

right of relief; neither took that contract any effect, not being registrate in the record of tailyies : so that the son's creditors were in *optima fide* to contract.

The Lords found it relevant to prefer the son's creditors, that the debt was paid out of the son's estate and effects.

Boswel, for the father's creditors. *Alt.* Sir Walter Pringle. Durie, Clerk.
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1715. Jan. 21. DAVID COUPAR, Maltman in Perth, *against* The SHERIFF-DEPUTE of Perth.

A COMPLAINT being given in to the Lords by David Coupar, showing, that he being pursued before the Sheriff of Perth, and having presented a sist upon a bill of advocation, before any interlocutor signed in the cause, yet the Sheriff-depute refused to stop procedure.

ANSWERED for the Sheriff,—*1mo*, That the interlocutor was pronounced before intimating the sist; and the signing of interlocutors is no new judicial act, since it may be done out of court. *2do*, It is known to be the custom of all inferior judges, to decline admitting advocations after sentence, whether signed or not. *3tio*, It being the last session day, the Court was up some time before, and the bill presented in the clerk's chamber, when the depute was examining witnesses. *4to*, All produced was a sist, before the expiration whereof the interlocutor was not signed; and though done thereafter, it was warrantable, unless the expedie advocation had been intimated before signing the interlocutor.

REPLIED for the complainer to the first,—That though the pronouncing sentence is the act of the judge, yet it is not act or sentence till it is writ out by the clerk, and signed by the judge, since *forma dat esse rei*: thus 15th December, 1708, *Houston contra Lord Ross*, a decret in absence of the Admiral was found null, because not signed, though by the custom of that court such were not in use to be signed, but only entered into the diet-book; and, therefore, the act of the judge being intrinsically null, when the advocation was presented, it was unwarrantable to cause write out and sign the interlocutor; which was the thing that gave being to the sentence, and therefore inferred contempt. To the second, that the custom of court ought not to free the Sheriff from damage and expense, though it may free him from a fine. For every man is liable in reparation, when his fact occasions the damage, whether the same be culpable or not; and that upon the head of natural equity, as in the case of *lex aquilia*. To the third, that it appears by the instrument produced, that the advocation was intimated the same day the decret was pronounced, while the Sheriff was sitting in judgment. And whether this was a second diet of the court sitting the same day, or a continuance of the former sederunt in which the decret was pronounced, does not import; for at presenting, the interlocutor was neither writ out by the clerk, nor signed by the judge. To the fourth, that, *1mo*, the contempt was in not admitting the advocation when presented. *2do*, The advocation being presented the last day of court, the signing the interlocutor in the vacance was an aggravation of the contempt. *3tio*, The decret bears date the same day whereon the advocation was presented; nor was

the deliverance signed before presenting ; and the presumption being that it was signed the same day, it follows it was signed after presenting.

The Lords found it unwarrantable in the Sheriff to have refused the sist of advocacy, though it was presented only in the afternoon of the last day of his sitting, the Sheriff and his clerk being then officiating ; but sustained the answer, that the sist expired before subscribing the sentence, sufficient to free the Sheriff from any farther penalty than the expense of the complaint.

Act. Graham. Alt. Fleming.

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1715. *Jan. 25.* Mr. ALEXANDER SETON, Chirurgeon, *against* SIR ALEXANDER SETON of Pitmedden, his Father.

JOHN HAMILTON, as assignee on trust by John Seton, pursues Mr. Alexander Auchmoutie for L10,000 Scots, for which Auchmoutie had obtained a wadset of part of the estate of Fyvie in his own name : Hamilton, by his back-bond, was obliged to denude in favours of John Seton and the heirs of his body, which failing, to Pitmedden and the heirs of his body. Thereafter, by a contract betwixt the said John Seton, with consent of Pitmedden, for any right he had by being substituted heir, on the one part, and Auchmoutie on the other part ; Auchmoutie obliges himself to dispoise the wadset in favours of John Seton, and the heirs of his body ; which failing, in favours of any of Pitmedden's children Pitmedden himself should nominate ; and failing of such a nomination, to Pitmedden and his nearest heirs whatsoever ; with a clause, restricting the L10,000 to 10,000 merks, in case Pitmedden or his children should succeed. In prosecution of this agreement, Pitmedden nominates the said Alexander Seton, his third son, with these reservations: *1mo*, That the annualrent during Alexander's minority should belong to the father. *2do*, That the father should have power, without the son, to transact the wadset. And the son, by virtue of the nomination, was served heir of provision to John Seton ; but the retour carries to be with the burden of the clauses and conditions contained in the designation whereupon it proceeded. Pitmedden thereafter enters into a submission concerning the said debt, with the Duke of Gordon, to the Lord Fountainhall ; who by his decreet-arbitral, decerns Pitmedden and his son to dispoise to the Duke the said right on Dumfermling's estate, and the Duke to grant security for L1000 Sterling to Pitmedden in liferent, and his said son Alexander in fee, in so far as extended to 10,000 merks ; and the rest payable to such other of Pitmedden's children as he should condescend on, with what qualities and restrictions he should think fit. And both father and son accordingly grant a disposition of the right, and Alexander, after majority, ratifies the same. The question arising, whether Pitmedden, by the nature of his grant, as having such an interest himself, might not only name such of his sons as he pleased, but under such qualities and restrictions as he thought fit.

It was ALLEGED for the son, the pursuer,—That by the contract betwixt John Seton and Auchmoutie, Pitmedden had no real interest in the sum itself, but only the faculty of nomination or choice of one of his children : so that any of the children whom he should name, were immediately substituted to the failing of heirs