

1788. *February 28.* JAMES LESLEY *against* JOHN SCOT.

## FOREIGN.

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.

[*Faculty Collection*, X. 14; *Dictionary*, 4,562.]

JUSTICE-CLERK. There was a blunder in the interlocutor in the case *Thompson and Tabor*: the Court went upon arguments not pleaded at the bar, and threw in the clause of a right to compear and compete in favour of the assignees under the statute of bankruptcy: how would the Court of King's Bench receive a like sort of interest, if produced by our factor on a sequestration, in terms of the Act 1772. The Court, in the case of *Thompson and Tabor*, although they found that the assignees had a right to compear and compete, yet they afterwards preferred arrestments used *pendente processu*. I did not like the decision then, but I must take it as it stands, and as it was explained. The decret in absence might have been opened at any time, by a representation, and it was opened by a suspension. I see no law nor expediency for sending the creditors to an English court.

ESK GROVE. Here there is an attempt to undo what has been formerly done by the Court. I do not believe that the English court would deny effect to our statutes of bankruptcy. The bankrupt here surrendered the very debt in question; and, by that means, Lesley got information of its existence, and laid on arrestment; the right of the assignee was intimated judicially and extrajudicially to the debtor. In the latter case of *Thompson and Tabor*, the Court preferred the arresters, not on that footing, but on the footing of an implied assignation: the Court allowed the assignees to compear and compete: could it mean that they might compete when no one appeared to oppose them? The sense of the Court was explained in the case of *Bedford and Son against Vasie*, where the word recover was used.

PRESIDENT. I should regret much were this Court to depart from the principles established in the case of *Thompson and Tabor*. Deeds executed according to the *lex loci* are good everywhere. By many English statutes the bankrupt is obliged to surrender and make over every thing to the assignees; if he fail to do this the law does it for him. A public assignment is just as good as a private one. The assignee comes into this Court with the *nomina debitorum*: will the Court say, we will give you no decret? That is not said. If the assignee's right is not good, the debtor could not have paid any part safely; a decret for payment of a balance on an open account is equal to an intimation. It is a mistake to say that the English courts would pay no regard to the claim of a factor under a Scottish sequestration.

DREGHORN. If the cause rested on the footing of the decree being notified, I should doubt whether that notification was more than a summons.

On the 28th February 1788, "The Lords preferred Scot, the assignee;" adhering to their interlocutor of the 27th November 1787.

*Act.* Ilay Campbell. *Alt.* Allan M'Conochie.

*Diss.* Henderland, Stonefield, Braxfield, Dunsinnan, Hailes.

1788. *March 1.* JOHN HAY *against* CREDITORS of ANDREW SINCLAIR.

#### BANKRUPT.

A person assigned his share in a mercantile adventure. The assignment was not intimated till within sixty days of his bankruptcy; found that the assignment being made, though not intimated before bankruptcy, was effectual.

[*Fac. Coll. X. 45 ; Dict. 1194.*]

JUSTICE-CLERK. The petitioner endeavours, by analogy, to extend the Act 1696 from heritable to personal rights, for which there is no authority in law. Much is argued from the time and manner of intimating the assignation; but, in truth, intimation was not necessary at all.

DREGHORN. This is a hard case: a person gets an assignation and conceals it. People deal with the assigner, supposing him still to have a property, which he has not.

HENDERLAND. It might be right to remedy this by a statute; but the law, as it stands, gives no remedy.

On the 1st March 1788, "The Lords repelled the reasons of reduction;" adhering to the interlocutor of Lord Rockville.

*Act.* G. Buchan Hepburn. *Alt.* J. Pringle.

1788. *March 8.* WILLIAM HANNAY *against* JAMES STOTHERT and OTHERS.

#### SALE.

Condition, that if the highest offerer at a sale do not find caution within thirty days, the purchase shall devolve on the immediately preceding offerer: Found to give this last a positive right if the exposers had called on him for performance.

[*Fac. Coll. X. 58 ; Dictionary, 14,194.*]

MONBODDO. This is not a conventional irritancy, but a conditional sale; and the condition has not been complied with: Had there been no prior offerer, the