

1787. November 24. JAMES LESLIE against JOHN SCOT.

FOREIGN.

An assignee under an English commission of bankruptcy, by obtaining decree in absence against a debtor of the bankrupt, divests him of the *jus crediti*, and renders every posterior arrestment ineffectual.

[*Fac. Coll. X. 14; Dict. 4562.*]

MONBODDO. If I should consider this assignment as a trust by the debtor for behoof of his creditors, this would not hinder any other creditor from doing diligence even if the trustee had recovered a judgment: still, while the subject was *in medio*, any creditor might step in and claim. But the late decisions have gone so far that we cannot turn back from them. The English assignee has been allowed to *compear* and *compete*: he has taken decree, which vests the subject in him, and he cannot be obliged to give up his preference.

BRAXFIELD. It is established that *nomina debitorum* do not vest in the assignees: that, although no right was established in them, they might *compear* and *compete*, and then that they might seek and obtain decrees. I doubt as to the second and third findings; but I go upon the supposition that they were right. If the assignee may *compear* and *compete*, and obtain payment, how far is this to go?—no farther than the law of the land allows. An arrestment laid on *pendente processu* was found good against assignees: here the arrestment was laid on three days before extract of a decret in absence. Were the decret held good, this would be giving an extraordinary effect to a decree in absence, especially when the creditor of Mitchell was no party to it. Had the debtor paid the money there would have been an end of the matter; for arrestment carries nothing when there is no debt. While the subject is *in medio* a decret in absence carries nothing. If a trustee, by the act of the proprietor, could not have had a stronger right, how can the trustee of the chancellor? No creditor is bound to submit to the management of any trustee: he is entitled to affect the subjects by the law of the country.

JUSTICE-CLERK. It has long been the view of the English to make the distribution of a bankrupt's estate even and equitable. Our law was later in adopting this idea; but it has been adopted by two successive bankrupt statutes; still, however, it is in the power of a Scots creditor to attach the subjects of his debtor and disappoint the English creditors. *Durum est*; but I will not take upon me to alter the law from analogy: this, however, should lead us not to deprive the English creditors of any equitable privilege which the Court has, by its decisions, given to them. Does a statute of bankruptcy give right to effects in Scotland? No: but the assignee, under such statute, has right to *appear* and *compete*; he has a right of action. What is the import of all this? Is it possible that this does not imply, that the assignee may not pursue as such, in order to have the right of the common debtor in Scotland established in him:

in this case, the assignee obtained decret against the debtor of the common debtor, decerning to pay to him as assignee. It is said, that arrestment was used *three* days before the extract of that decret; but the decret was obtained long before; and a decree, having been once obtained, may be extracted *quandocunque*, and it will draw back to its date. When the arrestment was used, the debtor had nothing in his hands; for, from the date of the decret, whatever he had was legally transferred. If the assignee had no right, then payment fairly made to him by Ferguson, the debtor of the common debtor, was *indebite solutum*, and might have been re-demanded: this is not said, but it is the consequence of the argument. I shall have no hand in weakening the bankrupt laws either of England or of Scotland.

PRESIDENT. In the case of the *Creditors of Balgair*, I was against the judgment; then there came in the distinction, allowing the English assignee "to compear and compete." I thought that there was a contradiction between the decisions: if a man has a right "to compear and compete," he may come and crave a judgment; here he got it, and without any objection: the extract will draw back to the date of the decret.

ESKSGROVE. My judgment went upon what I understood to have been the determination of the Court in former cases. There is nothing so hurtful as the varying of decisions. [He supported his judgment at great length, as his wont is, and with considerable warmth.]

HENDERLAND. The English assignee has been found to have a right "to appear and compete." Had I been on the bench at that time I should have doubted in so finding, because I do not see its principle or its necessity; besides, I think that no *comitas* or complaisance should be allowed, to the prejudice of the law of one's country: in this case the assignee did not constitute his debt by the form of this country; a man may have a title to compete, and yet he may go the wrong way to work. There is no decision of this Court which says that the diligence of a lawful creditor, according to the law of this country, is to be postponed to diligence carried on without attention to that law. The decret in absence was not in a competition, and I cannot consider it a *jus in re*: if the question had been as to moveables, another creditor, having *parata executio*, might have poinded, because he had *jus in re*.

On the 24th November 1787, "The Lords preferred the assignees, under the statute of bankruptcy;" adhering to the interlocutor of Lord Esksgrove.

*Act.* B. M'Leod, Advocate. *Alt.* A. M'Connochie, R. Blair.

Hearing in presence.

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

*Non liquet*, Rockville, (who had not heard the whole of the debate.)

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