

1672. July 3. MONSIEUR JAMART, Frenchman, *against* HENRY JOSSIE.

IN the foresaid action, Jamart against Jossie, It being ALLEGED for the defender, That he ought to be absolved, because, by the custom of Bourdeaux and Act of Parliament thereof, whensoever a debtor became insolvent, the greatest part of his creditors entering into a contract of policy, whereby the debtor disposes to them his estate, it secures him against all the rest of the creditors, albeit they be not consenters, that they can never use either personal execution against him, nor pursue for any part of his estate, but to be divided amongst them all: Likeas the said creditors, who had contracted, did compear, by their proctors for their interests, and concurred for the defender.

It was REPLIED, That albeit the said custom of Bourdeaux might be binding against all Frenchmen who lived within the jurisdiction of the Parliament of Bourdeaux, yet the defender being a Scotsman, and after great trust given him in Bourdeaux, for which he subscribed bonds, being retired to Scotland, where he had means and estate, he was liable in Scotland, both as to personal and real execution.

The Lords did repel the defence, and found, That if these particular customs should take place and be sustained here, or without the jurisdiction where they were in force, it would destroy all trust and commerce amongst merchants, who might easily transport themselves to other places, after they had sent away their stocks and commodities for which they had gotten trust upon their personal bond and security.

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1672. July 18. SINCLARE *against* Mr JOHN SINCLARE.

JAMES Sinclare of Roslin having set to his elder brother, Mr John, a tack of the lands, with a clause irritant,—That if two terms should run to the third, and the tack-duty be unpaid, the tack should be null, and it should be lawful to him to enter to the possession without a declarator; and accordingly he having entered to the possession without a decret, thereafter pursues a declarator of the clause irritant.

It was ALLEGED, No declarator; because the pursuer having arrested the whole duties, whereby the clause irritant might have been purged before any decret upon the clause irritant, and so had incapacitated the defender to purge the same; which he was *in pessima fide* to do, the Lords being always in use to admit the defender to purge at the bar, whensoever the declarator is heard.

It was REPLIED, That any arrestment used, or possession obtained by the pursuer, was after two terms were run in the third, and the clause committed which was lawful for him to do, and to enter to the possession, with consent of the tenants, without a decret.

The Lords did sustain the declarator, and repelled the defence in respect of the reply.

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