

1785. *August 4.* ALEXANDER M'KENZIE of Fairburn *against* ROBERT CLERK, Merchant, Linlithgow.

ARRESTMENT.

A debt due by bond to a party resident in England, having been arrested by a creditor of that party: *found*, that on his obtaining decree of preference in a furthcoming, the arrestee was bound to pay without being entitled to demand delivery of the document of debt, which was beyond the jurisdiction of the Court.

ALEXANDER M'KENZIE was creditor to John Birtwhistle, drover at Skipton in Yorkshire, in a bill for L. 253 : 10s., in security of which he arrested a debt due by bond to Birtwhistle by the defender. In a furthcoming, at the instance of the pursuer, (M'KENZIE'S representative,) decree was pronounced in his favour. In a process of multiplepounding raised by the arrester, in which the pursuer claimed to be preferred to the amount of his debt, the defender admitted the debt due by himself to Birtwhistle, but contended that he was entitled to insist that his bond should be delivered up to him before he could be compelled to pay.

The Lord Ordinary found, "That Robert Clerk is not bound to make payment of the sums in his hands, without delivery of the bond due by him, or a sufficient security that he shall not be brought to any future trouble for want of it."

And a diligence was granted to the pursuer to enable him to recover the bond out of the hands of Birtwhistle.

In a petition against this interlocutor, the pursuer PLEADED,—That having obtained decree in the furthcoming, and neither Birtwhistle nor any competitor appearing in the multiplepounding to oppose his claim, the raiser of the multiplepounding had neither title nor interest to oppose it: that he is in perfect safety to pay under authority of the Court, without production of the bond, which is not in the pursuer's power to produce: Birtwhistle resides beyond the jurisdiction of the Court: That, at any rate, such production is unnecessary, seeing a decree of preference in a furthcoming and multiplepounding is a judicial assignation to the subject arrested, in favour of the arrester, to the extent of his debt. Bank. 3, 24, 52, and 4, 24; Ersk. 4, 3, 23; *Campbell against Beaton*, 23d November 1665.

ANSWERED,—The arrestee would not be obliged to pay the debt to the common debtor himself without getting up the bond; and an arresting creditor can be in no better situation. An onerous assignee could not demand payment without producing the bond, and therefore, supposing the decree of furthcoming to be a judicial assignation, the petitioner must do the same. Stair, 3, 1, 24.

The Court altered the Lord Ordinary's interlocutor.

The following opinions were delivered:—

BRAXFIELD. A decret of furthcoming is a legal transfer. It would be hard to make the arrester produce the grounds of debt: it very often happens that he cannot do it; and it may happen that he has not a right to do it. For example, that debt in which he has an interest, may be no more than fifty pounds out of a bond for a thousand: Why find caution when a man has a clear right?

ESK GROVE. When the debtor does not object, judgment passes in a furthcoming, all parties being in the field; *that* is a sufficient security, and the arrestee is in safety to pay.

On the 4th August 1785, "The Lords repelled the defences, and decerned;" altering the interlocutor of Lord Alva.

Act. Al. Elphinston. *Alt.* Adam Rolland.

1785. *November 17.* GEORGE MAXWELL and OTHERS, CREDITORS of EBENEZER M'GEORGE, *against* Mr ADAM GIB, Minister.

BANKRUPT.

Act 1696. The apprehending of an Insolvent Debtor, without imprisonment or taking into custody, insufficient to qualify the statutory Bankruptcy.

[*Fac. Coll. IX. 359; Dict. 1113.*]

ESK GROVE. The only question here is as to the Act 1696. And what is required by that act? It is a correctory law, and a strong one, and so must not be extended by interpretation. *Here* there is no apprehending. I doubt whether, if actual imprisonment followed, payment of the debt would be sufficient to put a man out of the Act 1696.

PRESIDENT. The case of *Udston* was different from the present one, for *there* the debtor was detained for thirty-six hours. The case of *Lord Hopeton* is misunderstood.

BRAXFIELD. The question is not as to the effect of paying the debt after incarceration. But, were it good law that such payment would take a man out of the Act 1696, the consequence would be, that, a creditor for L.20 having imprisoned his debtor and brought him under the act, another creditor for L.1000, whose debt fell within the provisions of the act, would enable the debtor to pay the L.20, and so make place for his own debt.

On the 17th November 1785, "The Lords sustained the defences."

Act. Robert Corbet. *Alt.* H. Erskine.

Reporter, Alva.