the sums advanced, and true expenses, providing that Scheives would do the like, and not distress Menzies upon the warrandice of his assignation.

THE LORDS, finding that Menzies was a facile lavish young man, having assigned first to Scheives with great disadvantage, and next to Robertson, without any back-bond, and last returning again to Scheives, and having now by

this sentence liberated him from both, they did *ex proprio motu* interdict him as a prodigal and lavish person, and did appoint two of their number to be interdictors, and ordained the interdiction to be published and registrated.

Stair, v. 2. p. 861.

No 13.

1681. December 2. GORDON of Park *against* ARTHUR FORBES.

THE execution of an interdiction found null, because it bore not 'after three oyeses,' but only 'after proclamation and public reading of the letters;' but this was stopped.

Harcarse, (INTERDICTION.) No 643. p. 177.

No 14.

* * * Fountainhall reports this case.

Dec. 1.—AN interdiction was found null, because its execution did not bear three oyeses to have been given.

Fountainhall, v. 1. p. 165.

1682. February. Sir JOHN GORDON of Park *against* ARTHUR FORBES.

A REDUCTION of an interdiction against my Lord Salton, in the year 1601, being pursued by persons to whom he had disposed some lands after the interdiction, upon these reasons; *1mo*, The executions were null, because they bore not the oyeses; nor, *2do*, That a copy was left on the most patent yett, but only that it was left on the yett; *3tio*, It did not bear that a copy was left, because he could not be personally apprehended; *4to*, The execution did not say, after publication and public reading, but only, after reading and open proclamation.

Answered; The formality of the oyeses was not introduced by statute, but established custom, long after the year 1601, as appears from the registers, where, within five years after the 1601, upwards of two hundred and fifty inhibitions and interdictions want oyeses, whereof some were raised at the instance of the President of the Session, and others of the Lords Register and advocates, who best knew law and custom. *2do*, When the execution bears, that a copy was left on the yett, that is to be understood of the most patent yett; besides, the interdiction being raised by the party's own knowledge, needed not to be personally executed. *3tio*, The act 33d Parl. 6. Queen Mary, and act 86th Parl. 11. James VI. speak not of oyeses or public reading, but of open proclamation; which is a compendious expression of the calling the people and public reading, &c.

No 15.

An interdiction which had been published before the custom of oyeses was established, was not found ineffectual, altho' they were a-wanting.