

## S E C T. IV.

## English Commission of Bankrupt.

1747. November 13.

OGILVIE *against* The other CREDITORS of ABERDEIN.

## No 86.

An arrester in Scotland preferred to the commissioners of bankrupt.

JOHN ABERDEIN a Scotsman, residing in England, became bankrupt, and having a commission of bankruptcy awarded against him, complied with the terms thereof. Thomas Ogilvie, one of his creditors in a debt contracted in England, entered his claim before the commissioners of bankruptcy, which was refused in respect of an arrestment he had laid on the bankrupt's effects in Scotland. Thereafter Ogilvie pursued a furthcoming on this arrestment, wherein compearance was made for the assignees of the commissioners of bankruptcy in England, who craved to be preferred, in respect the common debtor resided in England, and became bankrupt there, and as *mobilis sequuntur personam*, the preference ought to be judged by the law of England, by which all arrestments fall by the commission of bankruptcy.

On the LORD ELCHIES's report for advice, the LORDS were of opinion, ' That moveables in Scotland could only be attached by diligence issuing out of the courts of Scotland, and that therefore the preference could be judged only according to the law of Scotland ; and preferred the arrestment.

*Fol. Dic. v. 3. p. 226. Kilkerran, No 4. p. 206.*

1755. January 31.

ASSIGNEES, under the Commission of Bankrupt of CAPTAIN WILSON, competing with the CAPTAIN'S CREDITORS ARRESTERS.

## No 87.

Assignees under a commission of bankrupt in England, preferred to arresters in Scotland, on debts contracted in England, and payable there.

CAPTAIN WILSON of London, having, in February 1751, stopped payment, a commission of bankruptcy was issued against him in November following ; and, in March 1752, the bankrupt's effects were conveyed to Bradshaw and Ross, chosen assignees by the creditors. Immediately upon Captain Wilson's bankruptcy, Adam Fairholm, and others of his creditors in Scotland, used arrestments in the hands of sundry persons debtors to Captain Wilson, and raised furthcomings. The arresters brought processes of multiplepoinding, in which the assignees to Wilson's bankruptcy appeared for their interest, and insisted

for preference, as having the only completed right to the subjects in competition. It was *objected* by the arresters, That if the assignees have any right, it is by the authority of an English statute, which having no effect *extra territorium*, cannot entitle them to compete with the arresters in the courts of Scotland, or with regard to subjects locally in Scotland. —It was *answered* for the assignees, That their right is not solely founded upon the statute, but also upon the consent of the bankrupt, who ought to grant the assignment in favour of his creditors; and in law is held as the granter, if he unjustly with-hold his consent. Such an assignment, therefore, which is good *jure gentium*, ought to be effectual all over the world. At the same time, this judicial assignment, with regard to debts at least, must even in Scotland be considered as a complete *cessio in jure*; because here, as in a decret of adjudication, the solemnity and publication of the deed may well stand in place of an intimation.

‘ THE LORDS preferred the assignees, under the commission of bankruptcy, to the arresters.’

In this case, the preference awarded to the assignees was certainly well founded, upon the real or supposed deed of the bankrupt, conveying his effects for behoof of his creditors. But let us suppose that a decret of furthcoming had been obtained before the bankruptcy, or even after the bankruptcy, before the effects were vested in the assignees, I see no ground for preferring the assignees in this case; notwithstanding that by the English statutes of bankruptcy, all securities granted to creditors, or obtained by them in course of law, are cut down, and all the creditors, real and personal, put upon an equal footing. This retrospect being merely statutory, could not be pleaded in Scotland to void any preference obtained there.

It was pleaded for the arresters against the judicial assignees, that a guardian to a lunatic named by the Chancellor of England, has no title to sue the lunatic's debtors in Scotland; because the powers of the guardian are circumscribed to England. But that case differs from the present; for though the Chancellor's powers are confined to England, a voluntary deed granted any where is effectual every where; and an assignment granted in consequence of bankruptcy, is in effect a voluntary assignment, which I prove thus: A judicial assignment, in favour of a bankrupt's creditors, is in itself a rational deed *jure gentium*. It is for the most part granted with consent of the bankrupt himself; his concurrence is required and expected; upon which he is entitled to certain privileges. And as it is his duty to co-operate with the judge, his creditors must not suffer by his obstinacy. Though he forbears to consent, he is justly held as consenting. See No 27. p. 2778.

*Fol. Dic. v. 3. p. 226. Sel. Dec. No 81. p. 106.*

No 87.

\* \* \* The same case is reported in the Faculty Collection :

CAPTAIN ALEXANDER WILSON of London, banker, was a native of Scotland, but had fixed his residence in England. On the 15th of February 1751, he stopt payment ; on the 24th November 1751, a commission of bankruptcy was issued against him ; and on the 24th of February 1752, he was found to have been a bankrupt from the 15th of February 1751. Bradshaw and Ross were chosen assignees under the commission of bankruptcy, and the whole effects of the bankrupt were conveyed to them.

In February 1751, but posterior to the 15th of that month, Fairholme and others, creditors of Wilson, raised horning on their grounds of debts, and used arrestments in the hands of certain debtors of Wilson ; the debtors were either officers in the army, not natives of Scotland, but on duty in Scotland, or natives of Scotland then residing there, or natives of Scotland having no residence there. Against the last, arrestment was used at the market-cross of Edinburgh and pier and shore of Leith.

The debts due by the arresters were all moveable debts, consisting of bonds granted and made payable in England.

Fairholme and the other arresters insisted in actions of furthcoming against the arrestees ; appearance was made for the Assignees under the commission of bankruptcy, and a competition ensued between them and the arresters.

*Pleaded* for the Assignees under the commission ; The *lex loci contractus* must determine the constitution, transference, and defeasance of contracts ; the debts in question were contracted in England ; the bonds for them were taken in the English form, made payable in England, where also the creditors resided ; the debts are therefore to be considered in every view as English debts. As such, they were, from and after the 15th of February 1751, fully vested in the legal assignees under the commission of bankruptcy, and could not be affected by any posterior diligence used against the bankrupt. See act. *imo* James I. c. 15. § 13. ; and the case Philips *versus* Thomson, Levinz's Reports, part 3. p. 191. ; and the case Kidwell *versus* Player, Salkeld's Reports, v. 1. p. 111. ; from all which it follows, that the legal assignees must be preferred.

*Pleaded* for the Arresters ; The solemnities requisite in a contract may be regulated by the *lex loci contractus* ; but the execution of legal diligence against the debtor, on such contract, must be regulated by the law of that country to whose jurisdiction the debtor is subject, and within which the diligence is used.

The commission of bankruptcy supersedes all diligence which might have issued from the courts in England, against the effects or debtors of the bankrupt, within the jurisdiction of these courts ; but it is incongruous to suppose, that the operation of this commission can extend itself to effects or debtors of the bankrupt within the jurisdiction of another country. The jurisdiction of the

courts in Scotland extended both to Captain Wilson and to the bonds arrested : As, therefore, the arresters have used complete diligence, according to the law of Scotland, prior to the assignation, they must be preferred to the assignees.

No 87.

' THE LORDS preferred the assignees under the commission of bankruptcy, with respect to the English debts, that is, the debts contracted after the English form, or payable in England.'

Reporter, *Justice-Clerk.* For the Legal Assignees, *J. Craigie, A. Pringle, & Advocatus.*  
Alt. *Miller & Ferguson.*

*N. B.* Other questions occurred in this case, viz. *1mo*, As to the effect of an arrestment of English debts, used in the hands of persons not natives of Scotland, but casually residing there; *2do*, As to the effect of arrestments used at the market-cross of Edinburgh, and pier and shore of Leith, against natives of Scotland residing in other countries; *3tio*, Whether a person born in Scotland, but who had fixed his residence in another country, remained perpetually liable to the jurisdiction of the courts in Scotland *ratione fori originis*? But the court seemed to wave the consideration of these questions, and to give judgment on this ground, that the bonds arrested were to be considered as English debts.

D.

*Fac. Col. No 133. p. 200.*

1759. March 6.

JAMES CRAWFORD, and Others, Creditors of ROBERT and JOHN DUNLOPS,  
*against* JOHN BROWN and JAMES CRAW, Legal Assignees under the Commission of Bankrupt.

ROBERT and John Dunlops carried on a company trade at Rotterdam. In June 1755 John Dunlop went over to London; and soon after, in July 1755, his partner stopped payment. A petition was given in to the Lord Chancellor on the 2d August 1755, for a commission of bankruptcy; which was immediately issued; and, upon the examination of two witnesses, who deponed to an act of bankruptcy on the 14th July 1755, the commissioners found, that John Dunlop, before the date and issuing forth of the commission, did become bankrupt. On the 23d August, they appointed John Brown and James Craw assignees to the bankrupt's effects.

James Crawford and others, creditors of the company, used arrestments in the hands of several persons who were debtors to the company, in Edinburgh, Glasgow, Perth, and Dundee, posterior to the 14th July 1755, but before the application for a commission of bankruptcy.

The assignees under the commission of bankruptcy brought an action against the company's debtors. Appearance was made for the arresters; and a competition ensued between them and the assignees.

No 88.

In a competition between arresters of debts due in Scotland to a bankrupt, and legal assignees under a commission of bankruptcy, the arresters were preferred, the arrestments having been used prior to the commission of bankruptcy, though posterior to the first act of bankruptcy.