

No 33.

Court, and that no judicial demand was made thereon to found a jurisdiction, therefore ordained the note to be delivered back to the petitioner. See APPENDIX.

*Fol. Dic. v. I. p 328.*

1772. August 4.

SAMUEL COLE of Covent-Garden, Mercer, and WILLIAM COLE, Brother of the said Samuel Cole; DANIEL WEST, and Others, all Silk-weavers, or Merchants, in or near London, Creditors of the said Samuel Cole; and JOHN GLOAG Merchant in Edinburgh, their Attorney and Trustee *against* EPHRAIM FLAMMARE and SON, Silk-weavers in London.

No 34.

An Englishman having goods in Scotland, may apply for sequestration under the bankrupt statutes.

SAMUEL COLE had, as a trader, sent James Holling Priest, his clerk, to this country with a quantity of silks, amounting in value to about L. 3000 Sterling; and, shortly thereafter, his brother William Cole came hither in the character of factor, or institor, for disposing of these goods; for which purpose, he hired a ware-room, and obtained a licence to trade in the Cannongate.

Samuel Cole, with a view, as was said, of doing equal justice to all his creditors, wrote the following letter, of date 29th May, to William Cole his brother, and institor in this country: 'Since my last, I hear Mr Flammare is gone, and I suppose is arrived, to attach the goods; a thing I know not whether he had a right to do, without my consent; and I never gave it: On the other hand I committed an act of bankruptcy before he went from London, as will be proved; therefore before you give up the goods, have the opinion of the most able advocate you can. Mr Swinton's brother is one, from whom I will get a letter to-morrow on that subject; but, if you have not given up the goods, apply directly.'

Mr Flammare, a creditor of Samuel Cole to the extent of about L. 900 Sterling, upon the day of his arrival in Scotland, viz. May 30th, obtained an Admiral precept against him: and, having arrested the silks which had been sent into Scotland, *jurisdictionis fundandæ causa*, did thereon institute an action against Cole; and upon the dependence, he used arrestments in the hands of the depositaries of the silks; and which, on the 2d June thereafter, were sequestrated and inventoried by order of the judge-admiral, before whom the action was brought.

On the 3d June, William Cole, brother to Samuel Cole, attached the silks also by arrestment, for payment of a promissory-note owing by his brother; and on the 16th June, the other parties, all English creditors, likewise used arrestments for attaching these silks.

While matters were in this state, a petition was presented to the Court of Session, in name of Samuel Cole himself, and of William Cole, brother of the said Samuel Cole, Daniel West, &c. (the other creditors of Samuel Cole above

mentioned,) and John Gloag their attorney and trustee, praying the Court, 'in terms of the statute passed last Session of Parliament, to sequestrate the fore-said parcel of silks, now lying in Cannongate, and to appoint a factor thereon for behoof all the creditors; and to give such other orders and directions relative thereto, as the said statute appoints.' &c.

The petition bore date the 27th of June, the penult day within which an application to the Court for a sequestration could operate against Flammare's arrestment.

At moving this petition, compearance was made for Flammare and Son, who prayed leave to give in answers; which were accordingly ordered and lodged. Upon advising petition and answers, 'the LORDS ordained memorials to be given in by both parties upon the whole points mentioned in the petition and answers;' which was likewise complied with.

Flammare and Son, respondents, had *objected*, *imo*, That this case did not fall within the purview or enactment of the late statute, as the debtor was an Englishman, who had never been in Scotland, and who had no estate in Scotland, other than the parcel of silks which had been arrested.

Upon this point, the COURT delivered their opinions, that, as expediency suggested a liberal interpretation to be given to a statute of this nature, so one clause of it was directly applicable, and warranted their giving relief in the present case. It enacts, 'That all debtors who know themselves to be failing in their credit and circumstances, may apply,' &c.

The *next* objection was, that taking the application to the Court as made in the name of Samuel Cole only, it was void, as having been made without any authority from him.

Upon this point the letter of 29th May was considered to be sufficient. Besides, latter powers of attorney were produced, as inferring ratihabition.

The *third* objection was, That, taking the application as made in name of the creditors, it was also void, as they had not made Samuel Cole a bankrupt in terms of the statute. Neither the truth nor the relevancy of this last objection was contested. It was only *observed*, that the common debtor's application, for the laudable purpose of doing equal justice to all his creditors, favourable in itself, was not the less so from having the sanction and approbation of his creditors.

'THE LORDS find the presenting the petition in name of Samuel Cole sufficiently authorised by him; repel the whole objections to the competency of the the said petition, so far as in the name of Samuel Cole; and therefore sequestrate the whole personal estate of the said Samuel Cole, situated within the jurisdiction of the Court.' And afterwards refused a reclaiming petition for Flammare, without answers.—(This case is mentioned No 268. p. 1245.) See NEGOTIORUM GESTOR. SEQUESTRATION.

Act. *Advocatus, et W. Baillie,* Alt. *Solicitor Dundas, et R. Sinclair.* Clerk, *Pringle.*

*Fol. Dic. v. 3. p. 239. Fac. Col. No 24. p. 65.*