

1713. July 1.

ALEXANDER STUART against PATRICK HALIBURTON.

ALEXANDER STUART creditor to Patrick Haliburton, intented a process of fraudulent bankrupt upon the act of Parliament 1696, cap. 5. against him, wherein the LORDS found it proved, that the defender contracted great sums of money within three months of his absconding; and that he did not keep, or at least produce any compt-books of his dealing, nor any copy-book of letters written by him, nor letters written to him for clearing the course of his correspondence, nor invoice of the goods sent him from abroad. But found it not proved that he hath withdrawn his effects from the diligence of his creditors, farther than that there appears no visible cause for exhausting his stock, and contracting such considerable debts. And found, that the said qualifications proved are relevant to infer, that the defender is a fraudulent bankrupt.

Then when the LORDS were about to advise what punishment to inflict upon the defender, he *pleaded* the benefit of her Majesty's indemnity.

Alleged for the pursuer; The indemnity (which extends only to the public concerns) cannot take place here in a process at the instance of a private party, without the concurrence of the fisk; for *indulgentia generalis nec concedi debet, in præjudicium partis, nec facienda cum detrimento alterius, Perez. ad Tit. Cod. de Sentent. passis et restit.* And for the same reason, the punishment of cutters of green wood, hath been found not to fall under the indemnity, the party injured having interest in the fine.

Answered for the defender; The indemnity would not free an offender from any pecunial fine appointed by law to be paid to the party injured, in lieu of his damages; yet where punishment is inflicted, not for repairing the parties damages, but simply *per modum pænæ*, the indemnity must take place. *V. G.* The pains of destroying green wood being L. 10 for the first fault, L. 20 for the second, and death for the third, act 11, Parliament 4, James V. the pecunial pains for the first and second faults fall not under the indemnity, because they seem to be calculated for the injured party's re-imbusement; but capital punishment which law inflicts for the third fault from a regard to the public utility, without any consideration of private interest, would certainly be indemnified. Now the punishment of fraudulent bankrupts by the act of Parliament 1696, being infamy, banishment, or otherwise, death excepted, is nowise adapted to the interest of private parties, but merely *ad vindictam publicam*; and consequently doth, without question, come under the indemnity, which pardons every thing that may be pardoned, except such as are therein particularly excepted, among which exceptions fraudulent bankruptcy is not found.

THE LORDS sustained the defence founded on the act of indemnity, relevant to exempt Patrick Haliburton from the penalty of the act of Parliament 1696 upon fraudulent bankrupts.

Fal. Dic. v. 1. p. 462. Forbes, p. 690.

38 F 2

No 10.
A fraudulent bankrupt exempted by a general indemnity from the penalty of the act of Parliament 1696.