Dec. 18, 1813. able to discover any rule by which that could be done.

ENTAIL.—ROXBURGHE FEU CAUSE.

Then having regard to the whole,—all were alienations, to operate only after the death of the Duke, and to alter the order of succession, under the colour of feuing; and, on these general grounds, (without saying any thing as to the special reasons,)—

Judgment. The judgment of the Court below was *affirmed*.

Agent for Appellant, CAMPBELL.

Agents for Respondent, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SELKRIG (Trustee for Creditors of FAIRHOLMES) - - - - - - } *Appellant.*

DAVIES and SALT (Assignees under a Commission against GARBETT, a Bankrupt) - - - - - - - - } *Respondents.*

March 23, 1814.

BANKRUPTCY—EFFECT OF AN ENGLISH COMMISSION OF BANKRUPT IN SCOTLAND.

IT is now settled law in Scotland, founded on a principle of international law, that the assignment under an English commission of bankrupt vests in the assignees, *ipso jure*, and without the necessity of intimation, the whole of the bankrupt's personal or moveable property in Scotland; and that the effect of all subsequent diligence, by any Scotch or other creditor, is thereby precluded. Thus, where a commission, issued in England, against a person, part of whose property consisted of certain shares of Carron stock, and a creditor in Scotland afterwards arrested these shares,

it was held by the Court of Session, and, on appeal, by the House of Lords, upon the above ground, that the title of the assignees was preferable. March 23, 1814.

Held, that the dealing by the assignees with the Company, respecting the shares, after the expiration of a sequestration, by force of which they might be supposed to have at first acted, was sufficient intimation, if it had been necessary; and that the arrester having claimed under the commission, was thereby also precluded from availing himself of his arrestment. BANKRUPTCY —EFFECT OF AN ENGLISH COMMISSION OF BANKRUPT IN SCOTLAND.

No authority given by the English bankrupt statutes, to compel a bankrupt, by legal process, to convey his Scotch real or heritable property to the assignees, but the amount sometimes brought into the common fund, by the creditors assigning their debts to an individual, who proceeds against the heritage according to the Scotch forms, or by the refusal of the certificate till the bankrupt consents to convey.

MR. SAMUEL GARBETT, one of the founders of the Carron iron works, carried on considerable trading concerns both in England and Scotland. Mr. Garbett being indebted to the estate of Messrs. Fairholmes, bankrupts, Mr. Grant, trustee for the Fairholmes' creditors, in 1773, arrested certain shares of Carron stock, belonging to Mr. Garbett. In 1774, it was agreed that the arrestments should be withdrawn, in consequence of an arrangement from which the Fairholmes' creditors derived some advantage, but not the whole that was stipulated.

Grant, trustee for Fairholmes' creditors, in 1773, arrests shares of Carron stock belonging to Garbett.

In 1774, agreement to withdraw the arrestment.

The arrestment, instead of being formally vacated, was made over by Mr. Grant to the trustee for the creditors of Mr. Garbett's son and son-in-law, bankrupts, for the alleged purpose of extricating their concerns, which were involved with those of Mr. Garbett. No process of forthcoming was instituted; but the arrestments were founded

Arrestment not formally vacated.

March 23, 1814.

upon in certain subsequent proceedings, which, as was contended, prevented the prescription.

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March, 1782, commission of bankrupt in England against Garbett; and, in April, 1782, Scotch sequestration.

Intimation.

In March, 1782, a commission of bankrupt in England issued against Mr. Garbett, and in April of the same year, his effects in Scotland were, on his own application, sequestrated, with the consent of, or without any opposition from, the assignees under the commission. No formal intimation of the assignment was given to the Carron Company; but as the assignees (one of whom was a trustee under the sequestration) corresponded with the Company on the subject of the shares, and continued to deal with, or to claim the right to deal with, these shares after the sequestration had expired, the question was raised, Whether this was, or was not, sufficient intimation?

Grant, and his successor, the Appellant, both claim under the English commission.

Mr. Grant offered to prove under the English commission, upon affidavit of the debt remaining due to the Fairholmes' creditors, and that he held no other security for it, except a decree of adjudication, not mentioning the arrestment. The proof was opposed, but a claim for 15,000*l.* was allowed to be entered. Mr. Selkrig, the Appellant, having succeeded Mr. Grant in 1793, renewed the application to be permitted to prove under the English commission, and made an affidavit, stating the agreement for withdrawing the arrestment of 1773, and produced certificates from the Signet Office, with a view to show that the arrestment had expired.

The Commissioners were ordered to report on the state of the facts in regard to this claim, but before the proceedings under the order were terminated,

Appellant

Mr. Selkrig, finding that the sequestration of 1782,

not having been renewed in terms of the Bankrupt Acts, 23 Geo. 3, cap. 18, and 33 Geo. 3, cap. 74, had expired, raised an action against Mr. Garbett in Scotland, and, in 1798, arrested the shares of Carron stock.

In an action of multiple-poinding, soon after brought at the instance of the Carron Company, the question of preference, as between the English commission and the Scottish arrestments, came before the Court.

The Court of Session was unanimous in favour of the general principle, that the English assignment transferred the whole of the bankrupt's personal property, wherever situated; and that the effect of the subsequent arrestment of 1798 was thereby barred. All, except *Lord Armadale*, appeared to have been of opinion, that the Appellant was, by the agreement of 1774, precluded from founding on the arrestments of 1773. *Lord Meadowbank* said, that if he reprobated the agreement, he must refund the benefit received under it; and (in regard to the intimation of the English assignment) that legal assignments, like those of marriage, operated without intimation. *Lord Balmuto* said, that as the Appellant and his predecessor had claimed under the English commission, he could not now object to the effect of the general assignment under that commission. *Lord Armadale*, while he concurred in the general principle, that the assignment under the English commission transferred the whole of the bankrupt's moveable property, wherever situated, and barred the effect of all subsequent diligence, doubted whether the principle applied to this

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abandons the proceeding under the English commission, and executes another arrestment of the Carron shares in 1798.

Question of preference as between the arrestments 1773—1798, and the English commission.

The personal property passed by the English assignment, and subsequent diligence thereby barred.

The effect of the arrestment of 1773 barred by the agreement to withdraw it.

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particular case, as an arrestment of 1773 appeared to be still subsisting.

On the 20th November, 1804, the Court pronounced an interlocutor, "finding the assignee "under the English commission preferable on the "fund *in medio*." The Appellant having reclaimed, an interlocutor was pronounced on the 20th November, 1805, "finding that the assignment (the "common debtor being domiciled in England) was "preferable to the arrestment of 1798, but appointing the parties to state, in mutual memorials, "their averments as to the effect of the arrestment "of 1773." The Respondents gave in a memorial accordingly, but the Appellant presented a note, stating, that he had been advised not to agitate farther the effect of the arrestment of 1773 *in that Court*. On the 3d June, 1808, the Court pronounced an interlocutor, "finding upon the whole "matter, in terms of the interlocutor of 20th No-"vember, 1804, that the assignees were preferable "on the fund."

Appellant declines to agitate farther in that Court the question as to the arrestment 1773, though memorials ordered by the Court.

Judgment for assignees, and appeal.

From these interlocutors, Selkrig appealed.

Arrestment, 1773.

Adam and *Leach* (for Appellant.) The arrestment of 1773 must be considered as still in force, having never been vacated, the prescription having been prevented, by its being made and continued litigious, and the creditors of the Fairholmes not having received the whole of the advantages stipulated by the agreement for withdrawing that arrestment. If the Appellant was well founded in this part of the case, it put an end to the other; the preference by the arrestment of 1773 being clear,

both as against the English commission and Scotch sequestration.

But suppose the arrestment of 1773 could not be made available, that of 1798 gave the preference,—the sequestration of 1782 having expired,—the Bankrupt Act, 33 Geo. 3, cap. 74, having laid the fund open to the legal diligence of any creditor, *prior* or *posterior* to the sequestration,—and the arrestment of 1798 being the first diligence.

Arrestment 1798. Two questions.

Under this very important branch of the case, two questions were to be considered:—1st, Whether the English assignment, *ipso jure*, carried the Scotch property, so as to exclude the preference by subsequent attachment, without previous intimation. 2d, Whether, if previous intimation was required, it had been given.

1st, Whether the English assignment, *ipso jure*, transferred the Scotch property. Strothers, 1803.—Steins, 1812, 1813.

In 1798, there was no idea, with Judge or Counsel, that Selkrig could have proceeded otherwise than he had done, or that the English assignment, *ipso jure*, transferred the Scotch property. The law, previous to the late cases of *Strothers v. Reid*, and *Bank of Scotland v. Stein and others*, appeared to have been founded on the *lex domicilii*, and the rule that personal property followed the person. But in this decision, and that in Stein's case, the Court had deserted the notion of the *lex domicilii*. A Scotchman, domiciled in Scotland, comes to England, commits an act of bankruptcy, and the commission founded on that act transfers, *ipso jure*, the whole personal property in Scotland to be distributed by a different law. This was the first appeal from that principle.

As the law stood before, the English assignment

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was admitted on the same footing as that of a private person; but then it gave no title in opposition to an arrestment there, unless previously intimated. The question of preference was to be judged of according to the law of Scotland. In the case of *John Aberdeen*, a bankrupt, (Kilk. 13th Nov. 1747,) a commission issued against a Scotchman residing in England. *Ogilvie*, one of the creditors for a debt contracted in England, arrested effects of the bankrupt in Scotland. Upon an action of forthcoming, the assignees appeared, and claimed the preference. "The Court was of opinion, that moveables in "Scotland could only be attached by diligence out "of the Courts of Scotland; and that therefore the "preference could be judged only according to the "law of Scotland, and preferred the arrestment."

Ersk. b. 3. t. 2. s. 42.

Aberdeen, Nov. 13, 1747. (Kilk.)

The next case was that of *Thorold and others, Assignees of Thomson and Tabor, v. Forrest and Sinclair*, (Appendix to Morrison's Dict. *voce Foreign*.) The judgment there was, "that the assignees had "a sufficient title to compear and compete in the "action; but that the proceedings under the com-"mission did not bar the creditors of the bank-"rupts, whether their debts were contracted in "England or in Scotland, from affecting their "debtors' effects situate in Scotland, or debts due "to them by persons residing in Scotland, by legal "diligence," &c. In a case (*Assignees of Wilson v. Fairholme*, Jan. 31, 1755) decided before that of Thomson and Tabor's bankruptcy, the Court preferred the assignees under the English commission to the arrester; but on this ground, that the debts arrested in Scotland were constituted by bonds

Jan. 26, 1767.

Fac. Coll. vol. i. p. 200.

granted in England in the English form, made payable in England, originating in debts contracted there, and were to be considered as English debts. So in the case of *Crauford v. Brown and Crew*, assignees under *Dunlop's* commission, it was decided that where the debts arrested were Scotch, the arresters were preferred to the assignees. In the case of *Divison and Graham v. Fraser*, only a few months before the present case, 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 at all; and it "is still clear law, that the creditors of a bankrupt "may obtain a preference over them by arresting or "adjudging; which proves, that in questions oc-"curring here, a radical right is held to remain "with the bankrupt." The whole of these cases were in opposition to the principle, that the English commission, *ipso jure*, transferred to it the property in Scotland. Though the assignees had a title to appear, the assignment must be completed by the forms necessary in Scotland to give it full effect.

March 23, 1814. BANKRUPTCY—EFFECT OF AN ENGLISH COMMISSION OF BANKRUPT IN SCOTLAND. March 6, 1759. Fac. Coll. vol. ii.—Ersk. b. 3. t. 6. s. 19. July 3, 1798. Fac. Coll.

In the subsequent cases, however, a different rule had been adopted, which their Lordships were now called upon to review. In the case of *Strothers v. Reid*, the English assignees were preferred; but that was the case of an English creditor arresting funds in Scotland for payment of a debt contracted in England, and the Court might have made the same distinction as in the case of Wilson's bankruptcy. Stein's case was the only one that exactly resembled the present, and that might be considered as also under appeal.

July 3, 1803. Fac. Coll.

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The common debtor was stated in one of the interlocutors to be a domiciled Englishman. In Stein's case, he was a domiciled Scotchman. The point could not turn on the domicil. What then was the principle? *Mobilia non habent situm.* The party might carry them with him. If this meant more, it led to a false conclusion. Moveables, in a certain sense, had a *situs.* They must be acquired and transferred according to the law of the place where they were situated, and not according to the law of the place where the owner might accidentally be. The owner here was in England, and personal rights followed the person. A commission was taken out against him, and the English law said, that the property belonged to the assignees, with the same rights as the bankrupt could have exercised in England. The cases of *Waring v. Knight,* *Hunter v. Potts,* and *Sill v. Worswick,* carried the principle no farther. But the Court of Session had gone beyond this,—had repealed the old law, and adopted an English statute on the ground of expediency.

Waring v. Knight, 1 Cooke, 325.—Hunter v. Potts, 4 T. R. 182.—Sill v. Worswick, 1 H. B. 665.

2d, Whether intimation had been given.

With respect to the question of intimation, it had been said, that a legal assignment was in itself notice; but it was denied that such was the law in regard to legal assignments in a foreign country. They stood on the same footing as judgments in a foreign country which must be proved. In Stein's case, however, it had been avowed, that intimation was not necessary. Here it was contended, that, if necessary, it had been given. But the mere fact, that the Carron Company knew of the assignment, was not sufficient. The notice must be, that the

assignee was entitled in virtue of the assignment, and no such notice had been given; one of the assignees having dealt with the shares merely by force of the sequestration.

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BANKRUPTCY —EFFECT OF AN ENGLISH COMMISSION OF BANKRUPT IN SCOTLAND, Arrestment, 1773.

Romilly and *Wetherall* (for Respondents.) The Appellant having refused to discuss farther the effect of the arrestment of 1773, though called upon by the Court below to do so, must be considered as having abandoned that ground. It was important to have it decided, whether, after that refusal, it was competent for him to argue that point here. But at any rate the effect of the arrestment of 1773 was a question purely of Scotch law,—nay, of Scotch practice; and it must be a very strong case indeed that would justify a reversal on that ground. That arrestment had prescribed, and certificates had been produced to the Chancellor by the Appellant, to show that it had prescribed. But suppose it had not; it had been abandoned by express agreement, from which the Appellant had derived advantages which he had not offered to restore.

Arrestment, 1798.

The question as to the effect of the arrestment of 1798 was one of the greatest importance. The principle was, that an English commission transferred all the property, wherever situated. It was not founded on any analogy to the law of an intestate's domicil. A commission might be taken out against a person, though not domiciled here. One might be in different places to different purposes, but an intestate had only one domicil. The Steins were domiciled in both countries. (*Lord Eldon* (Chancellor.) It had been held over and over

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Solomons v. Ross.—Jollet v. De Ponthieu, 1 H. B. 131, 132, n Hunter v. Potts, 4 T. R. 182.—Sill v. Worswick, 1 H. B. 665.—Phillips v. Hunter, 2 H. B. 402, &c.—1 Cooke, 321, Index, *voce Foreign Attachment.*

again, that if a man trading to this country was long enough here to commit an act of bankruptcy, a commission against him was good.)

It had been repeatedly decided here, that a foreign commission passed the effects in this country to the foreign commission.

The general doctrine was this,—that the commission (or equivalent proceeding in other countries) passed the whole of the bankrupt's effects, wherever situated. "Property of the bankrupt abroad *may* "be attached, notwithstanding the commission;"—the meaning of which was, that the law of England could not be administered in foreign countries. This was a question of international law. The law of a particular state might form an exception to the general rule of law among civilized nations. Scotland might form an exception. But there was at least a strong presumption, that this was the law of Scotland as well as of the rest of the world. The late cases of *Strothers* and the *Steins* were conformable to the law of the world. But there were other cases before, of which one only was a direct authority, and that was opposed to the two cases of

1747, Kilk. *Strothers* and the *Steins*. In *Aberdeen's* case, the arrestment was prior to the date of the commission, and the Courts in Scotland paid no attention to its relation to the act of bankruptcy. So, in the case of *Wilson's* bankruptcy, the arrestment was prior to the commission, though subsequent to the act. The retrospect was statutory, and of no force in Scotland. In *Dunlop's* case, the arrestment was also prior to the date of the commission. In the case of *Thomson v. Tabor*, it had indeed been held,

that a subsequent arrestment was preferable; and this had led to the erroneous statement of the law on this point in Erskine's very valuable book. Then came the case of *Strothers*, and this was a direct authority for the Respondent, unless it was a good ground of distinction, that the arresting creditor was English. On what principle was that distinction founded? What was it that made an English, and what a Scotch, creditor? How were they to be distinguished in cases of negociable securities, for instance? One rule was easy,—that every creditor who might have the advantage of the commission, should be bound by it. If two nations were at war, it might be doubted whether a commission in the one country could prevent the effect of an attachment in the other, where the attaching creditor could have no remedy under the commission. But the only distinction was, whether or not the creditor could thus have his remedy. And so it had been conceived by the Court below in these latter decisions, when these questions were more frequent, and better understood. The cases of *Strothers* and the *Steins* were not new in specie, though the circumstances had now arisen which required that the principle should be matured. The rule laid down was in analogy to that of the English law. The Courts here gave credit to foreign Courts, that they would distribute so as to do justice to the English creditors, in the same manner as they subscribed to judgments of foreign Courts. Nothing could be more unwise than a rule depending on distinctions between English and Scotch creditors. A rule founded on the *lex domicilii* presented the same

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Ersk. b. 3. t. 6. s. 13.

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inextricable difficulties. The effect of having a co-existent sequestration and commission would be to create two incompatible systems of management, one pulling one way, another pulling another way, and throwing the whole into utter confusion, (*vide Lord Meadowbank's* speech in judgment in Stein's case, 1 Rose. Bank. Ca. 480.) No question arose here as to heritage, the shares being clearly personal property. (*Lord Eldon* (Chancellor.) My own individual opinion is, that all property involved in a partnership concern ought to be considered as personal.)

Adam (in reply.) The old cases had not been cited with a view to set up a distinction between English and Scotch creditors as a rule, but to show that there was no idea before of the rule now adopted. What they (for Appellant) now contended was, that the *comitas gentium* ought to be exercised with reference to the law of the country where the question arose; and there an arrestment was preferred to an unintimated assignment, and the English assignment had not been intimated. (*Lord Eldon* (Chancellor.) Does the law of Scotland require a formal intimation?) The intimation ought to be by notorial instrument, or something equivalent; and there must be an intention to intimate. The sequestration had been awarded with the concurrence of the assignees, and there could have been no intention therefore to intimate an assignment which was conceived to have nothing to do with the Scotch property. Admitting then that the commission transferred the bankrupt's rights, it

Bankton, b. 3. t. 1. p. 191.—Ersk. b. 3. t. 5. s. 4.—Stair, b. 3. t. 1. s. 7.—Act of 1681, cap. 5.

could only transfer the Scotch property, with the qualification annexed by the Scotch law; otherwise the Court, assuming the functions of the legislature, repealed the old law, and enacted a new. This was the error in *Stein's* case.

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March 28, 1814. Observations in Judgment.

Lord Eldon (Chancellor.) Considering the nature and importance of this case, he need make no apology for requesting their Lordships' attention to the reasons why he thought that the judgment of the Court below ought to be affirmed.

He passed over much of the ground that had been taken in regard to the arrestment of 1773, which had led to the treaty under which Fairholmes' creditors had received a certain sum, though not the whole of their demand. A sequestration was afterwards awarded against S. Garbett, under the Bankrupt Act, 12 Geo. 3, cap. 72, renewed by 20 Geo. 3, cap. 43. The act 23 Geo. 3, cap. 18, (1783,) was then passed, which enacted, that sequestrations obtained under the former acts should remain in force for six months after the commencement of that act, during which time it was made competent to renew such sequestrations. Then came the act 33 Geo. 3, cap. 74, (1793,) which enacted, "That sequestrations created under the "act 12 Geo. 3, and not renewed under 23 Geo. 3, "in case of failure of application to the Court to "have a scheme of division made within six months "from the commencement of this last act, should "be entirely at an end; and that, if any effects "falling under such sequestrations remained undi- "vided, the same should be open to the legal dili-

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"gence of any creditor of the bankrupt, prior or "posterior." This had been referred to as the foundation of the argument, that when the sequestration of 1782 had expired in terms of this statute, the remaining personal effects were laid open to the diligence of 1798. The argument might be well founded, with reference to the sequestration; but in the case of a claim paramount to the sequestration itself, the consequence did not follow.

Appellant claimed under the English commission.

In 1782, a commission of bankrupt in England issued against Garbett, and the Appellant's predecessor applied for permission to come in under that commission. The application did not fully succeed, but a claim was allowed to be entered on the proceedings; and he need not tell their Lordships that this was of some consequence, as a final dividend was never made till the claim, unless substantiated, was expunged.

The Appellant afterwards applied to the Chancellor sitting in bankruptcy to be permitted to prove; and, in his affidavit made on that occasion, he stated that he held no security for the debt, except the arrestment of 1773, which he represented as having been withdrawn by agreement. He also produced certificates to show that no process of forthcoming had been instituted, and, generally speaking, that the arrestment had prescribed. He had, however, as he alleged, received nothing under the English commission; but that made no difference in the present question.

In 1798, the Appellant executed another arrestment of the Carron stock shares; and the question now was, Whether either of the arrestments—that

of 1773, or that of 1798—could have the preference as against the English commission of 1782? The arrestment of 1773 clearly could not. Whether that of 1798 ought to be preferred, depended upon the effect of an English commission with respect to the bankrupt's property in Scotland.

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It might be fairly stated, that when the commission of 1782 issued, the general persuasion was, that both an English commission and Scotch sequestration were necessary. This fact appeared to be proved to demonstration by the proceedings in this very cause.

Stein's case, lately decided, involved the general principle. The Bank of Scotland in that case applied for a sequestration of the property of the bankrupts in Scotland. They were met by the assignees under the English commission, who claimed the whole, both Scotch and English. In that particular case, the bankrupts had executed to the assignees dispositions, in the Scotch form, of the whole, not only of their moveable, but also of their heritable property situated in Scotland. In the very able and learned exposition of the grounds of judgment there, it appeared to have been taken for granted that the English commission imposed not only a moral, but a legal obligation on the bankrupts to convey their real property in Scotland to the assignees. But, according to the English law, there was no authority to compel a bankrupt to convey the real estate, and he knew that infinite difficulty had occasionally resulted from that circumstance. If this was a defect, the remedy must be applied, not by their Lordships in their judicial capacity, but by the legislature.

Bank of Scotland v. Cuthbert and others, assignees of Smith, Stein, and others, bankrupts; Second Division, Nov. 12, 1812, Jan. 20, 1813.—*Vide* a very able report of this case in 1 Rose. B. C. App. 462; characterized by Lord Eldon (*C.*) as a report indeed well worth looking at.

No authority given by the English bankrupt law to compel a bankrupt to convey his foreign real property to the assignees.

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He understood that one mode of getting at the real property in these cases was for the creditors to assign their debts to some individual, who proceeded against the heritable property according to the forms of the Scotch law; and another way was to withhold the certificate till the bankrupt consented to convey, the moral obligation upon him to do so being clear. In this manner, the amount of the real property was frequently brought into the common fund. But if a judgment rested merely on the ground that a bankrupt could, by legal process in England, be compelled to convey his Scotch heritable property, he was apprehensive that such a judgment could not be supported.

Appellant not entitled to set up the arrestment 1773.

If the Appellant's *cestui que trusts* had not had all the stipulated benefit from the transaction of 1773—4, they had at least had a considerable share; and he agreed with those Judges below who had said, that unless they had derived no advantage from the agreement, they must not be permitted now to set up the first arrestment. If they rejected the agreement, they ought to refund the benefit received under it. But more especially after the proceedings before the Chancellor, the statement that the Appellant held no security for the debt, and had no means to satisfy it, that arrestment could not be available.

"The second "arrestment "was also "precluded "by the first "transac- "tion."—Lord Balmuto.

He observed it had been stated that the second arrestment (1798) was affected by the first transaction. But he took it for granted that the arrestment of 1798 was good, subject to the question whether it could be supported as against the English commission. Here difficulties presented them-

selves which strongly called for legislative interposition. When one considered what was the effect of a Scotch sequestration—that it might be called for by the debtor, as well as demanded by the creditor—that the plan of distribution under it was different from that under the English commission—that it cut down all voluntary securities granted within a certain number of days previous to the first deliverance on the application, whether given *bonâ fide*, or, as they would say in England, in contemplation of bankruptcy; when one, on the other hand, considered the necessity in England of a previous act of bankruptcy as a foundation for the commission, and the relation which the commission had to a latent act of bankruptcy, the difficulty of applying to the whole of the bankrupt's property in England and Scotland the commission in one event, or sequestration in another, must be obvious. A co-existing commission and sequestration would involve the matter in still more inextricable confusion, unless the one were used for the purpose of distribution under the other. But it was at any rate clear, that the English commission passed the personal property in Scotland, and all other parts of the world.

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Difficulty of applying the process of the one country to property in the other, from the difference in their laws.

Difficulty would only be increased by co-existing commission and sequestration.

And at any rate clear law, that English commission passed personal property in all parts of the world.

Then it had been contended, that the assignment under the commission was like an assignation by a particular individual, and that, by the law of Scotland, an arrestment was competent, unless the assignment had been previously intimated to the debtor. Here, it was insisted, no intimation had been given before 1798, and that consequently the arrestment was good as against the commission. He

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agreed with a distinguished writer on the Scotch bankrupt law, that all the cases, prior to that of *Strothers*, exhibited a very distressing versatility of opinion; for he confessed he was unable to discover any principle common to them all. The true character, however, of the present case was this, that the whole Court was unanimous on the principle, one Judge only dissenting upon the ground of the transaction of 1773—4; also, that this was not the only decision upon the subject, but that judgment after judgment had been given on the same principle since 1803, and that consequently the case came with more authority than if it had stood alone.

Bell's Commentaries on Bankrupt Law.

Intimation.

A formal intimation, it appeared, was not absolutely necessary, something equivalent being held sufficient. But as to the question, whether intimation was at all necessary here, they must consider the difference between the assignation of a debt by one individual to another, and an assigment of the whole of a bankrupt's personal property for the use of all the creditors. If they were to hold, that the rule of law, with respect to intimation, applied to the latter case, they would cut up by the roots the use of an English commission in relation to Scotch property. In many cases, no account could be examined and settled till long after the commission had issued, and a long time might consequently elapse before intimation of the assignment of a debt could be given. *Lord Meadowbank*, therefore, in *Stein's* case, on account of the particular nature of this assignment, held, that it operated like the transference by marriage. A marriage in England ren-

If the common rule as to intimation were to be applied in cases of assignments under English commission, utility of commission as to Scotch property would be destroyed.

" Equiparating this to " the ordinary " case of " transference " by contract

dered the Scotch property of the wife her husband's, without intimation; and such must be the law in cases like the present, if an English commission were to have any effect at all in Scotland.

But he went farther. If intimation was necessary, it had here been given. Mr. Adam had well argued at the bar, that it could never have been intended that the English assignment should be intimated, as the assignees had consented to the issuing of the Scotch sequestration in 1782. That sequestration however had fallen to the ground, and when it did so, nothing remained but the commission, till 1798. The question then was, Whether the intermediate transactions had not furnished intimation sufficient? and he was of opinion that they had.

But independent of other considerations, if a Scotch creditor thought proper to come in under an English commission, he was to be considered, to all intents and purposes, as an English creditor who must deliver up, for the benefit of the general creditors, all securities for his debt before he could be permitted to prove. If an English creditor attached the bankrupt's property abroad, he must account to the assignees. This did not rest merely on the principle of equality in the distribution, but on the ground that the law passed the property. The assignees said, "If you claim "any thing here, you shall not keep for your own "exclusive use what you have got by force of the "law of another country." If he refused to prove at all on these terms, the Chancellor could not compel him to do so. Whether the assignees could,

"of marriage.
* * * * *
"The legal "assignment "of a mar- "riage ope- "rates, with- "out regard "to territory, "all the world "over."—Meadowbank, in Stein's case.

Intimation had been given.

Scotch creditor coming in under English commission.

"The Appel- "lant, by "claiming "under the "commis- "sion, was "precluded "from object- "ing to the "effect of the "English as- "signment." —Balmuto.

March 23, 1814.

BANKRUPTCY —EFFECT OF AN ENGLISH COMMISSION OF BANKRUPT IN SCOTLAND.

by law in another form, get the property out of his hands, was another question. Well,—the Appellant here had claimed under the English commission, and their Lordships already knew what followed.

Grounds on which judgment was given.

This, then, being personal property merely, his opinion was, that the judgment ought to be affirmed for these reasons:—1st, That in the case of transference by assignment under a commission, intimation was not necessary. 2d, That, if necessary, it had in this instance been given. 3d, That the Appellant was precluded from taking advantage of his Scotch arrestment, by his having claimed under the English commission.

Judgment. Judgment accordingly *affirmed*.

Agent for Appellant, CAMPBELL.
Agent for Respondents, NETTLESHIP.

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

GOODRIGHT *d.* BURTON—*Plaintiff in error.*
RIGBY and others—*Defendants in error.*

March 30, 1814.

RECOVERY.

BY statute 14 Geo. 2, cap. 20, a recovery is good, if the deeds making the tenant to the *præcipe* appear to have been executed at any time within the term in which the