

1768. July 13. MESSRS. PEWTRESS and ROBERTS *against* THOMAS THOROLD, and OTHERS.

FOREIGN—ARRESTMENT.

Arresters preferred to assignees under a commission of bankruptcy, upon funds which had become the subject of competition before the arrestments.

[*Faculty Collection, IV. p. 315 ; Dictionary, 756.*]

MONBODDO. It is not necessary to determine what right the legal assignees have, by the former interlocutor of the Court. The draught upon *Cumming* was like an assignation to a conditional debt. That a conditional debt may be arrested, was found in the case between *Sir Harry Innes* and *Ludovic Gordon*, 1740: I remember that *Arniston* *there* gave his opinion to that effect. The same thing was again found in 1742, in the case of *J. and R. Robertsons of Glasgow*; and there is a decision in the Dictionary which imports that an arrestment of a widow's jointure, *currente termino*, is good; though, if the widow were to die before the term, nothing would be due to her; and, consequently, the debt was nothing more than conditional.

COALSTON. I doubt as to the first point. An order is equivalent to an assignation; but I doubt how far an assignation in general will carry bills that are in my hand for the behoof of the common debtor. A conditional debt may be carried by assignation; but then the debt must be due by the person in whose hands the arrestment is used. The legal assignation under the commission of bankruptcy, could not carry *nomina debitorum* due by debtors living in Scotland. As to the judgment of the Court, finding that the assignees might *appear and compete* at that period, the Court went far in establishing the English bankrupt law. The interlocutor must be taken altogether. The same interlocutor preferred certain arresters; and, therefore, the only thing found was, that the assignees, under the commission of bankruptcy, had a title to demand payment, if no one interfered.

KENNET. The assignees have a right to compete, but still other creditors may attach the subjects. I do not think that the drawing of bills was equal to an assignation; because, at that time, *Cumming* had nothing in his hands. The assignees are preferable upon the second ground, because they produced their commission in *Cumming's* multiplepointing. This production was prior to the arrestments, and equal to a judicial intimation.

AUCHINLECK. The former interlocutor determines what effect the assignation, under the commission of bankruptcy, should not have; but it leaves uncertain what effect it should have. As we now consider this assignation to be no more than a step of English diligence, we may possibly now find that they have no right at all *here*. We have found in this particular case that they may *compear and compete*. The assignees have got a commission from the courts in England,

but they have not followed it out. In order to carry by arrestment, there must be a debt. Mr Cumming has now recovered the money : the assignees have done nothing to attach it. Messrs. Pewtress and Robarts have attached it ; and, therefore, they, as arresters, ought to be preferred to the legal assignees.

ALEMORE. The former interlocutor certainly found that the legal assignees had a right to draw where there was no competition ; but, if it be held to have found no more, it was elusory. The commission was found to give them no preference to prior diligence : but, after their right was produced, there could be nothing done to impair their right. The bills granted to Pewtress and Robarts were not equivalent to an assignation, because there was no debt due by Cumming. According to the course of business, Cumming was not bound to accept. A second draught, in favour of another person, after the money came into Cumming's hands, would have been answered, and would have been effectual. The second arrestment is not good against the assignees, who were lulled asleep by the interlocutor of the Court finding that they had a right to compear and to compete.

KAIMES. When a man conveys a subject by assignation, this, as an act of his will, is good over the whole earth ; but a court can convey nothing that is not within their jurisdiction. The legal assignation to the trustees conveys English effects, but nothing in Scotland. The assignees have a title to pursue ; but they have no *jus* or *nexus* in the subjects. The intimation to Cumming, when he had no money in his hands, signifies nothing ; but the posterior arrestments, when he had money in his hands, are regular : this diligence is to be preferred to the assignee's simple power of appearing. I give my public opinion so ; but my private opinion is otherwise.

PRESIDENT. The case of *Balgair* and this case were determined at the same time. In the case of *Balgair*, a certificate of the surrender in England was held to be a discharge of the debt. This shows, that, at that time, great authority was given to the English commissions of bankruptcy. The interlocutor in the present case was pronounced upon the same principles : it meant that the assignees had more than a simple power of appearing : it implied that posterior arrestments were barred.

JUSTICE-CLERK. I incline to give effect to the bills drawn upon Cumming. Cumming ought to have accepted *qualificate*. He became trustee for the holder of the bills as soon as they were presented to him, in a competition with Tabor and Company, the drawers of the bills, or with their assignees.

ELLOCK. I consider the legal assignation to be nothing more than an assignation by the bankrupt himself. An assignation by the bankrupt himself to trustees, for the behoof of all his creditors, will not preclude the diligence of others. Why should the legal assignation do more ?

PITFOUR. Cumming might have paid the money if he had pleased ; but he was not bound to pay it. What is the import of the interlocutor ? It was objected, that the assignation, being a creature of the law of England, could carry nothing : the assignees were found entitled to compear ; that is, they were found to have as good a title to the debts as if all the creditors had come in and assigned. The rest of the interlocutor shows, that their right was nothing more ; for, by it, the arresters were preferred.

On the 13th July 1768, the Lords preferred the arresters to the assignees. [The interlocutor was general; but it would seem that the majority of the Court went, upon this, that the legal assignees had not followed furth their right.]

On the 22d November 1768, the Lords adhered.

*Act.* H. Dundas. *Alt.* R. M'Queen. *Reporter*, Pitfour.

*Diss.* Alemore, Kennet, Hailes, President.

1768. July 14. CAPTAIN WILLIAM LIVINGSTON *against* JAMES WARROCH.

JUS TERTII.

Neither party can plead on a Defect in the Right of the Common Author.

(*Faculty Collection*, IV. p. 313; *Dictionary*, 7847.)

COALSTON. Both parties derive right from Lady Callendar. Neither of them can object to the author's right. Had the objection been made by the heirs-male, it would have been good; but then the defence of prescription would have been as good. The party here cannot plead in the right of the heir-male without being liable to the same defence as he would have been. If the defender may object to Lady Callendar's right, by parity of reason he may object to a progress of 1000 years.

MONBODDO. If a person is in the course of usucapion, he may maintain his right against every one who is not *verus dominus*: it is therefore material to inquire into the right of Sir James Livingston and Lady Newton. If the fact is true, that the lands are not in the charter of adjudication, then the pursuer has not proved that he is the *verus dominus*, and the subject is still *in hæreditate jacente* of James Livingston.

AUCHINLECK. It is not competent for the defender to say, that James Livingston had no right himself, and therefore could not sell to me. How can he dispute the right of the person from whom he himself derives right?

PRESIDENT. I always understood it to be a fixed principle, that no one can object to his author's right.

On the 14th July the Lords found, That it is not competent for the defender, who derives right from James Livingston, heir of tailyie to the Countess of Callendar, to challenge the Countess's right, upon which his own depends; and remitted to the Ordinary to proceed accordingly.

*Act.* R. M'Queen. *Alt.* A. Lockhart. *Reporter*, Pitfour.

*Diss.* Monboddo.