

the first part thereof bearing the return of the tocher, behoved to be interpreted with that same quality and condition, and could not divide and be of another nature, they being the parts of one individual provision and condition.

Page 253.

1672. February 27. ————— against —————.

THERE being a reduction pursued of a disposition, made after interdiction lawfully published,—it was ALLEGED for the defender, That the reason was not relevant, unless it were likewise libelled that the party interdicted was hurt and leised.

It was REPLIED, That there was no necessity so to libel, seeing dispositions made by parties interdicted, without consent of these to whom they are interdicted, are *ipso jure* null; as in the case of a minor having curators, who grants a bond or disposition.

It was DUPLIED, That it was offered to be proven that the sums of money, for which the disposition was made, were profitably employed to the behoof of the disponent.

The Lords did sustain the duply, and admitted the same to probation; which is the first decision of that kind; the case of persons interdicted, and minors, being always before thought alike.

Page 254.

1672. February 27. JACOB JAMART, Merchant, Bourdeaux, against HENRIE JOSSIE.

IN a reduction and suspension of a decret, obtained at Jamart's instance against Jossie, for the sum of 9000 livres, upon this reason,—That the decret was for null defence; and if he had compeared, he had a relevant defence to elide the libel; *viz.* That the ground of the debt being contracted at Bourdeaux, by the custom of which place, where a debtor to several persons makes a disposition of his whole estate,—the major part of the creditors accepting thereof,—it is sufficient to exoner him, not only at their hands who accept, but likewise at the hands of them who refuse; and accordingly Jossie had subscribed a concordate with the most part of his creditors, and had consigned his whole estate for their use: whereupon the Parliament of Bourdeaux, by a decret, had interponed their authority for the suspender's liberation; and so it was *res judicata* in France, according to their law and custom; which, *ratione loci contractus*, ought to regulate this case.

It was ANSWERED for Jamart the charger, That this allegiance, not being verified *instanter*, could not be received to stop justice and a legal procedure here; the suspender having had more than sufficient time to procure an extract of the sentence, if any such was, during the dependence of the first process, wherein decret was given by the bailies of Edinburgh: And albeit it were produced, yet it could not have furnished any such defence against Jamart; because such

a custom, albeit it were verified, was only municipal, and to take effect within the territory and jurisdiction where it was in force; and that, as to such estate and goods as were possessed by the debtor within these bounds where the law was obligatory, and whereof the debtor had the benefit as a native or denizen. But so it is, that Jossie being a Scotchman, and residing at Bourdeaux only as a factor or merchant, having no domicile of his own, after contracting of this debt fraudulently retiring to Scotland, where there is no such custom or privilege, being pursued for a most just debt, that the law of this kingdom may have execution against his estate here; the said pretended custom of France can never be respected, no more than a merchant here having an estate in France, and being incarcerated in Scotland is liberated upon a *cessio bonorum*; which could not hinder any of his creditors in France to pursue him there, and obtaining a decret there, to execute the same against any goods he hath in France. And if it were otherwise, it would open a door to infinite fraud and, circumvention; which would destroy all trade and commerce with strangers, it being easy to a merchant or factor, who is in credit and reputation abroad, clandestinely, by bill of exchange and loading of commodities under the name of another, to transmit his estate, and then retire himself.

The Lords did decern against Jossie, and found the letters orderly proceeded; in respect that there was nothing produced for instructing of that pretended custom; and that there was decret given thereupon by the Parliament of Bourdeaux: but superseded the extract thereof until the next session,—that, if the custom and authority of Parliament interposed were instructed, they might then resume the foresaid debate, and decide *in jure* if it were obligatory here, as being *res judicata*.

Page 255.

1672. June 26.

MOUBRAY against SPENCE.

IN a reduction of a disposition of lands, at the instance of Moubray against Spence, to whom one — Stewart disposed some lands in Orkney, upon the Act of Parliament anent Dyvors, as being made to Spence as a confident person, in so far as he was intrusted and employed as agent here at Edinburgh for Stewart in all his business; and therefore, besides the disposition bearing for an onerous cause and sums of money received;—it was ALLEGED, That he ought to condescend and instruct the onerous cause for which the right was made.

It was ANSWERED for the defender, That he was not such a person as did fall within the meaning of the Act of Parliament; which was only such confident persons who, *ratione sanguinis*, or by reason of the nearest relation of affinity, such as *utricus et gener*, or a good-brother, had interest in the disponent; whereas the defender had no relation or contingency of blood, and was only called as an agent and *ratione officii*.

The Lords found the answer relevant to assoilyie from the reduction, unless the pursuer would prove, *scripto vel juramento*, that, notwithstanding the disposition did bear for an onerous cause, yet truly there was none. For, as to former decisions, it was never decided, but in regard that rights were made to persons related by consanguinity or affinity, as said is.

Page 261.