

No 81. the bankrupt, and which cannot be pleaded by his creditors or any other person. See 2. Vern. 696. 697.; Trin. 1715. Goodwin's case : 2. Viner, 131.

'THE LORDS found, That the proceedings, under the commission of bankruptcy, did not bar the creditors of the bankrupts, whether their debts were contracted in England or Scotland, from affecting their debtors effects situated in Scotland, or debts due to them by persons residing in Scotland, by legal diligence : And therefore found, that such of the arresters, against whose arrestments no objections are made, are preferable to the assignees under the commission of bankruptcy.' (See FOREIGN.) See note under the next case.

Reporter, *Edgfield.* For the assignees, *Lockhart.* For the arresters, *Fergusson, Montgomery, John Campbell, jun. Pat. Home.* Clerk, —.

G. Fergusson. *Fol. Dic. v. 3. p. 41.* *Fac. Col. No 54. p. 286.*

1768. July 14.

PEWTRESS and ROBERTS, against THOROLD, and other Assignees, under the commission of bankruptcy against THOMSON and TABOR.

No 82.

This is a sequel of the above action ; where even arrestments, laid on after the above competition commenced, were preferred to the right of the assignees.

UPON the 2d of November 1758, a commission of bankruptcy was issued against Thomson and Tabor, merchants in London, and their bankruptcy certified to have commenced upon the day preceding.

Thomson and Tabor had drawn bills upon many of their debtors in this country, payable to William Cuming their agent here ; and, recently before their bankruptcy, they drew upon Mr Cuming in favour of some of their creditors, and particularly of Pewtress and Roberts of Lombard-street, bankers.

These bills were protested against Cuming for not-acceptance, whereupon arrestments were used, and a competition ensued between the arresters and the English assignees, (See Thorold, and other Assignees of Thomson and Tabor, *contra* Forrest and Sinclair, No 81. p. 753.) in which the LORDS found, ' That the assignees, under the commission of bankruptcy, have sufficient title to compare and compete ; but that such of the creditors-arresters against whose diligence no objection is made, are preferable to the assignees under the commission ; but sustained the objections made to the arrestments used in the hands of William Cuming.'

During the dependence of this competition, Pewtress and Roberts laid second arrestments in Cuming's hands, and a new competition ensued.

Pleaded for Pewtress and Roberts : These bills, drawn in their favour upon William Cuming, were equivalent to assignations of the effects in his hands ; and the protests for not-acceptance are equivalent to intimation. The bills payable to Cuming were effects in his hands, attachable by arrestment, as was found in a similar case, 13th February 1740, *Innes contra* Creditors of Gordon ; (No 51. p. 715.) at least, they were capable of being assigned ; and the draughts upon Cuming, being equal to assignations, must be preferable to the after diligence of other creditors, and, *a fortiori*, to the claim of the assignees, who can have no better right than the bankrupts themselves would have had.

Nor is there any *res judicata* in this case: Whatever may have been found in competition with other creditors, cannot affect such as were no parties to that competition. Indeed, all that has been found is, that the assignees are entitled to compare and compete; in other words, that, though deriving their powers from judicial proceedings in a foreign country, they have *personam standi* here, and may operate preference by diligence, or object to the diligence of other creditors; but they cannot be considered in a more favourable view than trustees for behoof of creditors, who, though named by the bankrupt, with the concurrence of the bulk of his creditors, are in no shape preferable to such as refuse to accede, unless in so far as they have acquired a preference by diligence.

Answered: Though a bill protested for not-acceptance may be considered in the light of an intimated assignation, where the person drawn upon has effects of the drawer in his hands, the case is different where he has no more than bills. And it was upon that ground that the arrestments in Cuming's hands were found to be ineffectual. A writing, in the form of a bill, requiring Cuming to indorse those bills to the holder, would have been good for nothing; and the virtual assignation, supposed to be implied in the drafts in favour of Pewtreffs and Roberts, can have no stronger effect.

2do, The assignees, by judgment of the Court, have been found entitled to compete; and, though they have been postponed to those creditors who had used valid arrestments prior to the competition, they are preferable to arrestments executed after it. The sums *in medio* became litigious by that competition, which must, at any rate, be considered as a sufficient intimation of the assignment in their favour.

'THE LORDS preferred Messrs Pewtreffs and Roberts to the sums in William Cuming's hands, to the extent of the draughts in their hands.' (See FOREIGN.)*

For the Assignees, *Macqueen, Blair.*
G. Ferguson.

Att. Solicitor *Dundas, &c.*

Reporter, *Pitfour.*

Fal. Dic. v. 3. p. 41. Fac. Col. No 72. p. 315.

1775. February 21.

CROSS and BOGLE, against JOHN MOIR, Factor for the Trustee and Creditors of DAVID LOCH.

ARTHUR MILLER, merchant in Edinburgh, having become bankrupt, and applied for the benefit of the *Cessio*, a sequestration was awarded upon an application of his creditors, and, among others, David Loch, merchant in Leith; and

* Although not particularly mentioned in this report, or in No 81.; the first arrestment used in Cuming's hands had been found ineffectual. Bills blank indorsed lodged with him, and bills drawn payable to him, in order to recover payment, were arrested in his hands, before he had obtained payment. This found inept; he being accounted a mere factor or agent. The arrestment used by Pewtreffs and Roberts, was *after* Cuming had recovered payment; which was sustained. In a case from Bremen, in Summer Session 1776, (see FOREIGN.) the Court disapproved of the above preference given to the prejudice of assignees of the bankrupt estate of a foreigner, and departed from the principle on which that preference is founded.

No 82.

No 83.

Arrestment used in the hands of a judicial factor, appointed in conse-