

No 95.

A commission of bankrupt executed in England, and followed with a certificate, excludes prior creditors from pursuing in this country.

1746. June 20. THOMAS MARSHALL *against* YEAMAN and SPENCE.

PETER YEAMAN and John Spence merchants in London having given way, a commission of bankruptcy was taken out against them; but in the proceedings before the commissioners, no compearance was made for Peter Thorburn, a creditor of theirs, upon their promissory notes, he having left England, as was alleged, before taking out the commission.

Thomas Marshall vintner in Edinburgh, as assignee from Thorburn, brought an action against the debtors, who had settled in Scotland, before the Court of Session, and they pleaded in their defence, that having been merchants in England when they granted the notes pursued on, and a commission of bankruptcy having been taken out against them, and they having complied with all the directions of the statute made in that behalf, as appeared from the Lord Chancellor of England's certificate, enrolled in the High Court of Chancery, this afforded them by law a full discharge from all debts prior to the said commission, as was found, *Rothead against Scot*, No 94. p. 4566.

'THE LORD ORDINARY, 13th December 1743, and 14th February 1744, sustained the defence.'

Pleaded in a reclaiming bill, That in all questions relating to the solemnities of contracts, the law of the place where the contract was made ought to be regarded, but the law of the place where the suit was brought, behoved to determine, whether execution was to be awarded; and the statute of bankruptcy, which was no more than a prohibition to the English Judges to interpose the assistance of the law to what still remained a just debt, could be no hindrance to any foreign court to give execution thereupon.

Suppose a Scots debtor should go into England, and have a statute of bankruptcy taken out against him, the Judges there would give him the full effect of it against his debts contracted in Scotland, because they were prohibited by their law to award any execution against him; and in like manner the Judges here ought to proceed in giving execution, as there was no prohibition to them.

Upon these principles proceeded the decision *Kinloch against Fullarton*, No 22. p. 4456, where it was found, that action could be carried on here against the heirs of a person bound by a promissory note, although no action would be competent against them in England.

That the decision, *Rothead against Scot*, was single, and in that case possibly the creditor had acceded to the commission of bankruptcy.

Answered, That as an obligation habilely constituted in one place was valid in another, in like manner a discharge granted in one place behoved to be sustained in another; and it was no matter whether that discharge was the deed of the party, or the operation of the law. In many cases a moral obligation might remain, and yet, no action be competent, as upon deeds prescribed, deeds of a woman *vestita viro*, or the like; but after a commission of bankrupt-

cy, it would be especially unreasonable to oblige the poor debtor to contest the goodness of the debt, as he had surrendered up not only his effects, but his books.

No 95.

That the execution of the commission was not solely a protection against diligence, but a discharge of the debt.

' THE LORDS adhered.'

Act. Boswel.

Alt. Wedderburn.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 228. D. Falconer, v. 1. No 120. p. 147.

1746. November 4.

CHRISTIE against STRAITON.

No 96.

Found as
above.

Two cases came before the Lords on the 21st of July 1746; one between Marshall and Yeaman & Spence in company, No 95 p. 4568.; the other between Alexander Christie merchant in Montrose, and Samuel Straiton of London, in both which they found, " That the pursuers were barred by the defenders having complied with the statute of bankruptcy in England, from recovering payment of debts due prior to the debtors bankruptcy out of effects thereafter acquired by them;" and the interlocutor in that of Marshall against Yeaman & Spence was acquiesced in, it being on all hands admitted, that the debt was contracted in England.

But in the other case of Christie against Straiton, it being controverted, whether the debt was to be considered as contracted in England or Scotland; Christie reclaimed, and the bill and answers coming this day to be advised, the fact appeared to be this: That for a course of years there had been a traffic between Christie and Straiton, whereby linen and other goods, proper for the London market, were purchased, and sent by Christie to Straiton at London, to be disposed of there for their joint-accompt; and towards purchasing Straiton's part of those goods, others were sent down by Straiton to Christie, fit for the market in Scotland; and there being a balance arising, due to Christie from this traffic, he obtained decree for the same before the Court of Session, and thereon arrested in the hands of certain persons in Scotland, who had become debtors to Straiton posterior to his compliance with the statute of bankruptcy in England.

It was argued for Christie, That as the balance due to him arose from the price of goods sent by him from Scotland, Scotland was to be considered as the *locus contractus*. But the Lords were of opinion, That as this was a debt arising from a copartnery, which was to take its effect in London, where the goods in copartnery were to be disposed of, and where the subject was to be accounted for, it was to be considered as a debt contracted in England.

This fell to put an end to the question, if the judgment given, and now final, in the other case of Marshall against Yeaman, was to be followed. But as cer-