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the effects of the defunct, appears foreign to the purpose, since it cannot shew that such a decree in favour of an assignee would not have divested the cedent. Of as little consequence is it, that a decree following on English letters of administration would not confer a preference over a creditor confirming, any more than a decree on a Scotch licence to pursue. In that case the decree could not be extracted without confirmation, which is necessary to take the effects out of the *hereditas jacens* of the defunct. With respect to the supposed necessity of arrestment and forthcoming, for vesting the right under the assignment; that diligence, it is plain, could only have proceeded on the footing of the right to the debt remaining in the bankrupt, which is absurd, seeing it has been transferred to the assignee.

The Lord Ordinary preferred Mr Scott, the assignee under the commission of bankrupt.

Mr Leslie reclaimed to the Court against this interlocutor, and his petition was followed with answers; after which, a hearing in presence was appointed. And,

Having resumed the consideration of the petition, with the answers, and having heard parties procurators thereon, the LORDS adhered to the interlocutor of the Lord Ordinary.

A petition reclaiming against this judgment having been advised, with answers, was refused.

Lord Ordinary, *Eskgrove.*

Alt. Lord Advocate, *Macleod-Bannatyne.*

For Mr Scott, *Blair, Maconochie.*

Clerk, *Home.*

S.

*Fol. Dic. v. 3. p. 227. Fac. Col. No 8. p. 14.*

1798. July 3.

DUNCAN DAVIDSON and CHARLES GRAHAM against JOHN FRASER and his ATTORNIES.

No 93.

A person whose estate was under a commission of bankrupt in England, found entitled to take the necessary steps in his own name, for securing and recovering a debt due to him in Scotland, al-

A COMMISSION of bankrupt was issued in 1786, against John Fraser, merchant in London, and the commissioners afterwards transferred his estate to assignees, in the usual manner.

At the time of his bankruptcy, he held a bond in the English form, granted by George Gun Munro of London, which was marked by the commissioners, as having been exhibited to them under the commission of bankruptcy.

Mr Munro afterwards settled in Scotland, where he had a small landed estate. In 1792, Mr Fraser, while the commission of bankrupt was still in force, obtained, in his own name, a decree of the Court of Session against Mr Munro; and, in 1794, Mr Fraser and his attornies led an adjudication of Mr Munro's heritable property.

The deed by Mr Fraser, appointing attornies in Scotland, authorised them to recover the debt due by Mr Munro, but under a declaration, ' that they were to account for the same to the assignees under a commission of bankrupt issued in England against the granter of the said factory.'

In a ranking and sale of Mr Munro's property, which was afterwards brought, Mr Fraser and his attornies claimed on the bond and adjudication; to which Duncan Davidson and Charles Graham, trust-disponees for another of Mr Munro's creditors,

*Objected*; The diligence done by Mr Fraser in his own name is inept, being obtained by one not in right of the debt. It is due by a bond in the English form, the granter of which, at its date, was domiciled in England. Consequently, every question with regard to its constitution, transmission or extinction, must be determined by the law of England; York-buildings Company against Cheswell, No 74. p. 4528; Rochead against Scott, No 94. p. 4566; Christie against Straiton, No 96. p. 4569; Marshall against Yeaman, No 95. p. 4568; Creditors of Galbreath against Galbreath, No 97. p. 4574; Blackwood against Cathcart, No 98. p. 4579; Watson against Renton, No 100. p. 4582. Now, by that law, a commission of bankrupt completely denudes the bankrupt of his whole property, which comes to be vested absolutely in the assignees chosen by his creditors, by virtue of an assignment from the commissioners; and the assignees alone can thereafter secure and recover it; 13th Eliz. c. 67. § 2; 1 Jac. I. c. 15. § 13; 1 Atkyns, 253; 12 Mod. 324; Blackstone, vol. ii. p. 485; 1 Comyns, Dig. 526; Cro. Car. 187. 209; Cro. Jac. 105; Lut. 274; 1 Saund. 239; 3 Salk. 59; 1 Salk. 108; Id. 3; 1 Bur. 20; 2 Vent. 63; 1 Salk. 3; Wilson, 307; Vern. 163; 1 Atk. 97; Cowper, 5. 70; Lutw. 701; 1 Seving, 17; 2 Tidd's Practice of the King's Bench, 564. This holds, even although the property should be situated in a foreign country; 1 Cooke's Bankrupt Laws, 370; Clive v. Mills at the Cockpit, 27th July 1764; Douglas, 161. Accordingly, their title to sue in Scotland has been uniformly recognised; Glover against Vassie, No 91. p. 4562; Scott against Leslie, No 92. p. 4562.

It is no doubt true, that, in the case of a Scotch debt, if, before payment to the assignees, a creditor of the bankrupt shall attach it, agreeably to the forms of execution in this country, he will be preferred to them; because the English statutes of bankruptcy can have no further force here than to put the assignees in the place of the bankrupt. But in the case of an English debt, like that in question, the right of the assignees would be preferred even to the diligence of the bankrupt's creditors; Assignees of Wilson against his Creditors, No 87. p. 4556. And, at any rate, it does not follow, that, because competitions may arise between the assignees and the creditors of the bankrupt, with regard to his foreign property, he can, in his own name, take any step for its recovery.

*Answered*; The assignment, under a commission of bankrupt in England, does not, *ipso jure*, divest a person of his property in Scotland; Ogilvie against

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though constituted by a bond in the English form, his object having been to make it over, when recovered, to his creditors.

No 93. Creditors of Aberdeen, No 86. p. 4556; Thorold against Forrest and Sinclair, No 89. p. 4561. The diligence, therefore, was competent; and, from the terms of the power of attorney granted by Mr Fraser, clearly intended for behoof of his creditors.

THE LORD ORDINARY 'sustained the objections to the interest produced for John Fraser and his factors; and found, that it must be struck out of the ranking.'

On advising a reclaiming petition for Mr Fraser, with answers, it was

*Observed* on the Bench; It is not very long since assignees under an English commission of bankruptcy were allowed to sue or insist in diligence in Scotland at all; and it is still clear law, that the creditors of the bankrupt may obtain a preference over them, by arresting or adjudging, which proves, that in questions occurring here, a radical right is held to remain with the bankrupt. Besides, as it appears that Mr Fraser was acting for behoof of his creditors, his assignees and he should be considered as the same party. And, at any rate, the objection, supposing it well founded, is *jus tertii* to Mr Munro's other creditors.

THE LORDS altered the interlocutor, and repelled the objection.

Lord Ordinary, *Ankerville*.  
Alt. *Ja. Oswald*.

For Objectors, *H. Erskine, C. Ross*.  
Clerk, *Menzies*.

R. D.

*Fac. Col. No 86. p. 197.*

*See APPENDIX.*

## S E C T. V.

### Effect of the Lord Chancellor's Certificate of Conformity.

1724. June 30.

SIR JAMES ROCHEAD *against* MR GEORGE SCOT Surveyor at Greenock.

No 94.  
A Scotsman in London became bankrupt, and obtained the usual certificate. An action was brought a-

IN anno 1704, Mr Scot, then merchant in London, became bound in a bond after the English form, to pay to Sir James Rochead, then also residing there, the sum of L. 600 Sterling.

In the year 1706, Mr Scot's affairs having gone into disorder, a commission of bankruptcy was awarded against him, and having conformed himself in all points to the act of Parliament made in England *anno quarto et quinto Annæ*, entituled, 'An act to prevent frauds frequently committed by bankrupts,' he ob-