

No. 2. The Court, upon advising a petition and answers, adhered to the Lord Ordinary's interlocutor; and afterward another petition and answers having been given in, and after a hearing in presence upon the effect of the accession, the Court adhered to their former judgment.

Lord Ordinary, *Monboddo.* Act. *Wright, Henry Erskine* Alt. *Craig.*

J. W.

1776. August 7. BENJAMIN GLOVER and Others, against ROBERT VASIE.

No. 3.

Whether assignees under an English commission of bankruptcy have a right of action entitling them to recover the bankrupt's effects in Scotland, and to compete for them? and whether other creditors of the bankrupt are barred from competing with the assignees, or claiming a preference on separate diligence used by themselves against the bankrupt's effects?

IN the year 1770, John Bedford and Son, merchants in Leeds, became bankrupt. At this period, some effects belonging to them were situate in Scotland; and Robert Vasie, one of their creditors, having arrested in the hands of one of their debtors in Scotland, was preferred by the Lord Ordinary in a process of furthcoming *secundo loco* to the sums in the hands of the arrestees, another creditor having previously used arrestments.

Afterward the assignees under a commission of bankruptcy awarded in England against Bedford and Son, having objected to Vasie's preference, both that as being a native of England he had no title to compete with them, and that he had received a dividend under the commission of bankruptcy;—it was on his part pleaded:

There are two questions here to be considered; *first*, Whether assignees under a commission of bankruptcy have a right of action entitling them to recover the bankrupt's effects in Scotland, and to compete for the same? and, *secondly*, Whether, this being granted, an Englishman claiming under an English debt, by having drawn a dividend of the bankrupt's effects on account of said debt under the said commission, be barred from competing with the assignees, or claiming preference under his arrestment?

On the first point it was argued, that a commission of bankruptcy is entirely the offspring of the statute law of England, and is even there considered as an innovation on the common law of the land, of which the effect is not to be extended by any construction or implication. Law for and against Bankrupts, page 59, 71, 96. Blackstone, vol. 2. p. 479. It cannot accordingly have any operation *extra territorium statuentis*. Voet. De Statutis, par. 11. Principles of Equity, p. 287. Erskine, B. 3. T. 2. § 42. Nay, besides the authority of the general principles of law, the operations of a commission of bankruptcy are limited, by the very statutes to which it owes its existence, to the territories of England. Law for and against Bankrupts, p. 52. Atkyn's Reports, p. 87. A commission of bankruptcy, besides, transfers the heritable as well as the moveable estate of the bankrupt, and even transfers an entailed estate. Bacon's Abridgment, vol. 1. p. 258. Blackstone, vol. 2. p. 485, 486. And the

See No. 91. p. 4562.

assignees under a commission of bankruptcy, be their conduct what it may, are in no respect amenable to the courts of this country. Such being the essential circumstances belonging to a commission of bankruptcy, it is not easy to discover upon what principles of law or expediency the assignees under it can have a right of action entitling them to recover the bankrupt's effects in Scotland, and to compete for the same. The Chancellor of England, from whom the commission flows, cannot confer such right upon them. The bankrupt statutes are not obligatory in this country; and the Courts of Scotland cannot, from any considerations of equity or expediency, give effect to such a commission here, when it is in the strictest sense of that word merely a *legal* remedy even in England.

If an English commission of bankruptcy transfers to the assignees, not only the personal estate of the bankrupt, but all his heritage, even an entailed estate, it is impossible, from its very nature, that it can have any operation in Scotland. Heritage with us cannot be transferred in that way, and even our late bankrupt law made its effects to be extended only to the personal estate of the debtor. But were an English commission of bankruptcy to have effect in this country, it would abolish the important distinction in our law betwixt heritage and moveables: The assignees must have an equal title to compare and compete with regard to the one as with regard to the other; but thereby the whole law of Scotland would be overthrown by an English statute.

This doctrine of assignees under a commission of bankruptcy having right of action in this country, as it is not founded on the principles of law, so it is not supported by the decisions of this Court. The question has frequently occurred, and it has been so found by the Court, 18th Novem. 1747, Ogilvie against Aberdeen's Creditors, No. 86. p. 4556; 6th March 1759, James Crawford and Others against the Assignees of Robert and John Dunlops, No. 88. p. 4559; 30th June 1748, Fraser against Lookup, No. 101. p. 4590. There are, it is true, some decisions prior to those mentioned, and a posterior one, Thomson, No. 89. p. 4561. which stand in the way of the doctrine maintained; but from this circumstance, nothing further can appear, than that the decisions of the Court have not been in every respect uniform; while nothing but an uniform train of decisions, (and it is this uniform train only which can constitute any consuetudinary law) could establish any point adverse to the great legal principles which shew that a commission of bankruptcy can have no operation in Scotland.

Considerations of equity and expediency are equally with this doctrine. If a title of action under such a commission be sustained, it will be no difficult matter to give a preference to English creditors, fraudulently combining with a Scotch bankrupt, over his creditors in this country. A Scotsman possessed of large property here, and who has only occasionally traded to England, yet so as to entitle a commission to be taken out against him, by giving trust bonds

No. 3. or bills to a confident person by whom the commission is taken out, and on whose application assignees are appointed, may, by their instantly compearing and competing here, get the whole of his funds in Scotland transferred into their hands, and thus disappoint his Scotch creditors of payment. The assignees, also, being without the jurisdiction of the courts in this country, no wrongs committed by them can be redressed by any court here, and the whole power is thus thrown into their hands without any authority existing to check or controul it.

On the second point, it was argued, That in England, where the commission is in full force, created and guarded by the sanction of positive statutes, a creditor coming in under the commission cannot act in opposition to it, and at the same time claim any benefit under it. He cannot there take separate measures. But the commission covers none of the effects in Scotland, and it secures there no equal distribution. Preferences depend entirely upon the activity of creditors. The general rule of our law is, that *vigilantibus jura subveniunt*. A creditor in England, by acceding to the commission of bankruptcy, has made his election, and can pursue no separate measures as to the common debtor's funds there. But he has made no election with regard to the funds in Scotland; and so far as that law prefers him according to the priority of his diligence, he is entitled to take such steps as it allows, and to reap the advantages which flow from them.

Pleaded for the assignees :

It is not meant to maintain so absurd a doctrine as that the laws of England are obligatory upon the Courts of this country *vi statuti*. Strictly speaking, it is in the power of the Judges of one independent country to refuse to pay any sort of regard to the laws of another. But though the Judges of one country cannot be compelled to give effect to the enactments of another Legislature, yet they have *ex comitate* been in the practice of giving effect to foreign statutes. Voet, De Statutis, No. 12. *Bona immobilia* are necessarily an exception to this rule; but with regard to moveables the rule is different. The same doctrine is laid down by Sande, Decisiones Frisicæ, C. 4. T. 8. § 7. and by Simon Van Leeuwen Censura Forensis, P. 1. L. 3. No. 3. The decisions of this Court support the same principles; and an obligation formal according to the law of the place where it was granted, will receive execution in this country, though destitute of solemnities which are necessary in deeds granted here; 15th November 1626, Galbraith against Cunningham, No. 2. p. 4430; 15th February 1630, Harper against Jaffrey, No. 3. p. 4431; 5th July 1673, Master of Salton against Lord Salton, No. 4. p. 4431. The same thing has been found with regard to judicial deeds and those executed by a private party; 12th Nov. 1624, Naismith against Naismith, No. 20. p. 4455. 20th December 1759, Clerk against Brebner, No. 30. p. 4471. No reason can be assigned why a similar effect should not be given to English commissions of bankruptcy. Principles of Equity, p. 368. In the case of Blackwood

against Cathcart, No. 98. p. 4579. the Court of Session interposed its authority to enforce the surrender by the bankrupt. And surely if this was done, there can be no question that the assignees under the commission of bankruptcy have *personas standi* in this country, and are entitled to pursue and do diligence here. Even in the case of Ogilvie mentioned for the defender, though the arresters were preferred, yet it does not appear that the title of the assignees was rejected. Their title was equally sustained in the case of Bradshaw and Ross against Fairholm, 31st January 1755, No. 87. p. 4556. There are likewise several other decisions; 20th June 1746, Marshall against Yeaman and Spence, No. 95. p. 4568; 4th November 1746, Christie against Straiton, No. 96. p. 4569.; July 1, 1762, Galbraith against Creditors of Galbraith, No. 97. p. 4574. In all these cases, the defence founded upon the statutory discharge established in England was sustained against prior debts; and in the latest case of all, Thomson and Tabor, 6th March 1767, No. 81. p. 753. the assignees under the commission were found to have a sufficient title to compare and compete in the action. (See No. 1. *supra*)

A contrary doctrine would be exceedingly hurtful to the mutual intercourse between the inhabitants of the two countries. If the English assignees have no title to pursue action here, a factor under a sequestration will have as little title in England. A person may become bankrupt here with funds wholly or principally consisting of debts due to him in England; and in this case, if the factor under the sequestration has no title to pursue, every individual creditor would be then under the necessity of commencing a separate suit, and the whole end and purpose of our bankrupt law be thus defeated. Both therefore by the principles of law, and on the grounds of expediency, there cannot be a doubt that the assignees have a right of action in this country; and the only question is, whether they are entitled to be preferred to the defender; who after having drawn his dividend under the commission for his English funds, has chosen to pursue separate measures for attaching and securing for himself the effects of the common debtors in Scotland.

It is an established point in the law of England, that a creditor who is come in under a commission of bankruptcy is held to have renounced his legal remedies, and is debarred from proceeding at law for the same debt. Burns' Justice of the Peace, Tit. Bankrupt, § 8. Abridgement, cases in Equity, 124, 126, 128. 1 Atk. 152, 154. If on the other hand a creditor recover any part of his debt independently of the commission, either by suing the bankrupt at law, or in any other manner, he is not allowed to draw a dividend under the commission. Now if the hands of creditors are thus tied up in England, there seems to be no reason why they should be at greater freedom in Scotland; or that a creditor who has acceded to the commission in England should be at liberty to follow separate measures elsewhere. This is a point indeed which has never yet been expressly decided in this country. But in all the competitions which have formerly been agitated between legal assignees and arresters,

No. 3. it has been considered as a point of great consequence to inquire whether the arresting creditors had appeared before the commissioners of bankruptcy and claimed upon their debts. When a question is to be judged of between Englishmen, the regulations established in that country relating to it, must be inquired into, and made the rule of judgment, so as to prevent any party from claiming in direct contradiction to them. The assignees are trustees for the creditors to all intents and purposes, in the same manner as if they had been chosen by their private act. No creditor is compelled to accede to the commission, but by acceding to it the assignees become his trustees; and it is unnecessary with regard to effects 'situate under another jurisdiction, to inquire whether *they* are to be considered as vested in the assignees by the act of the law. Acceding creditors, or those creditors who have received a dividend under the commission, are barred *personali exceptione* from competing with the assignees; and every right acquired by them, and every diligence used, vests in the assignees for behoof of the whole creditors, or, which is the same thing, the arresting creditors are bound to convey such diligence in favour of the assignees. 1st Atk. 104. The case of Christie, No. 96. p. 4569. and that of Cole, No. 34. p. 4820. are favourable to the same doctrine. In short, if the right of action be sustained in this case, it is a necessary consequence that the defender must be precluded from interrupting the proceedings of his own trustees, from whom he has already received payment of a considerable part of his debt, which, by the law of England, he could have received only upon the ground that he had no security for his debt, or having delivered up that security for behoof of himself and the creditors at large.

The Court pronounced the following interlocutor: "On report of Lord Hailes, and having advised the informations given in *hinc inde*, the Lords find, that Messrs. Glover, &c. assignees under the commission of bankruptcy awarded against Bedford and Son, have a right of action entitling them to recover the bankrupt's effects in Scotland, and to compete for the same; and further find, that Robert Vasie of Hexham, an Englishman, claiming under an English debt, and having already drawn a dividend of the bankrupt's effects on account of said debt, under the said commission, is barred from competing with the assignees, or claiming preference on his arrestments produced; and remit to the Ordinary to proceed accordingly, and further to do as he shall see cause."

Upon advising a petition and answers, the Court adhered to the first point of the interlocutor, by a judgment of this date (14th June 1776,) and afterward by another interlocutor adhered to the second point.

Lord Reporter, *Hailes.*

For the Assignees, *Geo. Ferguson.*

Alt. *R. Sinclair.*

J. W.

* * See Strother against Read, 1st July 1803, APPENDIX, PART I. *voce*
FORUM COMPETENS, No. 4.