

ver his claim against Andrew Straiton shall be ultimately ascertained in his favour.'

No 105.

On advising a reclaiming petition for Margaret and Anne Baynes, against this interlocutor, it was

Observed on the Bench : As the extent of Colonel Graham's debt would have been long since settled, had it not been for Straiton's appeal, it is that circumstance alone which prevents him from obtaining a decree of preference in the multiple-pounding. But, as the appeal unavoidably stops that action as to him, equity requires that his competitors should not be allowed to proceed in it. If they were, the precedent would be dangerous; as, on many occasions, it would give rise to collusion and undue advantage.

THE LORDS found, that the funds arrested must remain *in medio* till the discussion of the appeal †.

Lord Ordinary, *Aukerville*.
R. D.

For the Petitioner, *Dickson*.

Clerk, *Sinclair*.

Fac. Col. No 203. p. 485.

1797. May 24.

JOHN BUCHAN, Trustee for the Creditors of ROBERT GORDON, *against* The Reverend ROBERT FARQUHARSON.

ROBERT GORDON, on the 28th June 1788, assigned a personal bond to the Reverend Robert Farquharson.

Gordon's estate was sequestrated on the 19th July following, and on the 4th August, the assignation was intimated by Mr Farquharson to the debtor in the bond, before the estate was vested in the trustee for the creditors, either by disposition from the bankrupt or an act of the Court.

John Buchan, the trustee, afterwards brought a reduction of the assignation; *inter alia*, because, it was not intimated till after the sequestration.

Lord Dreghorn, Ordinary, reduced the assignation.

THE COURT, (9th December 1795,) 'repelled the objection to the want of intimation,' and remitted the cause to the Lord Ordinary.'

This interlocutor was pronounced, partly upon the ground that the trustee was bound to take the subject *tantum et tale*, as it stood in the person of the bankrupt, and consequently under burden of the assignation.

A petition having been presented against this interlocutor, doubts were expressed of its being well founded; but the petition was, (15th January 1796,) refused, 'as incompetent, being without the reclaiming days.'

† The reporter understands this to have been the judgment of the Court; but he has not been able to see the interlocutor in the record. See APPENDIX.

No 106.

A creditor, claiming on an assignation to a personal bond, granted before the sequestration of the cedent, but intimated after it, preferred to the trustee for his creditors, because the intimation was prior to the vesting of the estate of the bankrupt in the trustee.

No 106. The trustee then brought a reduction of the interlocutor, 9th December 1795, which was likewise remitted to the Lord Ordinary.

His Lordship ordered informations on both causes.

THE COURT, from certain specialties in the case, and without meaning to infringe the general rule, that a reduction is incompetent wherever a petition before extract would be so, were of opinion, that the objection in point of form was ill-founded.

On the merits, the pursuer

Pleaded ; In competitions between voluntary and legal assignations of an heritable subject, the right first completed by infestment is preferred ; 22d June 1737, Bell against Gartshore, No 80. p. 2848. ; 13th February 1781, Mitchels against Ferguson *vs* PERSONAL and REAL ; 31st January 1792, Russell and Ross against Creditors of Ross, IBIDEM ; the same principle holds in an assignation of moveables ; consequently, in this case, the right of the trustee under the sequestration, which being a judicial act, needs not be intimated, is preferable to that of the defender, which was not intimated till after its date.

If, instead of a sequestration, an arrestment had been used of the same date, the arresting creditor would have been preferred to the defender. But the bankrupt act declares arrestments and poindings incompetent after the date of the sequestration ; and it would be singular if an assignation, which would have been postponed to them at common law, should be preferred to a judicial act, by which they are excluded.

Answered ; It is not the sequestration, but the disposition afterwards granted by the bankrupt, or the act of the Court vesting his estate in the trustee, which divests the bankrupt of his property, 23d Geo. III. c. 18. § 19. For the statute requires him to grant a disposition to the trustee, which would, on the contrary supposition, be unnecessary. Indeed, it is expressly declared, by § 13. that the sequestration in heritable subjects shall merely have the effect of an inhibition ; consequently it could not prevent infestment being taken upon a disposition previously granted by the bankrupt ; nor upon the same principle can it prevent the competency of intimating a previous assignation.

Observed on the Bench ; The trustee on a bankrupt estate will be preferred to the creditor claiming on a voluntary disposition, granted before the sequestration, if the right of the trustee be first completed. And therefore, the propriety of the decision, 8th December 1795, Taylor and Smith against Marshall,* in so far as it went upon the supposition, that the trustee in such case is bound to make good the previous voluntary disposition, may be doubted. But, on the other hand, the mere act of sequestration, while it disables the bankrupt from disposing of his property voluntarily, does not at common law prevent a creditor from completing his right by legal diligence, or by any act independent of the consent of the debtor, such as intimating a previous assignation. The incompe-

* Not reported: See APPENDIX.

tency of arrestments and poidings, arises] entirely from the enactment of the statute. No 106.

THE LORDS, ' in respect of the assignation challenged being completed by intimation prior to the disposition from the bankrupt, vesting the estate in the trustee, assoilzied from the reduction so far as regarded that ground of challenge.'

Lord Ordinary, *Armadale*.
Clerk, *Colquhoun*.

Act. *M. Ross, Ar. Campbell*.

Alt. *Geo. Fergusson*.

D. D.

Fac. Col. No 28. p. 66.

Competition, porteurs of bills with other creditors. See BILL OF EXCHANGE.

Donatars of escheat with creditors. See ESCHEAT.

Disposition with a posterior gratuitous disposition of the same subject, clothed with infeftment. See BANKRUPT.

Base infeftment with other rights. See BASE INFESTMENT.

Tacks with other rights. See TACKS.

Annualrents with adjudgers *in mora*. See LITIGIOUS.

.See Creditors of Marshall against Hamilton, No 9. p. 47. & 48.

.See APPENDIX.