1770. *August* 3. JEAN COALSTON *against* ARCHIBALD STEWART.

FOREIGN.

The Lord Chancellor's certificate upon an English commission of Bankruptcy discharges all Debts due to persons residing in Scotland prior to the Bankruptcy.

[*Faculty Collection, V.* 110; *Dictionary*, 4,579.]

COALSTON. Peter Coalston, though born in Scotland, had lived 50 years in London *animo remanendi:* it is therefore just the same thing as if he had been an Englishman born. In this light, the effect of the bankrupt obtaining a certificate from the Chancellor of England, is to liberate him from all debts prior to the bankruptcy. The estate was not in Scotland at the time of the bankruptcy, but it was a subject *postea quæsitum;* so that this cause is different in its circumstances from those determined of late years upon the effect of the English statute of bankruptcy.

GARDENSTON. The statute has operated a discharge already: it is too late to seek to undo this.

AUCHINLECK. The certificate is not a discharge of the debt, but a *denegatio actionis.* This introduced in England from political reasons; but will not restrain creditors in another part of the world.

ELLIOCK. In the case of *Cathcart*, when the Court found no sufficient evidence of his having complied with the terms of the statute, the House of Lords reversed. This implies that they thought that he who complies with the terms of the statute was free from his creditors for ever.

PITFOUR. The plain point of law is, Does the authority of the bankrupt statutes go *extra territorium?* I answer, No; both from defect of jurisdiction and intention. It is said that the *lex loci contractus* affects not only the solemnities of the contract, but also its essence. I differ in opinion. I cannot be apprised of the solemnities of another country than that where I am; and, therefore, must contract according to its form. All the decisions are reconcilable upon this principle. In the case of *M'Morlan*, payment was made in England.

KAIMES. Of the same opinion. From the nature of the Chancellor's certificate, the bankrupt has an exception; but this does not operate *extra territorium.* Suppose the Chancellor had declared the debt null, still this would have no effect *extra territorium.* The certificate gives a personal protection, and no more: such protection cannot operate farther than the granter's jurisdiction.

MONBODDO. Both the constitution and transmission of obligations must be regulated according to the laws of the country where the parties are; so also discharge of obligations. Here a discharge not by the act of the parties, but by the operation of the law: the certificate of the Chancellor is like a sentence absolvitor.

JUSTICE-CLERK. The House of Peers always take it for granted that the cer-

tificate operates a discharge against every debt within the jurisdiction, and against every debtor. The contrary doctrine is adverse to many decisions of this Court and of the House of Peers, particularly to the decision in the case of *Cathcart.* It would be fatal to commerce were it otherwise; for then an Englishman, having obtained a certificate, and coming to Scotland, might be attached by every English creditor. The debts of Scotsmen, not subject to the law of England, will not be affected by the certificate.

ALEMORE. In *Cathcart's* case it was taken for granted by the House of Lords that the certificate was effectual; but it was not determined. English creditors may arrest, &c. in Scotland, notwithstanding the certificate. Why should there be any difference as to his person: if you can arrest his person, the certificate is good for nothing here. In England it protects his person.

BARJARG. This case is not the same with that of *Thomson* and *Tabor*; for *there* the Court would not extend *comitas* beyond jurisdiction. But here the interlocutor of the Ordinary goes farther,—it abridges the jurisdiction of the Chancellor; for, at the time of the certificate, the creditor resided in England, and was bound by that law. In *Thomson* and *Tabor's* case, the subject was *extra territorium* of the Chancellor: here the contrary.

AUCHINLECK. The last decision of the Court in *Thomson* and *Tabor's* case, is upon the same principle with this: the one is a corollary of the other. The *discharge* of the debt only means that no action lies: the debt itself cannot be discharged. Particular constitutions are very expedient in different countries; but of no consequence *extra territorium.*

PRESIDENT. The Court determined, in the case of *Thomson* and *Tabor,* contrary to my opinion, that the certificate *non egreditur territorium.* I will not set my opinion against that of the Court in a question already determined.

KENNET. I do not think that the judgment of *Thomson* and *Tabor* limits us in this case. The question here is, Whether a debt, extinguished by the law of England, can be revived?

COALSTON. The effect of a certificate is a discharge of the debt: how can it be revived? Payment of a debt in England may be proved by witnesses, where, during the period of the statute of limitations, the debtor resides in England. Such proof discharges, and will operate in Scotland as a discharge, not from *comitas,* but from justice: the discharge is not *quoad omnia,* but only as to effects in England.

PITFOUR. The statute of limitations has no more force out of England than the statute of bankruptcy; but a presumption of payment would thence arise in Scotland.

KAIMES. The executor is taken bound to pay *just and lawful debts.* This has been determined in Chancery, a court of equity, to comprehend debts discharged by the certificate.

ELLIOCK. For altering the interlocutor. This does not impinge on *Thomson* and *Tabor's* case. Here a debt was extinguished by the operation of the law, to which both parties were bound, in consequence of their residence in England.

On the 3d August 1770, the Lords "found the pursuers barred from insisting, in respect of the proceedings on the statute of bankruptcy;" altering Lord Auchinleck's interlocutor.

Act. G. Buchan Hepburn. *Alt.* D. Dalrymple.
Diss. Kaimes, Alemore, Pitfour, Auchinleck.
Non liquet, Strichen.

Judgment had been given in this case, 3d August 1771. A reclaiming petition was presented: answers were made. The pursuer prayed for a hearing in presence: the hearing began 25th January 1771. On the 26th, Lord Hailes happened to look at the bill: he observed that it was pasted on the back, and that the two partial receipts were on the paper pasted on both, written with the same ink, and at the same time. He likewise observed, that there was an appearance of writing under the pasted paper. In presence of the Court the bill was separated from the pasted paper, and it then appeared that there was marked on the original bill a receipt previous to the term of payment of the promissory-note for £14 sterling, and another receipt for £8 sterling, being within 30 shillings of the sum originally due.

On the 26th January 1771, the Lords found "that this action was founded on a gross fraud, and assoilyied the defender; and remitted to Lord Auchinleck, Ordinary, to do therein as he should see cause."

Act. J. Grant, H. Dundas. *Alt.* A. Wight, D. Dalrymple.

1771. *February 5.* WILLIAM REID *against* STEPHEN RONALDSON.

ARRESTMENT—HEIR *CUM BENEFICIO.*

The estate of the debtor, a minor, having been sold *auctore prætore*, the arresters of the price in the hands of the purchasers preferred, upon their diligence, to the other creditors.

[*Faculty Collection, V.* 213; *Dictionary, App. I. Arrestment, II.*]

GARDENSTON. An heir, *cum beneficio*, is proprietor, and, in every respect, heir; only that he has certain personal privileges. When a sale is brought by an apparent heir, the case is different: there he is not proprietor, but trustee.

PITFOUR. We naturally have a prejudice in favour of the *pari passu* preference of creditors; but it cannot take place here. The only method which an heir *cum beneficio* can follow, if he means to bring in the creditors *pari passu*, is not to sell till they all agree in a *pari passu* preference. If he *does* sell, the price must be affectable by the creditors.

MONBODDO. I lay aside the circumstance that Reid was a minor: he is in the common case of an heir. An heir *cum beneficio* is still *heir*, though having privilege: if he sell the estate, the price is affectable by his creditors.