

Lordships, to grant warrant for serving it on the trustees of Thomas Frazer and the Magistrates of Edinburgh; and, upon their failing to support the injurious expressions complained of, to appoint these expressions to be expunged from the deed and from the record, or grant such relief as to their Lordships should seem most competent and proper; and, in the mean time, to recall the extracts already given out, and prohibit the clerks to give out others, till their Lordships should determine the case.

The Court ordered this petition to be served on the trustees; and answers were put in for all of them, except the two who granted the above mentioned certificate.

The scope of the answers was, to vindicate Thomas Frazer and his settlement from several reflections thrown upon both, in the petition; for, as to Gortuleg's desire to have certain expressions delete, the respondents said, they were in the dark as to the import of these expressions, but thought it their duty to refuse their consent to any erasure or deletion, by which the deed might be weakened, especially as the stile of the petition was such as rendered it improper for the trustees and friends of Thomas Frazer to consent to any thing craved by that petition; and they submitted, without any argument, whether the Court could, *ex nobili officio*, do an act, which, if done by a private person, would be deemed a vitiation of the records.

When the petition and answers came to be advised, the counsel for Gortuleg declared, they did not insist, that any part of the deed should be expunged, as that would be a dangerous precedent, but only that the Court should find and declare the expressions to be injurious.

This restriction was ordered to be minuted; and then it was observed from the Bench, that the conclusions concerning the record had alone rendered the petition competent; but now that they were passed from, it was evidently not so.

“The Lords found the petition not competent.”

*N. B.*—An action of declarator was afterwards brought, and the Lord Coalston Ordinary having found the expressions in the deed groundless and injurious, the trustees who appeared in defence acquiesced in the judgment.

For the petitioner, *Advocatus Lockhart & Ilay Campbell*. For the respondents, *D. Dalrymple*.  
*J. M.* *Fol. Dic. v. 4. p. 311. Fac. Coll. No. 144. p. 341.*

1765. August 10.

ROBERT SYME, Writer to the Signet, against JAMES STEEL, Merchant in Edinburgh.

Robert Syme, writer to the signet, as trustee for the creditors of James Steel, merchant in Edinburgh, insisted in a summons against him, narrating various acts of fraudulent bankruptcy, and concluding, That Steel should be declared infamous, incapable of public office, and otherwise punished, as also for £.50 Sterling of damages.

A process with penal conclusions against a bankrupt, at the instance

No. 19.  
of his creditors, must proceed with concurrence of his Majesty's advocate, and by summary application.

Steel objected, That the action was absurd and incompetent; because, 1st, It contained very severe penal conclusions, and yet wanted the concurrence of the King's Advocate, who alone had a title to insist *ad vindictam publicam*; 2dly, The accusation ought to have been brought before the whole Lords by a complaint, and not before a single Judge by an ordinary action.

Syme answered, That several such processes had been sustained; however, to prevent any doubt, he offered to amend his libel, by obtaining and adding the concurrence of the King's advocate.

The Lord Ordinary allowed Syme to condescend on precedents, which he having failed to do, his Lordship took the cause to report; and the Court was of opinion, that the accusation could only be brought before the Inner-House by a complaint; that the King's advocate was the only proper party to insist for such penal conclusions; and that it was absurd to amend a libel by adding the name of the proper prosecutor; therefore

The process was dismissed.

See TITLE TO PURSUE.

Act. Geo. Cockburn. Alt. M'Laurin. Reporter, Alenoor. Clerk.

J. M.

Fol. Dic. v. 4. p. 311. Fac. Coll. No. 28. p. 50.

1786. June 24.

DAVID WALKER, Petitioner.

No. 20.

The effects of Drummond, a dealer in grain, were sequestrated in virtue of the bankrupt statutes.

David Walker afterwards preferred a petition to the Court of Session, setting forth, That he had consigned a quantity of wheat belonging to him, in the hands of the bankrupt, who had made another consignment of it to a third party, from whom the factor on the sequestrated estate had demanded it, in behalf of the creditors in general.

He therefore prayed for a warrant to serve the petition on the factor; and that, on the particulars in it being proved, the second consignees might be ordained to deliver the wheat to the petitioner.

The Court considered the application as incompetent. When, as in the case of the creditors of Kemp\*, subjects have once been in the possession of a factor appointed by the Court, an order for restitution may, on cause shown, be summarily granted in favour of the rightful owner. But this was here impracticable, as the wheat still remained in the custody of a third party, who could not be brought into Court, without the usual forms and *induciæ* of citation.

"The Lords refused the petition."

For the petitioner, Dean of Faculty.

C.

Fol. Dic. v. 4. p. 310. Fac. Coll. No. 280. p. 431.

\* No. 47. p. 4947.