1755. *January* 31.

Competition, betwixt ADAM FAIRHOLM, &c. and ALEXANDER HAMILTON, Solicitor at London.

No 27.
In a competition between an arrestment and a prior assignment granted in England, which, according to the form of that country, is not intimated, the arrestment was preferred.

ADAM FAIRHOLM, creditor to Captain Alexander Wilson of London, took a decreet of registration before the Court of Session, February 1751, upon his grounds of debt, and laid an arrestment in the hands of the Earl of Rothes, debtor to Wilson in a considerable sum. In the process of furthcoming upon this arrestment, compearance was made for Alexander Hamilton, solicitor at London, who claimed preference upon an assignment to Lord Rothes's bond, granted by Captain Wilson to him September 1750, for a valuable consideration. He insisted upon two grounds of preference, *1mo*, That Captain Wilson, who, residing in England *animo remanendi*, is not subjected to the jurisdiction of the Court of Session; and, consequently, that Fairholm's arrestment, founded on a null decree, is equally null. *2do*, That an arrestment is only a prohibitory diligence, which bars the common debtor from doing any voluntary deed in its prejudice, but cannot have the effect, more than an inhibition, to prevent the compleating of any right or deed granted by the common debtor before the arrestment.

With regard to the *first*, it was premised, That, of old, jurisdiction was for the most part personal, whence the power of repledging; that while such was the law, the *locus originis* was almost the only circumstance that founded a jurisdiction; that as commerce came to be diffused, which formed new connections among different nations, and, in places of trade, brought a confluence from all nations, personal jurisdiction lost ground, and at last gave place to territorial jurisdiction. *Voet de judiciis*, § 91. cites many authorities to prove, that birth singly does not produce a *forum competens, excepto solo majestatis crimine.*

Captain Wilson, though originally a Scotsman, has been long in England *animo remanendi*, by which, equally with a native, he is subjected to the law of England. The law of nations admits of change of place, and consequently of subjection. It would be hard for England, in particular, if this were not admitted; and it would be intolerable for a man who changes his country, to be still subjected to laws where he has no residence, and where he has no goods.

But, whatever may be thought in general, change of residence has always been admitted in countries belonging to the same Sovereign. Birth, without residence, gives no jurisdiction to a Sheriff; and the case ought to be the same betwixt the English and Scotch Judges. And, after all, is it not absurd to give a decree against a man, which the Court has no authority to put in execution, considering that neither the person of the defender, nor his effects, are within their territory? Now, if Captain Wilson, cited at the market-cross of Edinburgh, pier and shore of Leith, would not be bound to answer in an ordinary process;

brought against him before the Court of Session, a decreet of registration cannot be more effectual; and consequently execution upon that decreet is void. No 27.

Upon the *other* point it was *urged*, That though an assignment in England is only a procuratory *in rem suam*, as formerly in Scotland, which does not complete the transmission, yet that the assignee has the only equitable title, upon which he, and he only, can oblige the debtor to pay; that an arrestment can be no bar to the payment, because it only prohibits the debtor from paying to the cedent, or to any deriving right from him after the arrestment; but does not prohibit the debtor to pay to any person having right prior to the arrestment.

The assignee was preferred, without distinguishing upon what ground.

If it was upon the latter point, which appears to be well founded, it must overturn an established practice of preferring an arrestment to a prior assignation not intimated till after the arrestment.

Sel. Dec. No 80. *p.* 104.

1761. *July* 28.

ALEXANDER SHARP, Merchant in Edinburgh, *against* JOHN, ALEXANDER, ANDREW, WILLIAM, MARY, SUSAN, and CATHARINE WOOD, and their Trustees.

No 28.
This case was a competition betwixt an assignation and an arrestment, in which the assignee was preferred, on account of want of title in the arresters.

JOHN WALKINSHAW, late of Scotstoun, being attainted for his accession to the rebellion 1715, his estate was decreed, in virtue of the clan-act, to belong to the Earl of Eglinton his superior, who thereafter conveyed it to the Earl of Galloway, then Lord Garlies.

Mr Walkinshaw had granted a personal bond in 1728 to William Wood, for L. 751 Sterling; and as Lord Garlies had no intention of taking any advantage from his conveyance to the estate of Scotstoun to the prejudice either of Mr Walkinshaw or his creditors, his Lordship, after fitting an account with Mr Wood, from which it appeared that he was creditor to the extent of L. 20,000 Scots, including the foresaid bond, did, upon the 7th of August 1738, grant an heritable bond upon the estate for that sum, upon which infeftment immediately followed.

William Wood having died in March 1747, his eldest son, Captain John Wood, made up titles to the above heritable bond, and was infeft in April 1751, upon a precept of *clare constat* from the Earl of Eglinton the superior; but, prior to this, viz. upon the 30th of January 1749, a minute of sale had been entered into betwixt the said Captain John Wood as in right of his father, and William Crawfurd as in right of his father Matthew Crawfurd, (who was another very considerable creditor to Mr Walkinshaw, and had, in consequence of a decreet-arbitral betwixt Lord Garlies and him, got into possession of the estate), on the one part; and Richard and Alexander Oswald, merchants in