

bill whereupon decret had been obtained, might nevertheless be conveyed by indorsation, which would give right to the bill but not to the decret.

1754. November 29. COMPETITION among the CREDITORS of CAPTAIN WILSON.

[Kaimes, No. 80. 81 ; *Fac. Coll.* No. 133 ; and *Kilk.* 31st January 1755.]

THE said Captain Wilson, residing at London, having stopt payment upon the 15th of February 1751, was from that date found to be a bankrupt ; a commission of bankruptcy issued against him ; and assignees were named under that commission, who are one of the competing parties in this process. After the date of the bankruptcy, but before the assignation under the commission of bankruptcy, several arrestments were laid on by sundry of Wilson's creditors in the hands of sundry of his debtors, some of whom were Scotsmen, and residing in Scotland, such as my Lord Rothes ; others were Scotsmen, but residing in Ireland, though having estates in Scotland, such as Captain Johnston ; others were Irishmen, but occasionally in Scotland attending their duty in the army, such as Major Johnston ; and, lastly, others were originally Scotsmen, but had neither domicile nor effects in Scotland, such as Claud Johnston, merchant in London. In all these hands arrestments were laid on by Wilson's creditors, either upon depending processes or registrations, at the market-cross, pier and shore of Leith, or else by leaving a copy at their dwelling-houses, or giving it them personally when they were in the country.

The assignees under the commission of bankruptcy claimed to be preferred to these arresters, upon three separate grounds,—*1mo*, Because *mobilia*, among which *nomina debitorum* are reckoned, *non habent situm* ; that is, they are understood always to travel about with the creditor, and to be where he is, without any particular seat of their own ; the consequence of which is, that they must be governed by the law of the domicile of the creditor or proprietor, where they are supposed, by a fiction of the law, to be situated ; and therefore as in this case, by the law of England, the estate of the bankrupt is vested in the commissioners from the date of the bankruptcy, the arrestments, being laid on after that, are void and null. *2do*, The arrestments in the hands of Captain Johnston and Claud Johnston are null, as being laid on in the hands of persons who had no forum in this country, they having no domicile in Scotland, though originally of that country. And, *3tio*, All the arrestments are null, because the principal debtor, Wilson, has no forum in Scotland, having neither domicile nor effects there.

It was ANSWERED to the *first*,—That the maxim, that *mobilia non habent situm*, is only founded upon the authority of some Dutch doctors, and takes place nowhere else except among the little states of Holland, which are so much mixed and interwoven one with another ; but did never take place in separate and distinct states, such as France and Holland, France and Britain, or even England and Scotland, which are as much distinct, as to their laws and jurisdictions, as any two kingdoms in Europe : that this law does not hold even with respect to

succession, and a man dying intestate has as many separate heirs as he has estates in different countries; and so it was decided in this country in the case of *Duncan*, (*Vide* Information for the Arresters, p. 8;) and, if so, much less will it hold in the case of execution, or attachment by legal diligence, which, as it can only be done by the authority of the judge of the country, so it must be regulated by the laws and forms of that country: and there is no reason for making a distinction betwixt *corpora* and *nomina*, which have as much a fixed seat as the *corpora*, and must be supposed to be there where the debtor is; and it would be very strange if the moveables of any person, before they are disposed of, should be governed by one law, and after they are sold and turned into bonds and bills, should be governed by another: that the law of *comitas*, among nations, goes no farther than the proprietor's power of disposal; so that, by it, a man disposing of his goods according to the forms of the country where he lives, that deed is, *ex comitate*, held to be valid in the country where the goods are situated, though the deed be not according to the forms of that country: that if the English statute of bankruptcy was to be the rule in Scotland as to *corpora*, then all voluntary sales made of the goods, after the date of the bankruptcy, and all poidings by creditors, would be null and void.

To the *second* it was ANSWERED,—That both Captain Johnston and Claud Johnston, being natives of Scotland, had a forum there *ratione originis*; and this has been established by a series of decisions, from 1626 down to 1747, (*Vide* Information for the Arresters, p. 20,) as well as by the authority of the civil law: And with respect to Captain Johnston, he has a forum in Scotland *respectu rei sitæ*, having a land estate, which gives him a forum for all personal actions as well as real actions against the estate; and so it was decided in the case of the *York Building Company* against *John Hardin*, December 29, 1724, (*Vide* Information, p. 23:) And as to Major Johnston, he, by his temporary residence, was subjected to the jurisdiction of the courts of Scotland.

To the *third* it was answered, in like manner, that Captain Wilson, though residing at London, yet, being a native of Scotland, had a forum there *ratione originis*.

The Lords found, almost unanimously, that the assignees under the bankruptcy were preferable.*

Lord President said, as to the *first* objection as to the arrestments, viz. That the statute of bankruptcy must be the rule,—that the only question here was concerning *nomina*, and therefore, whatever his opinion might be as to moveables, or *corpora*, that was not the question here; the debts, he said, which were the subjects of arrestment, being contracted in England, the deeds executed after the English form, by persons then in England, and in favour of a person residing in England, and the place of payment, though not expressed, supposed to be in England, where the debts were contracted; for all these reasons, he said, he considered these debts as English debts, and, particularly, he laid much weight upon the place of payment, which, he said, gave a *situm* to the *nomen*, and made it be ascribed to that place where it is payable; and for this he quoted the title, *De eo quod certo loco*, by which it appears that a sum of money payable at a certain place is primarily and directly exigible

* January 31, 1755. Adhered to this interlocutor; allowing the arresters to be heard before the Ordinary, how far the debts were English debts or no. This interlocutor was unanimous.

there, and only indirectly, and by what they call an arbitrary action, exigible anywhere else; for which reason, he said, he would consider any diligence or execution upon that debt in the place where it was payable, as preferable to any diligence done upon it in any other place: And, for these reasons, he was of opinion that the statute of bankruptcy gave a preference in this particular case to the assignees. As to the objections to the arrestees, he thought that Lord Rothes had undoubtedly a forum here, to every intent and purpose; but as to the rest of them, though they might have a forum to the effect of being sued here, yet they had not a forum to the effect of executing prohibitive diligences against them, such as arrestments. As to the objection, that Captain Wilson, the principal debtor, had no forum here, he was of opinion that he had none; because, he said, he considered the *forum originis*, though established by many old decisions, upon the credit of which the later decision in 1747 proceeded, as no forum; for he thought it absurd that a Scotsman who happened to be born in this country, but had gone out of it perhaps a child of two years old, and settled himself in a foreign country, should be supposed to have a procurator here to look after his affairs; which is the only foundation of giving any man a forum in a country: And as to the Roman law, he said, there might be a *forum originis* in the Roman empire, where all was under the dominion of one sovereign, but that would not apply to the case of distinct kingdoms and sovereignties. For this reason, in general, he thought there was no *forum originis*; but there was a particular reason why, with respect to England and Scotland, there could be no such forum, which was, that as in England all Scotsmen are accounted Englishmen, according to the decision in the famous case of the *postnati*; so, by the same reason, all men born in England are Scotsmen, and consequently, by the rule of the *forum originis*, every man born in England had a forum in Scotland, because he is, in the construction of law, a native Scotsman. He further said, that he did not deny but that a man might have a forum wherever he happened to be present, or wherever he had effects, or even where he had but *nomina*, according to the authority of Huber, *De Jure Civitatis*, l. 3, sect 2, cap. 3, p. 61; but then, in order to establish this forum, it was necessary to begin with an arrestment *jurisdictionis fundandæ causa*, after which you may intent an action, and then, upon the dependance, arrest in common form; and if that had been done here, he would have thought the arrestments not void, though he would have still thought the assignation under the commission of bankruptcy preferable to them.

Prestongrange agreed with the President in rejecting the *forum originis*, and thinking that Captain Wilson had no forum in Scotland; but he preferred the English assignees upon this general ground,—that the assignation under the commission of bankruptcy was a full and complete assignation, according to the forms of the law of England, vesting the subjects in the assignees from the 15th January 1751; therefore all arrestments after that date were good for nothing, in the same manner as if there had been a voluntary assignation, of that date, executed according to the forms in England, or a decree of a judge in England adjudging these subjects to the assignees, which he thought would be effectual to give execution in Scotland; and with him agreed Lord Kaimes, both as to the nature of the assignation and the commission of bankruptcy, and that there was no *forum originis*, and consequently that all the arrestments

were null and void. Prestongrange thought that even the *corpora* of moveables followed the *lex loci*, in the matter of succession. There was in this case a voluntary assignation of some of the debts in question, prior to the date of the bankruptcy, executed according to the law of England, without intimation; which, nevertheless, all the Lords thought preferable to the arrestments in Scotland. But with respect to the preference betwixt the legal and voluntary assignees, the Lords delayed giving any opinion till they should have information from the lawyers in England; considering it as a point of English law merely.

1755. *January* 31. The Court preferred the voluntary assignees, upon seeing the opinion of English lawyers.

N.B. I cannot help observing that the Lords in this case seemed to have stretched a point in favour of the English assignees; for there are three points upon which the decision turns,—the *first* is, that Captain Wilson has no forum in Scotland; in finding which the Lords have clearly altered what is established by a series of decisions, and what has hitherto been understood to be the law of Scotland. The *second* point is, that the assignation under the commission of bankruptcy is to be considered as a voluntary assignation, completed according to the forms of the law of England: but neither will this do, for the commissioners of bankruptcy, who in this case are the cedents, derive their power and authority from the act of the law, and not from the deed of the bankrupt; and though our courtesy has gone so far as to sustain deeds flowing from the consent of parties, which are executed according to the forms of other countries, yet it hath never gone so far as to hold for valid the operations of law in other countries, so as to order them to be put in execution here, especially when that could not be done without depriving the natives here of the benefit of their own laws; and it should seem that, in consequence of this decision, the Lords would order execution here upon an English or French decret, without any trial of the cause. The *third* point is what the President put his judgment upon, viz. That the debts are to be accounted there to have a site where they are payable: but neither is this right, according to my opinion,—for, *1mo*, The debts in this case had no particular place of payment, and therefore were payable wherever they could be exacted, that is, wherever the debtor had a forum. *2do*, If there had been a certain *locus solutionis*, yet the debt was exigible *arbitraria actione*,* wherever the debtor was to be come at; and, for these reasons, if a debt can be said to have any site at all, it is either where the debtor has effects, or can be laid hold of and put in prison till he pays the debt.

As to the arrestment *jurisdictionis fundandæ causa*, upon which the President laid so much stress, I think it can never give a jurisdiction, but manifestly supposes a previous jurisdiction, by virtue of which it is laid on: in short, I take it to be the invention of later and barbarous ages, altogether unknown in the civil law. (See *infra*, 6th *January* 1758.)

* See with respect to this, Cujacius *Parat. Cod. ad tit. Cod. de eo quod cert. loc.*