

No 24.

THE LORD ORDINARY found, ' That though there was no express clause in the contract of lease granted by the pursuer, Mr Pringle, to the defender, Major Macmurdo, which ties him down from carrying off, or otherwise disposing upon, the whole fodder or straw that may be produced on the farm of Fairnilee, yet that he is not at liberty so to do, in opposition to the will of the landlord ; as, were such conduct to be tolerated, it would be attended with ruinous consequences to the ground, as well as repugnant to the general mode of cultivation in the country ; and therefore prohibited and discharged the defender from selling off in future, either by public roup or private bargain, the fodder on said farm of Fairnilee, and ordered him to consume the same thereon during the remainder of his lease.'

And his Lordship, on rehearing the cause, found the defender ' was entitled to sell his hay, and the straw of his outgoing crop, but *quoad ultra* adhered to the former interlocutor.'

In a reclaiming petition, the defender stated, in point of fact, that he had made great improvements on the farm since his entry to it ; that he proposed to manure it with compost dunghills annually ; and that it was the practice in Selkirkshire for tenants to sell corns on the foot without challenge.

In point of law, he *pleaded* ; The lease in question contains no stipulation which infers a prohibition on the tenant to dispose of the fodder produced on the grounds, and no such limitation arises from the nature of the contract. A tenant is absolute proprietor of the fruits, and as such, may dispose of them as he thinks proper. The landlord can require nothing more than that he shall labour the ground *salva rei substantia*, and restore it, at the end of the lease, in as good condition as he found it ; Erskine, B. 2. T. 6. § 39. Besides, the prohibition contended for would prevent the inhabitants of towns, and tenants of grass-farms from providing themselves with straw for feeding and littering their cattle, and other purposes.

*Observed on the Bench* ; A tenant cannot sell fodder off his lands, unless he either bargain with the purchaser for the dung produced from it, or purchase as much for the use of his farm.

THE LORDS unanimously ' refused the petition,' without answers.

Lord Ordinary, *Craig*. For the Petitioner, *Hay*. Clerk, *Menzies*.  
*R. D.* *Fac. Col. No 227. p. 528.*

No 25.

A creditor of a person who has obtained a *cessio bonorum*, suing him for a debt which had been previously contracted, must

1798. May 16. JAMES LAMB and Others *against* JAMES DUNCAN.

JAMES DUNCAN, in 1788, obtained a *cessio bonorum*, and in compliance with the act of sederunt 8th February 1688, granted to his creditors a disposition of his whole effects, consisting chiefly of a number of small outstanding debts. The creditors, however, never acted under it.

Duncan having, several years afterwards, acquired some property by succession, James Lamb, and other two of his creditors, all of whose debts had been contracted before the date of his *cessio*, brought an action against him for payment of them.

Duncan met this by a counter action against them, concluding, that they should be found liable for such of his effects as they might have recovered under the disposition *omnium bonorum*.

In defence, Lamb, and the other pursuers in the original action,

*Pleaded*; The circumstances of persons obtaining a *cessio bonorum* are generally so desperate, that although, in point of form, they are obliged to execute a disposition *omnium bonorum*, it rarely happens that their creditors pay the smallest attention to it. In the present case, none of the pursuers opposed the *cessio*, or so much as knew that the disposition had been granted. To make them suffer, therefore, for not acting under it, would be an evident hardship, and an unwarranted stretch of the law with regard to implied obligations. The disposition is not granted by the pursuer *in solutum pro tanto* of his debts, Erskine, b. 4. tit. 3. § 27.; 11th July 1778, Reid against Donaldson, No 5. p. 1392.; 5th August 1788, Pringle against Nielson, No 6. p. 1393.; but merely for the further security of his creditors; and it is a fixed point, that assignees in trust are not bound to do diligence, Erskine, b. 3. tit. 5. § 8.; 27th June 1796, Macmichen against Kennedy, No 15. p. 3482.; 8th June 1715, Anderson against Corbet, No 18. p. 3485.; February 1682, Home against Home, No 14. p. 3481.; Fount. 28th December 1709, Smith against Vint, No 17. p. 3483. Besides, as the disposition in this case was granted to all the pursuer's creditors, it in fact conferred no power of doing so on the defenders, who are but a small proportion of them.

*Answered*; The disposition granted by a person obtaining a *cessio*, is an irredeemable right in favour of his creditors, to the extent of their debts, Stair, b. 4. tit. 52. § 22. It is clear, that diligence must be done by some person for recovering the debts assigned by it; and, as the granter is thereby completely divested, and consequently barred from doing diligence himself, it necessarily follows, that it must be done by his creditors, Stair, 7th February 1678, Stuart against Melvill, No 12. p. 3480. It is no doubt true, that the bankrupt cannot compel them to act; but the implied obligation on them to do so, must go the length of precluding them from demanding payment of their debts, till they account for those funds of their debtor which they ought to have recovered. Nor will it, in this case, avail the pursuers, that they could not, in their own names, have sued the defender's debtors; they ought to have called a meeting of his whole creditors, and got a factor appointed to act for the general behoof.

THE LORD ORDINARY found, "That, in so far as the debts, belonging to the pursuer at the time of the granting the disposition *omnium bonorum*, were not prescribed at that period, the defenders, who were called as creditors of the

No 25.  
shew that proper diligence has been done for recovering the debts contained in the general disposition granted by the defender to his creditors when he got the *cessio*; and if the pursuer fail to do so, the defender will be entitled to set off the amount of these debts against the pursuer's claim.

No 25.

pursuer in his said process of *cessio bonorum*, must hold count and reckoning with the pursuer, to the effect of having the amount of the said debts proportionally and ratably imputed towards extinction of the debts owing to them respectively by the pursuer, at the period of his so obtaining his *cessio*, except in so far as they can sufficiently instruct, that the debtors, by whom the said debts were owing to the pursuer, were notoriously insolvent at the period above said, and have continued to be so: Found, that, *hoc statu*, there are no sufficient materials for judging as to the amount of the sums for which the defenders ought to hold count and reckoning, in manner above said: Ordained the pursuer to give in an additional condescendence, specifying the particular debts, and the circumstances thereof, for which he now insists that the defenders ought to be accountable; and, till then, reserved consideration of what allowance ought to be made to the defenders, on account of the expense which they would have incurred, if they had endeavoured to recover the said debts by virtue of the pursuer's disposition *omnium bonorum*."

The defenders presented a reclaiming petition against this interlocutor, on advising which, with answers, the Court, on the grounds stated for the pursuer, 'adhered.'

Lord Ordinary, *Glenlee*.      Act. *Dickson*      Alt. *Turnbull*.      Clerk, *Colquhoun*.  
*R. D.*      *Fac. Col. No 72. p. 163.*

Implied warrandice in contracts of Sale. See SALE.

See APPENDIX.