

The Lords thought it was time enough to sustain his privilege when he carried his election ; and therefore repelled it *hoc loco*. . Vol. II. Page 464.

---

1708. November 26. ANDREW RUSSEL'S EXECUTORS *against* JAMES BAIRD.

LORD Pollock reported the Executors of Andrew Russel, in Rotterdam, against James Baird, son to Alexander Baird, late bailie of Edinburgh. There had been a long tract of copartnery betwixt Russel and Baird, with one Turnbull and Thomson in Stockholm, by the space of thirteen years, wherein the effects were consigned to Bailie Baird, extending to one hundred thousand pounds and more ; and Russel's executors having raised a process of count, reckoning, and payment, for their share of that balance, against Bailie Baird in his lifetime ; and he being ordained to produce his count-books for constituting the charge, he deponed, That he had kept none for six or seven years bypast : which was urged as a great prejudice against him ; seeing, by the laws of Italy, and other trading nations, mentioned by Beneventus Stracca, *De Mercatura*, it is a criminal fraud in a merchant not to keep clear books anent his trade. During the dependence the Bailie dies ; and now there is a bill given in by Russel's executors, representing, that his son was tracing the same indirect footsteps with his father, to palliate, abstract, and embezzle all his effects ; and that, on his death, the haill cash and ready money lying beside him, upwards of a thousand pounds sterling, was secretly conveyed out of his house to some trustee ; and, on his deathbed, he indorsed his bills and bank-notes to a great value : his silver-plate, and other valuable moveables, were sent away to some private place, with all his bonds, securities, and instructions of debt, and the bulk of his goods and merchandize in his cellars and warehouses were removed, put out of the way, and disappear, which is done to defraud his creditors, and to abscond them out of the reach of lawful diligence : And, in regard of such dishonest methods, craves a summary warrant to cite the persons condescended on, to depone where these goods are hid ; not to infer any riot or crime against them, but allenarly to expiscate where they are, to the effect they may be confirmed, or otherwise affected by creditors' lawful diligence.

ANSWERED for Mr Baird,—That the desire of it was most irregular, extraordinary, and contrary to all form, unless the same came in by the course of a process ; for this is to begin at execution, and to believe their misrepresentations before they be proven, being an expiscation *super inquirendis*, against all and sundry ; and is liker to a defamatory libel and French manifesto, than an application to a civil judicatory tied to the forms of law ; and extraordinary remedies are never to be recurred to, save when all ordinary ones fail. But here law has introduced sundry remedies,—as creditors confirming themselves executors-creditors, arresting the effects, the gift of escheat, datives *ad omissa*. Likewise, thir very pursuers have raised a process of transferring, which will come in by course within a few weeks ; so a little patience will bring this affair to a regular trial, without breaking all the forms ever known in this kingdom, and without introducing the Spanish Inquisition, a name so formidably dreadful, that it is a terror to all the rational, sober part of the world ; especially when remedies are proposed infinitely worse than the disease.

REPLIED,—Though forms are both useful and necessary to be observed, yet they must never be so adhered to as to destroy matter ; and here justice craves discovery of one of the boldest tricks that has been set on foot in this age, to make a man in a moment bankrupt, who died in the reputation of being very rich ; so that extraordinary diseases must have as extraordinary cures ; and this is no more than what the Lords, by their *officium nobile*, may do. Yea, to come lower, it is what the Commissaries do every day, and every Justice of the Peace, to secure the goods and effects of defunct debtors from abstraction and embezzlement, and to discover all sinistrous practices to hide or conceal their goods,—the creditors being *in damno vitando*, and only craving the examination of his accomplices, not to infer any guilt, but only *ad rimandam veritatem*: and how oft do the Lords, *præter communis juris regulas*, examine parties before processes come in, to lie *in retentis*, that probation may not perish. And this can wrong nobody but those who design to cheat their creditors.

The Lords, in respect of the singularity of this case, granted a summary warrant for trying when his money, bonds, bills, bank-notes, silver-plate, and other valuable goods were absconded, not against all at random, but conform to the condescence given in ; to this effect allenarly, that they may be made forthcoming to the creditors, nearest of kin, and all others having right thereto.

*Vol. II. Page 466.*

---

1708. December 3. WILLIAM COCHRAN of KILMARONOCK and OTHERS *against* ARCHIBALD HOUSTON.

MR William Cochran of Kilmaronock, and sundry others, being bound for considerable sums, as cautioners for Hamilton of Orbiston ; when he sold his lands of Erskine to Blantire, it was agreed, that those debts wherein Kilmaronock and others stood engaged, should be paid out of the price, for relieving them of their cautionary, *primo loco* ; and accordingly sundry of their bonds being satisfied and retired, they were put into the hands of the deceased Archibald Houston, writer to the signet : and now a bill is given in, craving they may be given up, or else put into the clerk's hands for security of the cautioners, lest they wander and come back on them hereafter.

ANSWERED,—That Archibald Houston had debursed money for Orbiston, and likewise had an account due to him for writings and pains ; and, until these were paid, he had a tacit hypothec on the papers.

Some doubted of this privilege claimed by writers, especially as to lent money ; yet the Lords thought, if the writs were taken out of their hands, they had no security for their accounts, it being on that pledge they advanced their money ; therefore they remitted to the Ordinary on the Bills to consider his account, and the instructions thereof, and modify the same, that then the papers may be put into the clerk's hands, for the cautioners' security ; to be delivered up if no objection be made by the creditors, or any other having interest in

Z z z z