

of sending the messenger a second time to execute the summons of furthcoming; from which no harm whatever could arise to the complainers, or to any other person. This very objection was over-ruled as far back as the 7th Jan. 1704, *voce* ARRESTMENT, No 15. p. 686. ; from which it appears, that the like custom had even then taken place, and was authorised and approved of by the Court, upon very just grounds, recited in the decision; and as no contrary decision has occurred, and the same reasons of expediency, from the saving of expenses, and the conveniency of the subjects, do still subsist without any damage arising therefrom, this complaint must appear to be groundless.

*Observed* on the Bench: The procedure was most incongruous, as the summons of furthcoming is plainly made to narrate a fact not true; and this practice ought not to be allowed, although it may save the expenses of double execution. The single decision above mentioned will not make law; and, in a later case, similar to the present, Creditors of Strichen, 1706, *voce* LEGAL DILIGENCE, the LORDS found, That a libelled and signeted summons, before it was executed, did not make a depending action; and therefore did not sustain arrestments raised and executed thereon; although there was likewise, in that case, a clear proof of the constant practice of taking out the arrestment at the same time with the summons which made the dependence. But as the custom with regard to the present case had been inveterate, and there was no prejudice here done to any body, this was not a proper subject for a summary complaint.

‘ THE LORDS dismissed the complaint, with expenses.’

Act. *Arch. Murray,*

Alt. *Montgomery.*

*N. B.* THE LORDS appointed a committee of their number to draw up an act of sederunt relating to this matter.

*Fol. Dic. v. 3. p. 186. Fac. Col. No 169. p. 301.*

1764. November 16. JAMES PATERSON *against* ADAM ANDERSON of Kestock.

MR ANDERSON having become very much distressed in his circumstances, and unable to pay his debts, James Paterson, a preferable creditor of his, commenced a process of sale of his estate; during the dependence of which, a sequestration was also applied for to the Court.

In opposition to the sale, it was *pleaded* by the defender, That no sale of the estate could proceed, as the summons was irregularly executed, being not only signeted blank as to the names of the whole creditors meant to be called as defenders, but also returned into Court in the same state; from which it was evident that the executions of the messenger were destitute of a warrant, as they called persons whose names the summons did not contain, and whom he had

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The Court, in a process of ranking and sale, repelled the objection, that the names of the creditors were not filled up: before the execution of the summons.

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no authority to cite : That the act 1681 expressly required, that the real creditors should be specially summoned : That this requisite was neglected in the present case, as the summons was executed blank : That the act 1672 likewise ordains all executions of summonses to bear expressly the names and designations of the parties, pursuers and defenders, and that the execution shall be null, if supported only by a general relation to the summons, which plainly supposes that the summons bears the names of the parties ; for, if they were allowed to be blank, the messenger would not have been commanded to be particular in his execution, when the summons, which is his authority and warrant, was permitted to be general.

It was likewise *insisted* on by the defender, That the creditors were not in possession of the whole estate, as required by the act of Parliament 1681 : That this act could not be dispensed with, and had always been observed hitherto in processes of this kind.

To the first of these objections respecting the execution of the summons, it was *answered* by the pursuer, That summonses of ranking and sale were always executed in the same manner ; and being ordered by the Court to give in a condescence as to the common practice in this particular, he condescended, in consequence of information from the oldest practitioners about the Court, that it was altogether unusual to make a particular insertion of the names of the several defenders in a summons of sale ; that the common debtor alone was particularly mentioned, and a blank left for his creditors. It was also the practice for the agent or the clerk, when the summons was called, to make out a roll of the defenders' names from the executions ; that he sometimes filled up the creditors' names in the will of the summons, and sometimes not, as the former roll made a part of the process, and answered the purpose equally well. He likewise mentioned the ranking and sale of Newark, where the creditors' names were not filled up in the will of the summons till the decret was extracted, and that this procedure was advised by the ablest practitioners about the house. As to the other difficulty of the creditors' not being in possession of the whole estate, that was equally destitute of foundation. The act 1681 only required that the bankruptcy should be notorious, and the creditors in the possession of the estate ; but that it was no where required that they should be in possession of the whole estate ; and that it had been found by the Court, 11th July 1699, Learmonth against Gordon, No 6. p. 3096., that an infertment of annualrent was a good title to pursue a sale of a bankrupt estate, although it was no more than a servitude, and only over part of the lands.

During the dependence of the process of sale, the pursuers likewise applied for a sequestration of the estate. To which it was *objected*, That no absolute proof of the bankruptcy was brought, which was a requisite indispensibly necessary, and that the competition of the creditors alone founded the jurisdiction of the Court, without which no sequestration could proceed : That here there was no competition of rights but a simple process of sale, without any o-

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

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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.