No. 3. Scotland, but had married an English-woman in England, and never afterward returned to Scotland.

In 1779, he was married at Plymouth to Maria Morcombe, an English-woman.

After living together many years, it was alleged by Maria Morcombe, that her husband had deserted her, and lived in adultery with another woman; on which account, she brought a process of divorce against him before the Commissaries of Edinburgh. To this action he was cited edictally at the pier and shore of Leith, and a certificate by a notary was produced, that a copy of the summons had been delivered to him at Plymouth, where he retained his situation in the Myrmidon, without having ever been in Scotland since his first appointment in the Navy.

The defender declined the jurisdiction of the Commissaries, who pronounced the following judgment: "Considering that the courts of one country ought "not to be converted into engines for either eluding the laws of another, or "determining matters foreign to their territory, and that decreets of divorce "pronounced by incompetent courts, cannot effectually and securely either "loose the bonds, or dissolve the marriages, or fix the states of the parties "thereto, but might become causes or snares to involve other persons, as well "as the parties and their children, in deep distress; and observing it to be ad-"mitted in the libel, that the marriage of the pursuer and defender was cele-"brated in England; that they resided constantly in England since their "marriage; and even that the crime on which divorce is here demanded to be "decreed, was committed in England; therefore find that the action is not "competent in Scotland, and ought not to have been brought before this court; "and dismiss the process in all its parts, for want of jurisdiction and of power."

The Lord Ordinary having refused a bill of advocation, the pursuer, in a reclaiming petition,

Pleaded: In a *quæstio status*, like the present, the defender would be amenable to the courts of Scotland even *ratione originis*. But in truth, having been constantly in the navy service ever since he left Scotland, he has acquired no other *forum*, and consequently the country in which he was born and educated is still his proper domicil; 11th June 1745, Dodds, No. 14. p. 4793; 8th March 1796, Pirie, No. 104. p. 4594; 13th June 1800, French, No. 1. *supra*.

The Lords unanimously refused the petition, without answers.

Lord Ordinary, *Armadale*. For Petitioner, *R. H. Cay*.

R. D. *Fac. Coll. No.* 242. *p.* 545.

1803. *July* 1. STROTHER *against* READ and Others.

No. 4. Assignees under an English com-

A COMPETITION having arisen between Richard Strother of Killinghall near Kneasborough, a creditor of Edwards and Duplex, merchants in Leeds,

No. 4. mission of bankruptcy preferred to an arrester, in a competition respecting the effects of an Englishman situate in Scotland.

and Thomas Read, drysalter in Leeds, and others, assignees under a commission of bankruptcy which had been issued against them, with respect to certain effects of the bankrupts in the hands of Joseph Cauthra, merchant in Glasgow, a process of multiplepoinding was brought to ascertain the respective claims of the competing parties.

The interest produced for Strother, consisted of letters of *arrestment jurisdictionis fundandæ causâ*, (4th July 1799), raised by him against Edwards and Duplex, and an arrestment used two days afterward in the hands of Cauthra of all the goods and sums of money in his possession belonging to these persons. Upon this arrestment (23d July) he raised a summons of constitution before the Court of Session, which was (27th July) executed against the debtors as forth of Scotland; and having again (2d August) arrested upon the dependence in the hands of Cauthra, he (2d December) obtained a decree in terms of the libel.

The interest produced for Read and the other assignees, consisted of a commission of bankruptcy under the Great Seal, (30th May 1799), against Edwards and Duplex; and an assignment (29th June) granted by the commissioners of bankruptcy in their favour. But although the assignees had never in that capacity used any diligence in Scotland, they likewise rested their preference upon certain steps of diligence followed out by Richard Warwick, one of their number, the benefit of which he had communicated to them, for behoof of the creditors. Warwick, as a creditor of Duplex, one of the bankrupts, (25th May 1799), applied to the Sheriff of Lanark, within whose jurisdiction the bankrupt happened to be at the time, for a warrant to imprison him, until he should find caution *de judicio sisti*; and upon making oath, in the usual terms, the Sheriff granted the warrant; upon which deliverance, Warwick (27th May 1799) used arrestments in the hands of Cauthra.

The Lord Ordinary, conceiving the case to be of such general importance that it ought to receive the judgment of the Court, reported the cause.

Counsel were heard in presence.

The assignees pleaded: *Mobilia non habent situm.* They are understood, therefore, to follow the person of the owner. Hence, every deed *inter vivos* transferring moveable property, is sustained, if it be an effectual conveyance where it was executed. Hence, likewise, the succession to moveables *ab intestato* is regulated by the law of the country where the deceased had his domicil, however different it may be from the distribution made by the law of Scotland. According to the same principle, the law of the country where a debtor is rendered bankrupt ought to regulate the distribution of his moveable effects among his creditors.

The effect of an assignation under a commission of bankruptcy is held in England to be equivalent to a voluntary conveyance, by which a bankrupt divests himself of the whole of his property in favour of the assignees, to be distributed by them among his creditors; Blackstone, B. 2. C. 31. § 4; and as

No. 4. there is no doubt that a voluntary conveyance executed by a proprietor in any country, is sufficient to carry a right to his moveable effects all over the world, this deed of assignment, as a presumed voluntary conveyance, transfers to the assignees the whole of the bankupt's moveable effects, wherever they are situate. Such an assignment, therefore, which is not founded upon the statutory law of England merely, but which is a deed just and rational in itself, and which, from the presumed consent of the bankrupt, is a valid conveyance *jure gentium*, must be regarded as a complete divestiture of property; Rocheid against Scott, June 30, 1724, No, 94. p. 4566. Marshall against Yeaman, July 21, 1746 No. 95. p. 4568; Christie against Straitton, November 4, 1746, No. 96. p. 4569. Fairholm against Hamilton, January 31, 1755, No. 87. p. 4556. Galbraith against Galbraith, July 1, 1762, No. 97. p. 4574; Glover against Vassie, August 7, 1776, No. 3. APPENDIX, PART I. *voce* FOREIGN. Watson against Renton, January 21, 1792. No. 100. p. 4582.

This principle has accordingly been recognised in the English courts, with respect to the funds of a bankrupt attached after his bankruptcy by individual creditors, in countries not immediately subject to the jurisdiction of the Court of Chancery; and the creditor who aimed at any such advantage, has been obliged to communicate the benefit of it to the assignees; Sill *versus* Worswick, August 27, 1787; Blackstone's Reports, vol. 1. p. 665. Thus, even although the arresting creditor were to be preferred in this country, he would be obliged by the English courts to communicate any advantage which he might obtain to the assignees, for the benefit of the whole creditors. *Frustrà petis quod mox es restituturus;* nor will the law authorise a circuitous mode of procedure, when a direct course is equally conformable to the purposes of material justice.

But farther; this deed of assignment is to be considered by the law of Scotland to have effect from its date as a complete divestiture of property. For although the general rule with us, is, that an assignation is not complete without intimation, the maxim does not hold universally. It does not hold with respect to legal assignations, which are presumed to be intimated; nor with respect to such assignations as form a part of the *jus gentium commune;* Stair, B. 3. Tit. 1. § 12. This assignment must be held to be a legal assignation by the act of the English law where the bankruptcy took place, and to the jurisdiction of which the competing creditors are subject; and being a legal assignation, intimation is not necessary; although, were it otherwise, the notification in the English Gazette must be held sufficient intimation to creditors who reside in England.

The decisions quoted in support of the preference claimed by the arresting creditor, do not shew that arresters are to be preferred to legal assignees, when the debts upon which their diligence proceeds are contracted in England, when all the creditors have their residence in that country, and when the commission of bankruptcy has not only been issued, but has been followed by a conveyance to the assignees before the date of the arrestments.

No. 4.

As the general object of the bankrupt law is to equalize the payment of creditors, and to prevent undue preferences, the assignees under the commission of bankruptcy, acting for the common interest of the whole creditors, are to be preferred to any individual. The bankrupt law of Scotland does not admit sequestration in the case of persons resident in England. Unless, therefore, the assignees were to be preferred, the only rule of preference in such a case must be, *Prior tempore potior jure*; and the creditor who could contrive to execute the first diligence, would carry off the whole property.

But independent of these general considerations, the assignees are entitled to a preference, upon the ground of prior diligence. The steps taken by Warwick to attach the fund *in medio*, were of a prior date to the diligence used by Strother; and as he has communicated this diligence to the assignees for the benefit of the whole creditors, they are entitled to found their claim of preference upon this special ground, and to plead *separatim*, that even upon the strictest principles of the law of Scotland with respect to diligence, they are to be preferred.

Answered: The claim of the assignees is founded entirely upon the English bankrupt statutes, which have no force *ultra territorium statuentis*. By the law of Scotland, they can have no right whatever to the subjects, having never pursued the necessary measures for making their assignation effectual in this country, and for attaching the property of the bankrupt.

The utmost effect which can be given to an assignation under an English commission of bankruptcy, is to create a *jus ad rem*, giving the assignees a title to pursue and recover the effects of the bankrupt situate in Scotland. These proceedings may give them a right to use diligence, but they do not bar other creditors from taking similar measures. And as the matter in dispute must depend altogether upon the steps taken to attach the effects of the bankrupt in this country, it must be determined according to the rules of preference laid down by the law of Scotland in a competition of legal diligence. To give any farther effect to an English assignment, and to hold that it superseded the effect of diligence altogether, would be virtually to depart from the law of Scotland, to extend the bankrupt law of England to this country.

There is an obvious distinction between a voluntary and a judicial conveyance. The one is founded upon general principles, and the other merely upon municipal regulations. The assignment from the commissioners in this case, cannot be held as equivalent to a voluntary assignation of the proprietor. A deed executed by a man which affects his moveable estate, will indeed be sustained, if it be framed according to the law of the country where it is made, because a person has a right to dispose of his property as he pleases; and the presumption is, that he relied upon the forms of law recognised in the country where the conveyance is executed. But the assignment under the commission of bankruptcy, is strictly local, being exclusively the operation of the law of England. As it is only a judicial conveyance, it has no effect beyond the jurisdic-

No. 4.

tion where it originates; Voet, D. p. 44. § 11.; Rodenbur, C. 3. Tit. 1. § 4.; Kames' Principles of Equity, B. 3. C. 8.

It makes no difference that the arresting creditor happens to be an English subject. The laws of this country are open to all. An English creditor endeavouring to make a just debt effectual, is equally entitled to avail himself of the diligence of our law, as if he were a domiciled Scotsman; and if he proceed in a regular way to constitute his claim, and to attach the funds of his debtor in the way pointed out by law, he is entitled to have his right ascertained, according to the known rules with respect to a competition of diligence, although he himself may be subject to the laws of England.

Now, intimation is held absolutely necessary by the law of Scotland to make an assignation complete; nor can property be transferred without intimation or delivery. It is very true, that legal assignations do not require intimation; but these are only such as proceed by the authority of the courts in this country, in which, on account of the publicity of the procedure, intimation is presumed. But the judicial steps taken in one country can never be construed as an intimation in another; and therefore there is a radical defect in the interest produced for the assignees. If the argument maintained by them be correct, and the essential requisites for the transmission of moveables be dispensed with, there is no reason why the same dispensation should not likewise apply to heritage, and an assignment should be held as an *ipso jure* transference of any heritable subjects that a bankrupt may possess in Scotland, without the necessity of adjudication, seisin, or any requisite of law for the transmission of heritable property. The *comitas* due to the laws of one country by the courts of another, can never authorise such a conclusion, nor is any such effect understood in England to belong to an assignment; Cooke, Vol. 1. p. 337.; Douglas, p. 170.; Blackstone's Reports, Vol. 1. p. 665.

Accordingly, the preference claimed by the arresting creditor in consequence of his diligence, is not supported merely by the established principles of our law, but has been explicitly recognised in various cases, by which the very point at present in dispute has been finally decided, and where it has been found, that when the debts arrested are due by persons in this country, and can only be sued for in our courts, the decision is to be regulated by the ordinary rules of the law of Scotland in a competition of diligence; and the utmost effect that can be given to an English assignment, is to allow the assignees to adopt legal measures for constituting their claim; Ogilvy against Creditors of Aberdeen, November 13, 1747, No. 86. p. 4556. Bradshaw and Ross against Fairholm, January 31, 1755, No. 87. p. 4556. Crawford against Brown, March 6, 1759, No. 88. p. 4559. Thorold against Forrest, No. 1. APPENDIX, PART I. *voce* FOREIGN. Rhones against Parish and Schreiber, August 6. 1776, No. 2. APPENDIX, PART I. *voce* FOREIGN. Scott against Leslie, Nov. 28, 1787, No. 92. p. 4562; Davidson and Graham against Fraser, July 3, 1798, No. 98. p. 4564.

No. 4.

With respect to the argument founded upon the diligence used by Warwick, it was answered, that his arrestments were completely null and void; that as Duplex was not amenable to the laws of this country, it was necessary, in the first place, to have used arrestments *jurisdictionis fundandæ causâ*, and that no arrestment could properly be used upon an application against a debtor as *in meditatione fugæ*.

The Court, by a great majority, and proceeding entirely on the general ground, preferred the assignees under the English commission to the fund *in medio*.

Observed on the Bench: It is a rule of old standing in Scotland, that an Englishman, or foreigner, having moveable effects here, or personal debts due to him by Scots debtors, cannot be sued here *ratione rei sitæ*, without a previous form of attaching these effects *jurisdictionis fundandæ causâ*, which is not necessary in the case of lands. The case of intestate succession, although long disputed, has likewise been of late finally settled with us in favour of the *forum domicilii*. The same rule is followed in questions of legitim. As to cases of bankrupt, the interests of commerce, as well as the regard which all nations ought to pay to the principles of general law, point out the necessity of adopting one uniform rule; and nothing can be more expedient, than that we should follow out the principle, already noticed, of moveable effects being subject to the disposition of that law which binds the person of their owner. England has its own bankrupt law, and we have ours. It is perfectly fair and equal, that when an English merchant, who happens to have personal effects here, becomes bankrupt, the law of his own country should be allowed to take his whole effects, wherever situate, into its custody, for the purpose of equal distribution among his creditors, according to the rules of the English law, while we are permitted, in the case of a Scots bankruptcy, to do exactly the same thing in England. The 23d section of our late bankrupt law takes this for granted. The first cases which occurred here with regard to the effect of an English commission of bankruptcy, were attended with doubt and difficulty; and, indeed, they occurred before we had a regular system of bankrupt law, and when, perhaps, we were too jealous of the interference of English forms and English jurisdiction. While matters were in this situation, Lord Hardwicke and Lord Mansfield appear to have had, on that very account, some delicacy in interfering with us in such cases, although their own ideas were not the same upon that subject, and still less those of their successors in office, as we may clearly see from a variety of the English cases which have been referred to, in the course of the argument. In one of our oldest cases, Christie against Straiton, in 1746, observed by Lord Kilkerran, effect was given to the Lord Chancellor's certificate. In the after-case of Ogilvy, 13 November 1747, the decision went upon much too harrow a principle. In the case of Bradshaw against Fairholme, January 31st, 1755, the assignees under the English commission were preferred to the arresters after the bankruptcy, with re-

No. 4. spect to the English debts, that is, debts contracted after the English form, or payable in England; and the cause was remitted to the Ordinary as to the Scots debts. It does not appear whether any of the arresters were preferred. It was also found, that assignations granted in England by the bankrupt himself, a few days before his bankruptcy, were preferable, though not intimated, the law of England not requiring intimation. The case of Crawford against Brown seems to have turned upon specialties. In the case of Thorold against Thomson and Tabor, in 1762 and 1764, a very imperfect and contradictory decision was given. The Court was at that time much divided in opinion. To compear and compete under the title of an English assignment were nugatory, if posterior arresters might be preferred. The legal assignment ought either to have been rejected altogether, or full effect given to it as complete *suo genere*, and, of course, sufficient to carry the right. The next case, Scott against Leslie, November 28th, 1787, occurred after our bankrupt statutes had taken place. The Court there went a step further than they had done in the case of Thorold. Some of the Judges held the process to be a sufficient intimation; others, the interlocutor in absence to be a sufficient completion of the right, before the arrestment was used. But still this was too narrow a view of the subject. Then followed the case of Watson against Renton, January 21st, 1792, as to the effect of the Lord Chancellor's certificate. The Court there went upon the distinction of English and Scots debts; whereas, there is now much reason to doubt, whether any such distinction ought to be allowed. The recent decisions in England throw great light upon the subject, and proceed upon a much more enlarged and liberal principle. The amount of the whole is, that by the commission of bankruptcy and legal assignment, the property of the personal effects becomes changed, and the bankrupt completely divested by a transfer, which in this country we ought to receive as complete, and give it the same effect as we do to our own bankrupt law, or as they give in England to our present law. It is of no consequence that process or execution must always be according to the forms of the country where it is sought; for still the question upon its merits is, Whom we ought to prefer in the competition, when brought before us in a regular form? An Englishman certainly is not to come into the Court of Session with a writ of *fieri facias*, or a writ of *elegit*, but with a process according to our own forms. He will then state his grounds of preference or competition; and he will obtain those remedies of execution, according to our forms, which he is justly and legally entitled to; so that there can never be any transgression of our municipal institutions.

Lord Ordinary, *Justice-Clerk.* For Assignees, *Gillies, Baird.* Agent, *M. Linning, W. S.* For Strother, *Solicitor-General Blair, W. Erskine.* Agent, *Jo. Bogue, W. S.* Clerk, *Home.*

J. *Fac. Coll. No. 115. p. 253.*

*** All the cases mentioned in the speech from the Bench are referred to in the prior argument in the Report, and their places in the Dictionary pointed out.