No 99.

2do, A debt, cut off in England by the statute of limitations, was not extinguished by the law of nations; and hence such a debt might accordingly be made effectual in Scotland. The only operation and effect of that statute, *quoad* a debt pursued for in Scotland, was to afford a presumption of payment; which could be defeated by contrary presumptions, and by evidence, shewing, from circumstances, that payment could not be presumed; Rutherford *contra* Campbell, No 63. p. 4508.; Trustees of Renton *contra* Baillie, No 67. p. 4516. If the statute of limitations, therefore, was not understood to be a real discharge of the debt, upon what consideration of law could the statute of bankruptcy have greater force, and be deemed a virtual discharge of a debt confessedly just and unextinguished, by any method of payment known or acknowledged in the law of nations? The decision Rochead *contra* Scott was a special case; the debt pursued for was secured by an English bond; and the judgment accordingly went upon this specialty, that the bond, being in that form, and granted in England, fell to be regulated by the laws of that country.

Their Lordships were a good deal divided; several of them thinking that the statutes of bankruptcy in England could have no effect *extra territorium*; the majority, however, being of opinion that the Chancellor's certificate was a complete discharge everywhere, it was found, 'That, by the proceedings upon the statute of bankruptcy, the pursuer is barred from carrying on this action.'

Coalston gave in a reclaiming petition, which was followed with answers. But, before these came to be advised, and when hearing counsel upon the question, their Lordships took up a suspicion as to the note, which was pasted upon a slip of paper; and having ordered it to be soaked in warm water and taken off, it appeared that two partial payments of L. 14 and L. 8, which came to within a trifle of the amount, had been made. Without therefore giving another judgment upon the general point, the Lords assoilzied the defender simpliciter, and remitted to the Lord Ordinary to inquire into this gross fraud.

Lord Ordinary, *Auchenleck*. For Coalston, *Buchan-Hepburn*, *J. Grant*.
For Stewart, *D. Dalrymple*. Clerk, *Kirkpatrick*.

R. H. *Fol. Dic. v. 3. p. 228. Fac. Col. No 40. p. 110.*

No 100.
An English certificate of conformity, discharges the bankrupt from English debts.

The price of goods furnished in Scotland to the order of a person in

1792. *January* 21. Adam Watson *against* James Renton.

In consequence of a commission sent by Renton, a merchant in Berwick-upon-Tweed, to Watson, a merchant in Dunbar, the latter sold him certain goods, which were delivered at Dunbar to a common carrier employed by Renton to receive them. For a part of the price, Watson drew a bill on Renton, which he accepted, payable in four months at Renton's house in Berwick. The remaining part was to have been paid in ready money.

Before the bill became due, the other sum being likewise unpaid, a commission of bankrupt, under the English statutes, issued against Renton, who ob-

tained a certificate of conformity, which was *allowed* by the Lord Chancellor. To these proceedings, however, Watson had no accession.

No 100
England, not held an English debt; but a bill payable in England taken from the debtor, renders it such.

Watson afterwards made application to the Sheriff-court of Berwickshire, for a warrant to arrest the person of Renton, called a *border-warrant*, which was granted, but recalled by the Sheriff, on account of the above-mentioned certificate.

This judgment having been brought under the review of the Court, the question came to be tried concerning the validity of those English proceedings, as a bar to this personal diligence; it being enacted by the English statute, 5th Geo. II. cap. 30. that 'an allowed certificate is a bar and discharge against any action for any debt contracted before the issuing of the commission:' Which question involved two points; 1*mo*, Whether or not, even in the case of English debts, such an effect ought to be recognized; and, 2*do*, Whether those in question were English or Scots. For Watson, the creditor, it was

Pleaded, 1*mo*, The primary object of the English commission of bankrupt is to derive, from the jurisdiction of the Lord Chancellor, protection to creditors against the frauds of their bankrupt debtors. For this end the bankrupt is enjoined, under severe penalties, to disclose and surrender his whole effects. But unless within the peculiar territory of that magistrate, it is obvious there cannot exist either a title to that assistance, or the means of affording it. On the other hand, the bankrupt, upon making a fair surrender, obtains, in his turn, under the same authority, a protection against all claims of debt prior to the commission. Those mutual protections are plainly commensurate, and limited by the territory which confines the powers from which they both proceed.

In respect to persons, therefore, who live beyond the jurisdiction of the Lord Chancellor, and have no participation in such procedure, this interposition in behalf of the bankrupt is a mere *ex parte* order, without coercive authority. 'Extra territorium, jus dicenti impune non paretur.'

It is a common rule, indeed, that effect ought to be given to foreign decrees *ex comitate*; but the expression would be more accurate if this were styled a dictate of equity, or of the law of nature and nations. Now nothing that is unjust can derive any sanction from that source; and nothing can be more unjust than to debar a creditor from full payment of a debt that is due.

This, however, has been vindicated, by calling it an extinction of an obligation by the *lex loci contractus*, and a consequence of this law regulating the constitution and the transmission of obligations. It is, however, an improper inference.

The great principle to be regarded as a criterion in a question like this, is implied in the very notion of property, viz. that no man can be lawfully deprived of it without his consent, presumed, at least, if not real, or without a delict on his part inferring forfeiture.

No 100. Now, in the constitution of an obligation according to the *lex loci*, a consent both real and presumed is implied; real, as the parties made choice of the mode; and presumed, as a new form, perhaps, could not afterwards be obtained, so that otherwise injustice would be done. Hence, no objection can arise to those decisions which have sustained deeds executed according to the formalities of England, or of other countries.

The same consideration is applicable to the transmission of obligations, the assignee being entitled to rely on the efficacy of the same forms in transmission as in the original constitution.

Nay, it might even be admitted, that the endurance of a debt constituted in England, when sued for in this country, may be regulated by the English sttutes of limitation instead of the Scotch prescriptions; for as those limitations are barred, except both parties have lived all the while in England, there arises thence a strong presumption of payment, to which nothing can be opposed but the supposition of great negligence; and therefore it is a matter remote from the present discussion. In fact, however, the contrary seems to have been found in the case of Renton *contra* Bailie, No 67. p. 4516.; and in that of Randall *contra* Innes, No 70. p. 4520.

In the other, more pertinent instances, there was room for a presumed consent. But upon what principle is a creditor to be presumed to have consented to the Chancellor's injunction, by which his debtor, contrary to justice, is to be absolved from every claim, however small a part of the debt he may have paid?

It is no doubt a just rule of the Roman law, that 'qui vult quod antecedit, 'non debet nolle quod consequitur;' and accordingly, as far as the operation of the certificate is a necessary consequence of the contract, it is just in regard to the creditor, who when entering into it should have known, that he could have no action for any prior debt in the English courts. But this could not vary the inherent justice of his claim, though it might render it so far inefficacious; and therefore beyond that territory, the demand, no longer restrained by a local regulation, must become effectual on the general principles of equity. On that ground of inherent justice, accordingly, action was sustained for an English debt against an heir, who, as not being specially bound, would not have been liable in the *locus contractus*, any more than a bankrupt after obtaining an allowed certificate; Kinloch *contra* Fullarton, No 22. p. 4456.

Nor do the English bankrupt statutes seem intended to produce an absolute extinction of debt. The statute 5th George II. declares, that if a bankrupt be arrested or impleaded, after the allowance of the certificate, 'a verdict shall 'thereupon pass for the defendant,' which is in effect to deny the aid of the English courts for execution on such debts; but to enact a like denial of execution in countries under a different jurisdiction, could not have been meant. Thus too the whole detail of procedure is exclusively adapted to England; Blackstone, b. 2. c. 31. § 4.

No 100.

Such a destination cannot reasonably be attributed to any statutes. It is obvious, that the bankrupt's surrender of himself and of his effects, and the discharge or protection which he obtains, are counterparts to each other; as the former is plainly not to be justified but in virtue of the latter. Where this then cannot be inforced, that cannot in justice be required; and by necessary consequence, both must be confined to the same jurisdiction. Such appears to be the sense of English lawyers, particularly Lord Chancellor Talbot, who, when at the bar, gave it as his opinion, 'that an English certificate would be no discharge if a 'suit were commenced against the bankrupt in Virginia, or the other plantations, to which the statutes do not expressly extend.' Davies, Law of Bankrupts, p. 439.; Cunninghame's Law Dictionary, *voce* BANKRUPT.

That the commission of bankrupt in England cannot produce any transference of effects in Scotland, is now unquestionable, and will be admitted. From this, however, it plainly follows, that the bankrupt continues here still vested with his property, while in England he is completely divested; and therefore, to exempt him notwithstanding from personal diligence, were not to give either to English laws or to English rights, an operation similar to that which obtains in England, but one infinitely different. In that country the surrender is the sole cause of the immunity, without which no title to it could exist. In this, that cause is wanting, and consequently what might be right there, would here be wrong.

With regard to the decisions of the Court, relative to the defence founded on those English statutes against personal diligence in Scotland; that in the case of Rochead *contra* Scott, No 94. p. 4566, which sustained the effect of the certificate, appeared to rest on the tacit consent of the creditor, implied in adopting the English form of his bond; and in that of Christie *contra* Straiton, No 96. p. 4569, a similar judgment seemed to proceed, on the idea of Scotch effects being *ipso jure* vested in the assignees. But the groundlessness of this notion was evinced by the decision, Ogilvie *contra* Creditors of Aberdein, No 86. p. 4556. which found, that moveables in Scotland were not affected by such foreign procedure.

In the case of Galbraith's creditors, No 97. p. 4574. the Court at first refused to sustain the above-mentioned defence founded on a certificate of conformity. And, at the same time, in that of Forrest and Sinclair *contra* Assignees of Thomson and Tabor, No 89. p. 4561, it was found, that the proceedings under the commission did not bar the prior English creditors from attaching the bankrupt's effects in Scotland.

But, though a contrary judgment was afterwards given in Galbraith's case, the first judgment in that of Forrest and Sinclair was adhered to at a still later period, viz. 5th March 1767, which indicates, that the principle of the first judgment in the other question was then recognized. For if the debts had been extinguished by the certificate, how could diligence proceeding on those very debts have been sustained?

No 100.

This at least is certain, that the latter judgment in the case of Galbraith was never acknowledged as fixing the point. For Coalston *contra* Stewart, No 99. p. 4579, the general question was made the subject of a hearing in presence, though from some unforeseen circumstance it became unnecessary to determine it.

Indeed many other objections to that doctrine might be suggested. A succession of advertisements in the London Gazette is requisite for giving effect to the commission of bankrupt, and it is indispensable that none of those be omitted; but in regard to persons in Scotland, they must be held to be all omitted. To us the London Gazette is no more a legal channel of intimation, than any other foreign newspaper.

The improbability too may be remarked, of our decrees of *cessio bonorum* being allowed effect in England, though a discharge not so extensive, or, of course, so contrary to equity, as their certificate of conformity. The same observation may be made, in respect of our statutory exception to deeds executed 60 days before bankruptcy. But it will be easily granted, that the degree of deference respectively due to the municipal institutions of the two countries must be reciprocal.

It is also remarkable, that such an effect, in our courts, seems never to have been ascribed to the English insolvent acts; and yet no distinction in this respect, founded on principle, occurs between these and the bankrupt statutes.

Last of all, it must be admitted on the other side of the question, that the operation of the certificate is at least so far different in the two countries, that though in England the debts viewed as extinguished cease, from the time of the commission, to give to individual creditors the right of attaching the bankrupt's property, they subsist nevertheless in Scotland unimpaired to that effect as a legal claim against the debtor.

It is a concession, however, which seems to include the whole of the present argument, viz. that the discharge and the surrender are correlative and reciprocal; or rather that the former is a mere equitable consequence of the latter; so that the one neither ought nor can be supported, where the other cannot be enforced. For surely it is a singular notion of a discharged debt, which yet admits its existence, to authorise a claim against the debtor's property; and one not less singular, which, after going thus far, denies the power of arresting his person; notwithstanding that the right of attaching property must ever include that of using the means, of which, with respect to moveables, the chief perhaps is diligence affecting the person.

2*do*, But at all events those English statutes can never extend to debts contracted in Scotland, and such was the debt in question. Dunbar was the *locus contractus*. There the commission for the goods was given and accepted, and the sale perfected by mutual consent. Voet, *ad tit. Dig. de jud. et ab. quisq. ag. vel conv. deb.* § 73. And at the same place too, delivery of the goods was made, which from that moment were at the risk of the buyer.

No 100.

A bill, it is true, payable at Berwick, was drawn and accepted for a part of the price; but this did not change the nature of the debt. It subsisted independent of the bill, which the creditor might safely relinquish or destroy at his pleasure; as the granting of this, for the convenience of the creditor, could afford no *jus quæsitum* to the debtor.

Answered, 1*mo*, In Scotland as well as in England, the certificate of conformity operates in favour of the debtor, a discharge of all debts contracted before the bankruptcy.

It has been termed a bar to execution. If so, it is a perpetual one, and similar to a decree suspending the letters *simpliciter*, which is equivalent to a decree absolvitor from an action of debt.

In fact, by the express terms of the statute, the certificate is an absolute 'discharge from all debts due or owing at the time when the party became 'bankrupt;' Blackstone, v. 2. p. 483. Nor if this part of the English jurisprudence had been deemed either unjust or impolitic, would it have been adopted and transferred into our law by the late bankrupt act.

It has been objected, that this English statute cannot have effect *extra territorium*. This objection, however, is little connected with an argument concerning rights that result from laws *intra territorium*. In this way, contracts, and obligations perfected according to the *lex loci*, create rights, which ought to receive effect every where. Thus persons married in England, according to the law of that country, will in this be equally acknowledged in that state. So also the discharge of an English debt agreeable to the English forms will be no less valid in Scotland.

With regard to the distinction stated between claims founded in justice, or in the law of nature and nations, and those considered as unjust, and authorised solely by municipal institutions; it may be asked, what is the criterion of this supposed injustice. Nations have no title to judge so harshly of each others jurisprudence. The general and reasonable presumption is, that the laws of every people are suited to its situation, and connected together; and, if the expression may be pardoned, it would be a high degree of national insolence, to alter and invert, according to our particular notions, the rights which by the law of his own country are competent to a foreigner, or the obligations which by the same law he lies under.

It should seem, therefore, that the Court would not deny effect to a foreign decree if conformable to the *lex loci*, though such law might be deemed unwise or unjust. In one case indeed execution was refused here on a decree of the Court of King's Bench, from an apprehension of its being contrary to justice and to the true meaning of the statute on which it proceeded; Wilson against Brunton and Chalmers, No 84. p. 4549. But that judgment was reversed on appeal, and an opposite decision given afterwards in the similar case of Laycock *contra* Clerk, No 85. p. 4554.

No 100.

If then a decree of an English court were now produced, assoilzieing Renton from an action at the instance of Watson, in virtue of the statutes of bankruptcy, effect would not be denied to it; and it is obvious, that the present case is tantamount to that.

But it must be allowed at least that we are not to consider our own law as unjust. Now, by our late bankrupt act, the discharge authorised by the English statutes has been adopted, and it is now a law common to both kingdoms. The forms indeed by which the discharge is obtained have their respective differences; but the right itself is the same in the one country as in the other. This is a circumstance which makes the present question to wear quite a new aspect, and seems alone decisive of the cause. Such, too, is the unavoidable inference from the admissions on the other side of the question.

In support of the position, that the English bankrupt-statutes can produce no effect *ultra territorium*, it has been said, that each regulation bears a peculiar reference to the judicatories and magistrates of that kingdom. But though the certificate may not obtain a more extensive operation *viribus statuti*, this is no reason for withholding effect from the substantial right which thence results; otherwise no force could be allowed to any foreign contract, the formalities of which must always relate particularly to local institutions.

As for the opinion of Lord Talbot, it does not appear but that the debts treated of were colony debts instead of English; and at any rate, on a point of the law of nature and nations, no peculiar deference can be claimed to the sentiments of any municipal lawyer.

The decisions of the court of themselves establish the present argument. But before stating them, an important distinction is to be remarked. Though rights arising from foreign laws or decrees ought undoubtedly to receive effect, the laws themselves are to have no farther operation than is necessary to gain that end. Thus, in the present instance, the English statute affords a title in law, on which an action may be raised, and a defence founded; or a *jus ad rem*, which, by means of our proper forms, may be rendered a complete right; but it cannot produce a direct transmission of Scotch property.

The first case is that of Rochead, No 94. p. 4566., in which the certificate was sustained as an extinction of debt in England, and consequently every where.

The next, that of Christie, No 96. p. 4569., underwent a very deliberate discussion, as appears from a full detail of the argument in Kilkerran, *voce* Foreign. There the pursuer was found to be barred by the certificate, 'from 'recovering his payment out of the effects acquired by the defender after the 'said commission of bankrupt.'

In the following year, the case of Ogilvie occurred, No 86. p. 4556., in which arresters of Scotch effects were preferred, on the ground which excludes an *ipso jure* transferrence by the English proceedings; a decision, as above shown, perfectly consistent with the foregoing.

No 100.

The question between the Heir and the Creditors of Galbreath followed, No 97. p. 4574.; and as the plea founded upon the certificate was, in that case, deemed peculiarly ungracious, it was indeed at first rejected; but afterwards it was finally sustained.

The case of Thomson and Tabor, No 89. p. 4561, stated on the other side, as of a contrary tendency, was in reality the same as that of Ogilvie; it being found in like manner, that Scotch effects did not vest in the assignees *ipso jure*. To have argued there, that the debts of the arresters were extinguished by the certificate, would have been highly absurd. It is manifestly in questions between the creditors and the bankrupt only, that the effect of the certificate can be matter of discussion. In competitions between the creditors themselves respecting subjects acquired before bankruptcy, there can be no room for such a question.

The result then of the whole inquiry is, that the Chancellor's certificate must be allowed to operate in Scotland as well as in England, a discharge of any English debt which was owing at the period of the bankruptcy.

2. As to the question, how far the debt is to be accounted an English one; it is to be observed, that the place of the contract of sale was of no importance. The sale, no doubt, was the remote cause of the debt; but it is only of this itself that the place is to be considered. Nor was the delivery of the goods to a carrier more than a step towards creating it; for though the risk then lay on the buyer, it was merely from his having prescribed this particular mode of conveyance.

Now the *locus* of the debt was Berwick, as the debtor became there finally answerable for it; a rule laid down by the above-cited decision, Christie *contra* Straiton, which found a debt to be an English one, because the subject from which it arose was to be accounted for at London. Besides, the bill here being made payable at Berwick, this excludes all doubt concerning that part of the debt.

THE LORD ORDINARY sustained the defence founded on the certificate in question.

On advising a reclaiming petition and answers, the COURT appointed a hearing in presence, which took place.

Observed on the Bench; If the creditor in an English debt expressly agree, that in reference to it he shall continue subject to the English bankrupt-law, there can be no doubt of the validity of such a paction. The same agreement seems here to be implied; nor is it the less entitled to regard, that it is not express, but tacit.

It was likewise *observed*, That the point was still unsettled by the former decisions; and that, on occasion of the discussion in the case of Stewart *contra* Coalston, No 99. p. 4579., doubts had been expressed by very eminent judges, in respect to the propriety of the judgement in that of Galbreath.

No 100. 'THE LORDS found, that the Lord Chancellor's certificate of conformity, obtained by James Renton in England, does operate as a proper discharge, so as to bar action in this country as to Mr Renton's accepted bill; but as to the other debt, find, that the Lord Chancellor's certificate does not operate as a proper discharge, so as to prevent the execution of a border-warrant, or an action in this country.'

Lord Ordinary, *Hailes*. For Watson, *Dean of Faculty*, *Steuart*, *A. Campbell, jun.* Alt. *Macleod-Bannatyne*, *Sir W. Miller*, *Hope*. Clerk, *Colquhoun*.

S. *Fol. Dic.* v. 3. *p.* 229. *Fac. Col.* *No* 197. *p.* 409.

SECT. VI.

Mode of proving debts contracted in England pursued for in Scotland.—Cohabitation in a foreign country.—Foreign trust-deeds in favour of Creditors.—Divorce.

No 101. 1748. *June* 30. FRASER *against* LOOKUP.

ALEXANDR FRASER, victualler in Westminster, having pursued Mr John Lookup advocate, for L. 32 : 3 : 6 Sterling, as the price of wines furnished at London to Mrs Lookup before her marriage; and having brought what appeared to the LORDS a *semiplena probatio* of the furnishing, the LORDS 'allowed him 'his oath in supplement.' And Mr Lookup having reclaimed upon this ground, that by the law of England, where the debt was supposed to be contracted, the pursuer's own oath is never admitted to any effect, the petition 'was refus- 'ed without answers.'

It might with the same reason be pleaded, that a debt contracted in England could not, in a process brought for it in Scotland, be proved by the defender's oath: Though we sustain defences upon the law of England with respect to contracts made there, yet we still observe our own forms.

N. B. If the method of proof falls under what is called the forms of the Court, How comes it that we allow payment of a bond granted in England to be proved by witnesses?

Fol. Dic. v. 3. *p.* 230. *Kilkerran*, *No* 5. *p.* 207.