

ther procedure, except some preliminary objections being stated to the competency of that process.

No 17.

To the first of these it was *answered* by the pursuer, That a proof of an absolute bankruptcy was founded neither in law nor in practice: That the Court, agreeable to the authority of Lord Stair, lib. 4. tit. 50. § 28, and Mr Erskine, lib. 2. tit. 12. § 22, had always found sequestration competent when the estate was heavily charged with debt; and that this remedy had never been refused on account of the bankruptcy not being proven, as was determined in a late case, Campbell against M'Lauchlane of Greenhaugh. See RANKING and SALE.

With regard to the necessity of the competition of rights, he observed, that, in the present case, there was such a competition; and, in support of which, a decret of pointing of the ground, and another of mails and duties, were produced at the instance of two different creditors against the same tenant; and, even though there was no direct competition, the Court had been in use to grant sequestration when it appeared for the advantage of the parties concerned.

THE LORDS sequester the lands and estate belonging to the said Adam Anderson, and remit to the Lord Ordinary to name a factor thereon; and repel the objections to the process of sale. See SEQUESTRATION.

Act. Ja. Ferguson, jun.

Alt. Alex. Lockhart.

Fol. Dic. v. 3. p. 186. Fac. Col. No 150. p. 355.

1769. December 7. FOGGO and GALLOWAY against SCOT and OLIVER.

No 18.

MARGARET ELLIOT having taken out diligence against Gavin Elliot the common debtor, and given a charge, assigned her debt and diligence to Scot and Oliver, who executed a pointing in their own name.

A pointing cannot proceed in name of the assignee, upon a pointing raised by the cedent.

In a reduction of this pointing, a remit was made by the Lord Ordinary to three writers to the signet, who reported, 'That there seems no good reason why a pointing may not follow, in the name of an assignee, upon letters raised and executed in the name of the cedent, especially as the old style of an assignation generally provides that diligence may follow, or be executed either in the name of the assignee or cedent.'

*Pleaded* for the pursuers; The duty of messengers, in the execution of diligence, is purely ministerial. They are strictly bound by the terms of the warrant, and cannot depart from it in any respect. Haddington, — March 1604, Moncur *contra* Ld. Craig, No 1. p. 3681.; Durie, 24th January 1627, Erskine *contra* Lord Erskine, No 2. p. 3681.

The practice referred to in the report of inserting a special clause, empowering the assignee to do diligence in the cedent's name, would seem to prove, that, without such a clause, he can only use diligence in his own.

No 18.

Indeed, the very point in question was expressly determined 11th July 1745, *Hay contra Stewart, voce LEGAL DILIGENCE*; where, upon a report by the whole body of writers to the signet, the Lords cut down an arrestment which had been used by an executor upon a horning taken out by the defunct.

*Answered*; The letters of horning, containing warrant to poind for payment of the debt therein mentioned, authorised the messenger to carry on a poinding for behoof of the person who was in the right of the debt for the time. The will of the letters is to make payment of the debt to the creditor at whose instance they were obtained; and yet there cannot be a doubt, that they would have been sufficiently obeyed, by making payment to the assignee.

But, however strictly messengers may, in other diligences, be tied down to the precise terms of their warrant, a greater latitude must be allowed in poindings, where they truly act in a judicial capacity, as sheriffs in that part, and are entitled to determine among the parties competing for the property of the goods. *Stair, IV. 30. 6. and IV. 47. 26.*

Poindings of moveables are analogous to apprisings of lands; but it cannot be doubted, that, after the denunciation in an apprising, the creditor might assign his debt, in which case, the apprising would go out in the name of the assignee. Indeed, this point was expressly decided 5th February 1745, *Ramsay contra Creditors of Clapperton of Wyliecleugh, voce PASSIVE TITLE*; and it is difficult to suppose, that the powers of the messenger are more limited in poindings of moveables than in apprisings of lands, which are of much more consequence.

*Replied*; The powers of the messenger do not seem to be greater in poindings than in other diligences, in which also he acts as sheriff in that part. The case of Clapperton is but a single decision, and ought not, by analogy, to be extended to poindings; indeed, in that case, it appears that possession had followed on the apprising for no less than 60 years.

‘THE LORDS sustained the objection, and reduced the poinding.’

*Act. Armstrong.*

*Alt. Macqueen.*

*G. F.*

*Fol. Dic. v. 3. p. 185. Fac. Col. No 104. p. 362.*