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1776. August 7. GLOVER and Others *against* VASSIE.

BEDFORD and Sons merchants in Leeds having become bankrupt, and a commission of bankruptcy being awarded, Vassie, an English creditor, received a dividend under that commission; but, learning that the bankrupts had some effects in Scotland, Vassie laid arrestments in the hands of the Scottish debtors, and in a process of furthcoming obtained a preference on the sums due. The assignees under the commission of bankrupt objected to this preference, on the grounds that Vassie being a native of England, could not compete with the English assignees under the commission of bankrupt, and that he had obtained a dividend under that commission. On the part of Vassie it was *urged*, That the assignees under an English commission of bankruptcy, have no right of action in this country, to recover the bankrupts effects therein situated, or to compete for the same with a creditor who uses the diligence of the law of Scotland.—THE LORDS found the assignees under the commission had a right of action entitling them to recover the bankrupts effects in Scotland, and to compete for the same; and further, that Vassie, an Englishman, and claiming under an English debt, and having drawn a dividend for the same under the commission of bankruptcy, is barred from competing with the assignees, or claiming any preference on his arrestments. See APPENDIX. See Note under p. 757.

*Fol. Dic. v. 3. p. 227.*

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1787. November 28. JOHN SCOTT *against* JAMES LESLIE.

No 92.

An assignee under an English commission of bankrupt, by obtaining decree in absence against a debtor of the bankrupt, divests him of the *jus crediti*, and renders every posterior arrestment ineffectual.

A COMMISSION of bankrupt having been issued against Andrew Mitchell merchant in London, Mr Scott was appointed assignee to the estate. Having learned that one Ferguson, residing in Scotland, was debtor to Mitchell, Scott, in the character of assignee, demanded payment of the debt, of which he immediately received a part, and upon naming an attorney, raised an action for the remainder. After the summons was executed, some farther partial payments were made; and at length decree for the balance was obtained in absence. But before the decree was extracted, Leslie, as a creditor of Mitchell's, raised a process of constitution, and upon the dependence used arrestments in the hands of Ferguson, who then called all the parties in a process of multiple-poining; in which it was

*Pleaded* for Leslie; By the judgment of the Court in the case of Thomson and Tabor *contra* Forrest, No 89. p. 4561, it was indeed found, "That assignees under a commission of bankruptcy had a sufficient title to compear and compete in the action;" but it was likewise found, "That the proceedings under the commission of bankruptcy did not bar the creditors of the bankrupts, whether their debts were contracted in England or Scotland, from affecting by

‘ legal diligence, their debtor’s effects situated in Scotland.’ Though Mr Scott had thus a title to appear and compete, the proceedings which have taken place at his instance are not to be deemed equivalent to an arrestment and decret of furthcoming. That, in effect, would be to extend the bankrupt laws of England to this country, in direct contradiction to the above mentioned judgment. An Englishman may have effects in Scotland without having any creditors there; in which case there can be no harm in allowing the assignee to carry off the effects; nor in any case would action of repetition lie against him, or against the debtors, were payment to be *bona fide* made; or such assignee may raise processes of constitution against the bankrupt in Scotland, and may arrest or adjudge, in order more effectually to compete with Scotch creditors; but it would be to supersede the common law of Scotland, to hold an action for payment at his instance as equivalent to the diligence of that law.

In no case is a mere decree for payment considered as equal to legal diligence, or as a ground of preference, where a subject is *in medio*. Thus, during the six months, ‘ no executor can warrantably pay even to a creditor who has obtained a decree, if before actual payment, while the subject is yet *in medio*, another creditor shall interpel him by citation;’ Erskine, b. 3. tit. 9. § 43. Or suppose a decree to follow on English letters of administration, it is clear that would be ineffectual against an executor-creditor who had completed his right by confirmation. In such a case as the present, a decree cannot in its nature mean any thing else, than that it is given for ought yet seen; but if any other competitor steps in while the subject is *in medio*, a competition must ensue; the merits of which can only be determined according to the rules of preference which are known and established in the law of Scotland.

That the English assignment gives a *jus ad rem*, or personal claim to the effect of suing for recovery, may be admitted to be the result of the decision in the case of Thomson and Tabor. But that the property becomes transferred the moment that an interlocutor in absence has been obtained in such a process, is a position neither founded in principle, nor supported by authority; for nothing can transfer property from a debtor to a creditor, but either a special conveyance duly completed, or effectual legal diligence.

*Answered*; If, as has been now admitted, the English assignment gives a *jus ad rem*, or claim to the effect of suing for recovery, it must evidently follow, that when the *jus ad rem* so given, or in other words, the transference of the *jus crediti* under the assignment, was by the decree in question sustained as effectual, and at the same time in the strongest manner intimated to the debtor, the bankrupt being thereby completely denuded, nothing was left to be attached by the competing party. Nor is the decree in this view held as equivalent to a decret of forthcoming; its operation being, not to produce a preference on the effects of Ferguson in competition with his other creditors, but to complete the transference of the *jus crediti* which was in the bankrupt. Thus, the instance given, of a decree against an executor not affording any preference on

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the effects of the defunct, appears foreign to the purpose, since it cannot shew that such a decree in favour of an assignee would not have divested the cedent. Of as little consequence is it, that a decree following on English letters of administration would not confer a preference over a creditor confirming, any more than a decree on a Scotch licence to pursue. In that case the decree could not be extracted without confirmation, which is necessary to take the effects out of the *hereditas jacens* of the defunct. With respect to the supposed necessity of arrestment and forthcoming, for vesting the right under the assignment; that diligence, it is plain, could only have proceeded on the footing of the right to the debt remaining in the bankrupt, which is absurd, seeing it has been transferred to the assignee.

The Lord Ordinary preferred Mr Scott, the assignee under the commission of bankrupt.

Mr Leslie reclaimed to the Court against this interlocutor, and his petition was followed with answers; after which, a hearing in presence was appointed. And,

Having resumed the consideration of the petition, with the answers, and having heard parties procurators thereon, the LORDS adhered to the interlocutor of the Lord Ordinary.

A petition reclaiming against this judgment having been advised, with answers, was refused.

Lord Ordinary, *Eskgrove.*

Alt. Lord Advocate, *Macleod-Bannatyne.*

For Mr Scott, *Blair, Maconochie.*

Clerk, *Home.*

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*Fol. Dic. v. 3. p. 227. Fac. Col. No 8. p. 14.*

1798. July 3.

DUNCAN DAVIDSON and CHARLES GRAHAM against JOHN FRASER and his ATTORNIES.

No 93.

A person whose estate was under a commission of bankrupt in England, found entitled to take the necessary steps in his own name, for securing and recovering a debt due to him in Scotland, al-

A COMMISSION of bankrupt was issued in 1786, against John Fraser, merchant in London, and the commissioners afterwards transferred his estate to assignees, in the usual manner.

At the time of his bankruptcy, he held a bond in the English form, granted by George Gun Munro of London, which was marked by the commissioners, as having been exhibited to them under the commission of bankruptcy.

Mr Munro afterwards settled in Scotland, where he had a small landed estate. In 1792, Mr Fraser, while the commission of bankrupt was still in force, obtained, in his own name, a decree of the Court of Session against Mr Munro; and, in 1794, Mr Fraser and his attornies led an adjudication of Mr Munro's heritable property.