No. 14. that the debtor actually reside in Scotland, or at least had such residence or dwelling-house, or house of business, within a year prior to the application for sequestration. Now Douglas had resided between two and three months here, and he bought and sold goods as a merchant, for which he granted bills. He has also expressly styled himself "merchant in Glasgow" in an authentic and formal deed; and in the power given to his attorney, which entitles him to appear for him in this action, he admits the same thing, designing himself "late "of Demerara, presently in Glasgow, merchant." His journey to Scotland was not so much a visit of friendship, as in prosecution of his trade; and the sound principle of the act of sequestration is, that foreign, like domestic merchants, cannot carry on trade, or hold property as traders in Scotland, without being subject to the bankrupt laws of this country, and without rendering that justice to their creditors, which the native merchant is bound to render.

The Lords were of opinion, that § 17. of the statute must be explained, in conformity with § 13. to mean traders in Scotland, and did not reach such cases as the present: Therefore refused to award the sequestration.

Lord Probationer *Tytler*, Reporter. Act. *H. Erskine, Fletcher*. Agent, *M. Montgomerie*. Alt. *Solicitor-General Blair, G. J. Bell*. Agent *J. Campbell tertius, W. S.* Clerk, *Menzies*.

F. *Fac. Coll. No. 21. p. 43.*

1802. *March 5.*

CLERK, and Others, the Adjudging Creditors, *against* The COMMON AGENT of the Postponed Creditors of CHARLES MACLEAN of KINLOCHALINE.

No. 15.
Interpretation of the clause of the bankrupt act relative to conjunction of adjudications.

IT having been decided (See No. 13. p. 28. *supra*), that the conjunction of adjudications could take place only with the first adjudication, the postponed creditors next maintained, that the adjudication of George Andrew was not the first, and consequently that all those conjoined with his, could be in no better situation than those which had been conjoined with Butter's: That a bill had been drawn on 12th August 1793 by Colonel Allan Cameron upon the common debtor for £500, which was discounted by Donald Smith and Company; and that another bill for the same sum was likewise discounted by them on 3d September; these not being retired when due, diligence was done upon them; and an adjudication at the instance of Smith and Company, was raised against the estates both of Maclean and Cameron, against the last of whom, proceedings were also instituted in the King's Bench, he being then in England. The adjudication was intimated on 17th January 1795, in terms of the statute.

During the running of the period of intimation, the proceedings in England obliged Colonel Cameron to pay the debt. Instead of obtaining an assignation

to the debt and diligence, the bills were delivered up to him with a discharge, acknowledging the payment from him. When it seemed impossible to retrieve Maclean's affairs, he granted a bond to a trustee for Cameron, as he was then abroad, having the vouchers of the debt in his possession. The bond proceeded on the narrative of the transaction, and an adjudication was led upon it, (29th April 1797.) Thus the first adjudication, after it had been duly intimated, was neglected by Cameron, in whose favour, as retirer of the bills, it stood; and none of the other creditors ever took decree upon it.

No. 15.

George Andrew having intimated his adjudication (11th June 1795) as the first, twelve creditors appeared, and were conjoined with him in the decree. Against their preference, the common agent for the postponed creditors,

Pleaded: As common law recognises no conjunction or accumulation of actions, it is only from statute 33d Geo. III. that the adjudging creditors can derive any support to their diligence. When to prevent the necessity of each from taking legal steps to adjudge for himself, the same effect was given to conjunction with the first intimated adjudication; this was intended to serve as a common action for behoof of all the creditors, and never could be meant to be at the capricious disposal of the individual creditor who raised it. Each was to stand as much as possible on its own footing, without being injured by any defect in the first adjudication. For each creditor was to raise and signet his summons before it could be conjoined; and he could not extract his own part of the general decree, as if it was a separate process; 33d Geo. III. C. 74. § 10. The general rule seems to be, that in no case whatever is the diligence of an individual creditor, after it has been communicated to others, and converted into a general process for the common behoof, to be held as any longer under the control of him who began it, or subject to be abandoned, or extinguished, farther than concerns his individual interest. Thus, when ultimate personal diligence has been done against a debtor, if his debt should be paid, that indeed is extinguished, but it cannot extinguish the character of bankruptcy consequent upon it; Earl of Hopetoun against Nisbet, 9th November 1750, No. 176. p. 1098; Mackellar against Macmath, 1st March 1791, No. 190. p. 1114. Again, by 1661, every adjudger within year and day of the first effectual adjudication, is entitled to a *pari passu* preference. The creditor may discharge this adjudication, may destroy the evidence of its completion; but the other creditors are entitled to have the whole reinstated, as a diligence to the participation of which they are by statute admitted; Streit against Lord Northesk, 13th December 1672, No. 23. p. 248; Maclurg against Murray, 28th January 1676, No. 27. p. 256; Straiton against Bell, 7th November 1679, No. 26. p. 255.

The common debtor's interest is nearly concerned, that no creditor should have it in his power, by delaying to take decree after intimation, to defeat the right of those who were ready to be conjoined with him, as each could lead separate processes, and the whole evil of the old law would return.

No. 15.

The adjudgers

Answered: If the argument be well founded, that if a summons of adjudication have at any time been executed, this must be held to be the first adjudication, it seems to lead to this conclusion, that it is of no consequence whether the adjudication was raised lately or twenty years ago; whether the debtor was in flourishing circumstances, *vergens ad inopiam*, or bankrupt; whether the debt was paid and discharged, or unpaid and outstanding; whether it was a well or ill founded process of adjudication; whether it was dismissed or sustained; whether it was immediately dropped after being brought, or carried on till decree; whether the debtor had sufficient defences to cast the summons on informalities, or upon the merits of the case; whether other creditors appeared in it, or let it be dropped without taking notice of it. It would be so difficult to say when the first adjudication against any estate had been led, that the benefit of the *pari passu* preference would be lost, and each would adjudge for himself, and thus each adjudication would come to be ranked again according to its date: No one could be sure but that some steps towards an adjudication may have been at some time or other taken and insisted in, which would deprive that one to which he could be conjoined of the name and privilege of a first adjudication.

This case, it appeared to the Court, had been omitted among the provisions of the bankrupt statutes; but it likewise appeared, that in reason, and according to the spirit of those statutes, it was to be held that here the adjudication first raised, had fallen to the ground, in respect of its being discharged, or not insisted in; and therefore, it was found that the adjudication of Andrew was to be held as the first, and consequently, that those creditors, whose summonses had been conjoined with it were preferable, (24th November 1801.)

To which judgment, on advising a petition with answers, they adhered, (5th March 1802.)

Lord Ordinary, *Ankerville*. For the Postponed Creditors, *Solicitor-General Blair*, *M. Rose*, *G. J. Bell*. Agent, *K. Mackenzie*, W. S.
Alt. *J. Clerk*, *Duff*. Agent, *Ja. Watson*, W. S. Clerk, *Menzies*.

F. *Fac. Coll. No.* 34. *p.* 69.

1802. *March* 10. WILKIE'S Creditors, *against* WILKIE.

No. 16.
A sequestration suspended till an offer of composition should be considered by the creditors.

ON 17th October 1801, Wilkie's estate was sequestrated, and he was ordained (26th January 1802) to make over all his effects to the trustee on or before the 12th of February, in the usual form; his public examinations were fixed to take place on the 12th and 26th of that month. Having shown an unwillingness to execute the disposition of his effects, the trustee for his creditors required him to do so on 10th February, under form of instrument: Then, as well as at his first examination on the 12th, he positively refused to dispone.