

No 93. Creditors of Aberdeen, No 86. p. 4556; Thorold against Forrest and Sinclair, No 89. p. 4561. The diligence, therefore, was competent; and, from the terms of the power of attorney granted by Mr Fraser, clearly intended for behoof of his creditors.

THE LORD ORDINARY 'sustained the objections to the interest produced for John Fraser and his factors; and found, that it must be struck out of the ranking.'

On advising a reclaiming petition for Mr Fraser, with answers, it was

Observed on the Bench; It is not very long since assignees under an English commission of bankruptcy were allowed to sue or insist in diligence in Scotland at all; and it is still clear law, that the creditors of the bankrupt may obtain a preference over them, by arresting or adjudging, which proves, that in questions occurring here, a radical right is held to remain with the bankrupt. Besides, as it appears that Mr Fraser was acting for behoof of his creditors, his assignees and he should be considered as the same party. And, at any rate, the objection, supposing it well founded, is *jus tertii* to Mr Munro's other creditors.

THE LORDS altered the interlocutor, and repelled the objection.

Lord Ordinary, *Ankerville*.
Alt. *Ja. Oswald*.

For Objectors, *H. Erskine, C. Ross*.
Clerk, *Menzies*.

R. D.

Fac. Col. No 86. p. 197.

See APPENDIX.

S E C T. V.

Effect of the Lord Chancellor's Certificate of Conformity.

1724. June 30.

SIR JAMES ROCHEAD *against* MR GEORGE SCOT Surveyor at Greenock.

No 94.
A Scotsman in London became bankrupt, and obtained the usual certificate. An action was brought a-

IN anno 1704, Mr Scot, then merchant in London, became bound in a bond after the English form, to pay to Sir James Rochead, then also residing there, the sum of L. 600 Sterling.

In the year 1706, Mr Scot's affairs having gone into disorder, a commission of bankruptcy was awarded against him, and having conformed himself in all points to the act of Parliament made in England *anno quarto et quinto Annæ*, entituled, 'An act to prevent frauds frequently committed by bankrupts,' he ob-

tained a certificate from the commissioners and from the Lord Keeper of the Great Seal of England, as directed by that statute.

Sir James brought an action against Mr Scot, for payment of what remained unsatisfied of the foresaid bond; and Mr Scot founded his defence upon the act of Parliament, whereof the words are, 'That the bankrupt conforming, &c. to the statute shall be discharged of all debts owing by him prior to his having become bankrupt;' and therefore it was contended, That since he was thereby *ipso facto* discharged of all the debts that he owed in England, where the act of Parliament had authority, he must in consequence be discharged of this debt, because it was contracted in England, and secured by an England bond, when both parties did reside there.

It was answered for Sir James, That there was a difference betwixt the solemnities of a writ and the execution competent upon it. As to the *1st*, The solemnities usually adhibited in the place where it was executed, make it probative and binding every where; but the execution competent upon it must be regulated by the laws of the place where it is sought. Thus, though all execution passes in Scotland upon extracts of registrated bonds, yet these would not be sustained in England; and though by the law of Scotland a *dyvor*, after a *cessio bonorum*, is free from all personal diligence, yet 'tis doubted if that would protect his person in any other kingdom where the law was otherwise: And for the same reason the defender, who has the benefit of the statute of bankruptcy in England, where neither his person nor effects can be distressed for any debt prior to the bankruptcy, being now in Scotland, where the law subjects his after-acquisitions to the payment of debts prior to his bankruptcy, his plea must be determined by the law of Scotland.

Replied for the defender, That the act of Parliament does as truly extinguish this obligation as if he had a discharge of it executed in the English form, which no doubt would be sustained in Scotland, to stop all diligence upon this bond. The obligation therefore being once extinguished by the law of the place where it was entered into, and designed to take effect, it can never revive, or be the ground of an action in Scotland or any where else.

'THE LORDS found, that the bond being granted in England, after the English form, must be regulated according to the laws of England.'

Reporter, Lord Pencaitland. Act. Jo. Horn. Alt. Dun. Forbes. Clerk, Gibson.

There was a letter produced from Mr Scot to Sir James, desiring he would delay further proceedings on the summons, and that he would be soon at Edinburgh and would satisfy Sir James of his willingness to do him all the justice that was in his power; but this the LORDS found not binding.

Fol. Dic. v. 3. p. 227. Edgar, p. 60.

No 94.
gainst him in
Scotland, for
payment of a
bond granted
in England
prior to his
bankruptcy.
The Lords
found, that
the bond be-
ing granted
in England,
and after the
English form,
must be re-
gulated by
the laws of
that country;
and, conse-
quently, that
execution
thereon was
put an end to
by the com-
mission of
bankrupt
and the cer-
tificate.