

1767. March 5.

THOROLD, and OTHERS, Assignees under the Commission of Bankrupt of Messrs Thomson and Tabor of London, Merchants, *against* Messrs FORREST and SINCLAIR, Merchants in Edinburgh, and Others.

WALTER THOMSON a native of Scotland, and Samuel Tabor an Englishman, merchants in London, committed an act of bankruptcy, upon the 1st of November 1758. A commission of bankruptcy was obtained upon the 2d of November; and the commissioners vested the estate in assignees upon the 21st.

Forrest and Sinclair, and others, merchants in Scotland, were creditors to the bankrupts, partly by accounts for goods furnished to them, and partly by bills of exchange originally due to Englishmen, but indorsed in their favour before the bankruptcy.

None of these creditors appeared before the commissioners of bankruptcy, or claimed upon the debts. But, upon the 8th and following days of November 1758, they used arrestments for affecting certain debts due to the bankrupts, by persons residing in Scotland.

The arresters having brought processes of furthcoming, a competition ensued between them and the assignees under the commission.

*Pleaded* for the assignees: The debts due to the bankrupts are *English* debts. They are the result of that intercourse of trade, which was carried on by their correspondents here, with the bankrupts residing in England. It was *there* that they made the advances by which they became creditors, and it was *there* that the money ought to have been repaid. England, therefore, was both the *locus contractus*, and the *locus solutioni destinatus*.

It is a point much disputed among lawyers, whether *moveables* have any *situs* other than that of the creditors *domicile*; and it has been said that they follow the person of the creditor, and must be held to be in that place, *ubi dominus rerum suarum larem summamque constituit*.

But, whatever may be held as to moveables, which are capable of local situation, the case is clearer as to debts, mere incorporeal rights, incapable of locoposition in themselves, and which can scarcely be considered as existing any where but in the person of the creditor. Indeed, it would produce strange effects, were debts supposed to follow the person of the debtor, who, by that means, would have it in his power, not only to constitute as many *fora competentia* for his creditors, as the different kingdoms he chose to resort to, but even to vary his succession in the same manner. With regard to the last point, the question came to trial, 28th November 1744, *Brown contra Brown*, (Kilkerran, p. 199. *voce* FOREIGN.) In that case, the law of the creditor's domicile was found to regulate the succession to debts; and there seems to be no reason why the same thing should not take place in questions of transmission *inter vivos*.

But the preference of the assignees may be supported, without discussing these abstract points.

It cannot be disputed, that the assignees are entitled to compete for their interest. That is an adjudged point in various instances. If so, it must follow that

No 81.

A Scotch creditor of an English bankrupt company, arrested in the hands of debtors of theirs, residing in Scotland, posterior to the date of the commission of bankrupt, and the vesting of their estate in assignees. The arrester preferred to the assignees.

No 81.

they are preferable. A *voluntary* assignation by the common debtor, would have been good, if executed according to the forms established *in foro domicilii*. A *necessary* assignation would also have been good, were it the practice in England to make the bankrupt execute a conveyance of his estate in consequence of the commission. And it cannot alter the case, that, by the laws of that country, a bankrupt is not required to convey, but only to disclose his effects, which are held to be, *ipso jure*, vested in the assignees, from the time of the act of bankruptcy. To give full effect to this transference of the property, is not to recognise the authority of a foreign statute, as obligatory beyond the territory of the law-giver: It is no more than to support a conveyance, formal according to the laws of the place where it was executed; a thing which has been uniformly done whenever the question occurred.

The laws of a foreign state, cannot operate authoritatively *extra territorium*; but there are certain consequences arising from the laws of one nation, which must, in equity and justice, be allowed to take effect in another. Marriage is a legal assignation to the husband of the debts due to the wife. Suppose the debtor should retire into England, where the law is different, it would be no defence to say that the debt was now become an English debt, and must be regulated by the law of that country. In England, promissory notes carry interest; in Scotland they do not. Suppose an action to be brought here, for payment of a promissory note granted in England, there cannot be a doubt that decree would be recovered, not only for the principal, but also for the interest.

The same rule has been followed, with respect to the *extinction* of obligations. In an action pursued upon a bond granted in England, payment was allowed to be proven by witnesses; 15th November 1626, Galbraith *contra* Cunningham, (Durie, p. 232. *voce* FOREIGN.) The oath of the cedent was admitted against the assignee of a bond granted in England; 28th June 1666, Macmorlan *contra* Melvill, (Stair, v. 1. p. 382. *voce* FOREIGN.) The English statute of limitations has been allowed to be pleaded in bar of an action pursued here for a debt contracted in England; Dic. *voce* FOREIGN.

If then the law *in foro contractus* regulates the constitution, and the extinction of obligations, it would seem to follow that it must regulate their transmission also. And, accordingly, in the noted competition of the Creditors of Captain Wilson, 1st February 1755, the assignees were preferred to the arresters\*.

It was pleaded *separatim*, That the bankrupts had obtained the Lord Chancellor's certificate, which was an effectual bar to all actions for prior debts, at least against English creditors; and the arresters must be considered in that light, as having indorsements in trust of bills of exchange originally due to Englishmen.

*Answered* for the arresters: Although, in a question of succession, the right of the debts due to the bankrupts might be regulated by the law of England, yet that is nothing to the present case, where it is enough to observe, that the debts arrested are due by persons resident in Scotland, and cannot be pursued for else.

\* Bradshaw and Ross *against* Fairholme, Fac. Col. of that year, No 133. p. 200. *voce* FOREIGN.

where than in the courts of Scotland, or attached otherwise than by the diligence of the law of Scotland.

Nor is there any absurdity in supposing a creditor, who has lands, or moveables, or debts, in different parts of the world, to be amenable to as many different jurisdictions. On the contrary, there is a necessity, that his creditors should have access to affect his subjects.

It cannot be maintained that an English statute can have effect in this country *vi statuti*; the utmost length that it is possible to go, is, that it ought to be enforced by that *comitas* which prevails among different countries. But all *comitas* must be mutual; and it is certain, that the Judges of England would pay no regard to a mere positive enactment of the law of Scotland. There can be no reason, therefore, to give effect here to similar enactments of the English law.

The legal transference of the estate of the bankrupt, which takes place in England, in consequence of the commission, must be considered in a very different light from a voluntary conveyance. The creditor has a right to dispose of his property as he pleases, and a conveyance made by him must be effectual every where. But a legal conveyance is strictly local, and can never operate beyond the territory of the legislature which introduced it. Payment may have been allowed to be proved, in a manner agreeable to the law of the country where the debt was contracted, from the just presumption, that the party relied on that species of proof which is there admitted. For a similar reason, the English statute of limitations may, in some cases, have been held to be the rule in the extinction of obligations contracted in England. Conveyances may have been sustained when executed according to the forms of the law of that country where they were made, though different from the forms known in this country: And, upon this principle it is, that, in the present case, the assignees have been found entitled to compete, though deriving their right from a species of legal conveyance unknown in Scotland. But it does not follow from thence, that the diligence of the law is to be disappointed, in consequence of a statutory transference of property established by the law of another country. To admit this effect, would be to render our own legislature, and our own judges, subordinate to foreign laws and foreign courts.

*Answered* to the argument upon the Lord Chancellor's certificate: It would seem that the benefit of the certificate is not meant to reach beyond England itself, for which, reference was made to the opinion of Lord Talbot and another great lawyer, which are given by Davies on *Bankrupts*. Indeed, the plea now urged could not be maintained even in England. There no creditor is compelled to accede to the commission; and creditors, who have not acceded to it, are not barred by the certificate, as was proved by several authorities from the law of England, particularly 7. Viner, p. 116. 134.

Hence it follows, that the certificate could have no effect against the arresters, though it were allowed, in any case, to afford a defence in the courts of Scotland. At any rate, the benefit given by the certificate, is a privilege personal to

No 81. the bankrupt, and which cannot be pleaded by his creditors or any other person. See 2. Vern. 696. 697.; Trin. 1715. Goodwin's case : 2. Viner, 131.

'THE LORDS found, That the proceedings, under the commission of bankruptcy, did not bar the creditors of the bankrupts, whether their debts were contracted in England or Scotland, from affecting their debtors effects situated in Scotland, or debts due to them by persons residing in Scotland, by legal diligence : And therefore found, that such of the arresters, against whose arrestments no objections are made, are preferable to the assignees under the commission of bankruptcy.' (See FOREIGN.) See note under the next case.

Reporter, *Edgfield.* For the assignees, *Lockhart.* For the arresters, *Fergusson, Montgomery, John Campbell, jun. Pat. Home.* Clerk, —.

*G. Fergusson.* *Fol. Dic. v. 3. p. 41.* *Fac. Col. No 54. p. 286.*

1768. July 14.

PEWTRESS and ROBERTS, against THOROLD, and other Assignees, under the commission of bankruptcy against THOMSON and TABOR.

No 82.

This is a sequel of the above action ; where even arrestments, laid on after the above competition commenced, were preferred to the right of the assignees.

UPON the 2d of November 1758, a commission of bankruptcy was issued against Thomson and Tabor, merchants in London, and their bankruptcy certified to have commenced upon the day preceding.

Thomson and Tabor had drawn bills upon many of their debtors in this country, payable to William Cuming their agent here ; and, recently before their bankruptcy, they drew upon Mr Cuming in favour of some of their creditors, and particularly of Pewtress and Roberts of Lombard-street, bankers.

These bills were protested against Cuming for not-acceptance, whereupon arrestments were used, and a competition ensued between the arresters and the English assignees, (See Thorold, and other Assignees of Thomson and Tabor, *contra* Forrest and Sinclair, No 81. p. 753.) in which the LORDS found, ' That the assignees, under the commission of bankruptcy, have sufficient title to compare and compete ; but that such of the creditors-arresters against whose diligence no objection is made, are preferable to the assignees under the commission ; but sustained the objections made to the arrestments used in the hands of William Cuming.'

During the dependence of this competition, Pewtress and Roberts laid second arrestments in Cuming's hands, and a new competition ensued.

*Pleaded* for Pewtress and Roberts : These bills, drawn in their favour upon William Cuming, were equivalent to assignations of the effects in his hands ; and the protests for not-acceptance are equivalent to intimation. The bills payable to Cuming were effects in his hands, attachable by arrestment, as was found in a similar case, 13th February 1740, *Innes contra* Creditors of Gordon ; (No 51. p. 715.) at least, they were capable of being assigned ; and the draughts upon Cuming, being equal to assignations, must be preferable to the after diligence of other creditors, and, *a fortiori*, to the claim of the assignees, who can have no better right than the bankrupts themselves would have had.