

and therefore if the tack was to endure for any space it was of necessity that the tenant should have the use and disposal of these things, for otherwise there would be a moveable subject entirely locked up from commerce, as it was admitted that the master could not dispose of it. The President was of this opinion; but he thought that the last year of the tack, when the steelbow was to be restored, it was to be considered as rent, for which the master had an hypothec over all the goods upon the farm; and the fact here was, that the tenant renounced his tack, and soon after died, upon which the master took possession of the farm, and all the stocking upon it, and the creditors of the tenant confirmed themselves executors, so that the goods were *in medio* and in possession of the master; and therefore all the Lords agreed in preferring him.

1764. *August 8.* DUKE of HAMILTON, &c. *against* MR DOUGLAS.

IN Mr Douglas's service as heir to the late Duke of Douglas, there were produced by Mr Lindsay, town-clerk of Edinburgh, who was called as a witness for Mr Douglas in his service, certain letters said to be written by one Pierre La Mar, a man-midwife, to Sir John Stewart, concerning Mr Douglas's birth. The Duke of Hamilton raised a reduction of the service, and when this process was going on, he insisted in an improbation of these letters, and craved that Mr Douglas and his curators might be ordained to abide by them *sub periculo falsi*: but the Lords unanimously found that they were not obliged to abide by them in that way; and therefore they dismissed the improbation as incompetent, reserving to the Duke of Hamilton to prove these letters forged in the process of reduction. Lord Coalston thought that the improbation was competent, but that the defenders might abide by these letters *qualificate*. The President, on the other hand, thought that there could be no abiding by in that way, but the defenders must either give up the letters altogether, or abide by them *simpliciter, sub periculo falsi*. The principle of law in this case seems to be, that an improbation is truly a criminal process, though carried on in the civil court, founded upon the presumption that a person who has in his custody, and produces a forged deed, is the forger; but if the deed is produced, not by the party, but by a witness in a cause, that presumption ceases with respect to the party, and there can be no process of improbation against him, but only against the witness who produces the deed; though in the cause with the party the deed may be proved to be forged in order to take off the evidence arising from it

1764. *December 12.* CREDITORS of THOMSON and TABOR *Competing.*

AN English merchant became bankrupt, having many debtors in Scotland, who owed him money by bills payable in Scotland, and by open accounts. A statute of

bankruptcy was taken against him ; but before the assignation to the assignees under the commission, but after the first act of bankruptcy, his creditors, both Scotch and English, arrested in the hands of the debtors before mentioned ; and the question now came betwixt the assignees and those arresters,—the assignees contending that the whole effects of the bankrupt were vested in them *retro* from the first act of bankruptcy ; the arresters, on the other hand, maintaining that, by the diligence of the law of Scotland, they were preferable.

1762. *February 23.*—The Lords first determined the general question, Whether the assignees had any right at all in their persons, and were entitled to uplift subjects in Scotland though there had been no creditor in competition with them ? And it carried unanimously that they had right ; but Lord Coalston said, that, if the point had been entire and not fixed by the decisions of the Court, he would have been of another opinion.

The next question was, Whether they were preferable to the arresters ? And it carried by a considerable majority that they were not ; and the Lords on that side seemed to put their opinion upon the general point, that no assignation under the commission of bankruptcy can compete with an arrestment of a particular debt in Scotland, without distinction whether the creditor or debtor be Scots or Englishman, or the debt a Scots or English debt ; and the principle upon which they went was, that a debt or *nomen* has a *situm*, not where the creditor but where the debtor resides ;—so that they can only be affected by the act of the law of that country.

This decision was contrary to the former practice, particularly the decision in the case of *Wilson's Creditors*, *July 7th 1758.**

1764. *December 12.*—The Lords at first preferred both the Scotch and the English creditors-arresters ; and with respect to the Scotch arresters the assignees acquiesced, but with respect to the preference of the English arresters they reclaimed ; upon which the Lords appointed a hearing, then memorials, and this day the cause was determined in favour of the arresters by no great majority ;—*dissent. Preside ; Alemore non liquet.*

1764. *December 18.* The question to-day was concerning the validity of the arrestments, to which the assignees under the commission of bankruptcy objected, that part of them were laid on upon a depending process against Tabor and Thomson, the bankrupts, and who are foreigners in this country, without an arrestment *jurisdictionis fundandæ causa*, by which only they could have a *forum competens* in this country ; and part of them were laid on upon bills drawn by the bankrupts and protested here for not-acceptance, upon which protests letters of horning were raised. And the whole argument turned upon this, Whether the form of arrestment, *jurisdictionis fundandæ causa*, was necessary in order to give a jurisdiction over a stranger who had effects in this country ?

The opinion that an arrestment *jurisdictionis fundandæ causa* was necessary, prevailed by no great majority ; adhering to the judgment 23d February 1762.

See *inter eosdem, Fac. Coll., 5th March 1767.*

* This case was omitted of its date, but will be found at the end of this collection.