AUCHINLECK. It is not said that the tutors named have refused to accept. This woman wants to have the total management of the pupils' affairs.

JUSTICE-CLERK. The tutors named have not refused to act. The tutor of law may act. The widow may apply to the Exchequer for a tutory dative: so that this petition is, in all these three lights, incompetent.

COALSTON. Factors *loco tutoris* were established upon necessity; but the necessity must be set furth. An Act of Sederunt is not to be overturned *per saltum.*

[This alludes to an apprehension which he had entertained, as if the Court meant to set aside the Act 1730; which was certainly a groundless apprehension.]

PRESIDENT. There is no intention to hurt the Act of Sederunt; but only not to grant factories unless *causa cognita* and from necessity.

ALEMORE. Before the year 1730, there was no difficulty to find tutors: since that time, there is. If the country has lost humanity, it is owing to this Court being too apt to provide something in lieu of tutors.

AUCHINLECK. I like factors *loco tutoris,* for they serve for hire, and consequently better than those who serve for conscience sake.

On the 26th July 1770, "The Lords refused the petition."

For the petitioner, B. W. M'Leod.

1770. *July* 26. MESSRS PETER and BOGLE *against* DUNLOP'S TRUSTEES.

BANKRUPT—FOREIGN—ARRESTMENT.

The enactment of the statute 1696, c. 5, not effectual *extra territorium.* A trust-deed by a bankrupt, for behoof of his creditors, though reduced at home, as falling under the statute 1696, found to be effectual, and a valid title in favour of the trustees to apprehend the possession of the effects of the bankrupt situated in a foreign country;—and, in a competition between the said trustees and certain non-acceding creditors to the trust, who had arrested the effects of the bankrupt sent home from a foreign country, both in the hands of the trustees and the master of the ship—the trustees preferred.

[*Faculty Collection, V.* 100; *App. I. Bankrupt, No.* 1.]

COALSTON. Judgment in the Courts of Virginia would or ought to have been given for the trustees. I think the same judgment ought to be given here. Had there been no bankruptcy the trustees would have been preferable: the only objection is from bankruptcy. A ground of challenge *de jure gentium* ought to be regarded every where—but a ground of challenge by statute of any country is local. The restraints in the statute 1696 are of the same nature as those by inhibition and interdiction. The statute of bankruptcy in England has no effect as to goods in Scotland—and so *vice versa.* The case of *Jackson* was de-

termined at a time when the Court was in use of finding that the English statute extended to Scotland—and so *vice versa.*

MONBODDO. This is an ungracious plea on the part of the non-acceding creditors. The trustees have acted with proper diligence—the creditors sit with their hands across till the trustees convert the subjects into cash and bring it home. The creditors could not have made the subjects effectual in America—they could not have arrested there—their claim is as little supported by law as by equity. I do not say that a disposition by a bankrupt will tie up the hands of creditors. I agree to the judgment of the Court in the case of *Snee.* I should have thought arrestment good if laid on in any other hands than those of the trustees. My opinion would be the same were the effects such as had been collected in this country. The disposition to trustees is not void and null, either at common law or by the statutes 1621 and 1696. The decision in the House of Lords does not affect the general point—there seems no difficulty upon the other ground mentioned by Lord Coalston. With respect of the solemnities used in executing a deed, the law of the foreign country is the rule: With respect to the effects of a deed, they must depend upon the law of the country where the execution is sued.

AUCHINLECK. It is not necessary to enter upon the general point: that was determined in the case of *The Creditors of Duke of Leaths.* If this case were to be tried in the plantations, it would be regulated by the law of the country. A debtor's effects are liable to his creditors wherever they are attached. If Dunlop had sent over effects from America, the creditors might have attached them. They are sent to trustees. The law says that the trust-right is ineffectual. How then can the trustees hold them by an ineffectual right?

PITFOUR. I suppose trust-rights to be ineffectual. My opinion is founded upon the nature of jurisdiction, and all the laws throughout Europe concerning bankrupts. Statutory frauds,—if we may call them so,—cannot have effect beyond their meaning: no statutes can go beyond *territorium statuentis.* We cannot now go into the notion that *mobilia non habent sequelam.* That doctrine is exploded. The English bankrupt statutes have no effect as to the estates of an Englishman in Virginia. Virginia was settled in 1620. It is liable to the laws of England as they then stood, but no farther, unless there is a special provision to that effect. Thus, by Act 29th Ch. II., three witnesses are required to a testament, but only two are required in America—because the colonies were settled before the 29th of Ch. II. It is said that it is strange that a deed null by both laws,—by that of England as to its form, by that of Scotland as to its substance,—should be able to carry off the effects. I answer,—the deed is not null by the laws of Virginia: for laws regulating the solemnities of deeds are good all over the world. This is not a matter of *comitas,* but of necessity —neither is this deed reprobated by the law of Scotland. It is only limited *qualificate,* as to goods in Scotland. As to what is said, That the trust-right is ineffectual, and how can you make it effectual by receiving the effects abroad? I answer,—the creditors have as good a title to the effects by the law of the foreign country as if they had purchased them: you can only seize the bankrupt's effects, not those of his creditors, where the acquisition is lawful. The

argument, if good, here, would never serve any other person; for the trustees would always divide upon the spot, instead of bringing home the goods.

KAIMES. I have no doubt that the trustees would have been preferred in Virginia. The goods of Dunlop were brought home to this country: How can this make any difference? I do not see how the creditors-arresters can be preferred. I am for a *pari passu* preference.

JUSTICE-CLERK. All that the trustees did was by a right, good every where from necessity, not *ex comitate*. The Bankrupt Act, 1696, operates upon effects in Scotland. The trustees, had they touched such effects, would have been holding a subject contrary to the law of this country. But here the case is different: they hold the goods by a title valid in the law of Virginia. It makes no difference whether the trustees had divided the proceeds in Virginia, or brought them home.

ALEMORE. This is a very favourable case. But, suppose that a bankrupt should seek to prefer any single creditor, might he not do it in this shape?

GARDENSTON. The present case depends upon the local situation of the goods. If there was a valid right to them in Virginia, how could it cease upon the goods coming to Scotland? How shall property play bo-peep in this manner? I do not apprehend any danger from partial preferences. Fraud will not stand anywhere: It is reprobated by the laws of every country.

PRESIDENT. This presumption of fraud being unavailable, will not do. In many cases there may be no fraud other than the statutory fraud by Act 1696. The deed of trust is a good title to recover; but, when the effects are brought to Scotland, then the law of Scotland must take place.

On the 26th July 1770, the Lords preferred the trustees.

Act. R. Blair. *Alt.* H. Dundas.

Hearing in presence, after report, by Auchinleck.

Diss.—Auchinleck, President. *Non liquet*,—Kennet, Strichen. Kaimes for a *pari passu* preference.

1770. *August* 2. WILLIAM ROBERTSON *against* JANET ROBERTSON.

PRESCRIPTION.

An adjudication being led against two distinct subjects, but no infeftment taken; so that it remained a personal right, and possession maintained only upon one,—the right to the other found to be cut off by the Negative Prescription.

[*Faculty Collection, V. p.* 105; *Dictionary*, 10,694.]

MONBODDO. The only argument for the pursuer is from the decision in 1671, *Balmerino*. I think that decision erroneous, and that the Court did not make a proper distinction between the debt and the *jus hypothecæ*.