choose; and in a late case this was carried so far, that though the trustee was chosen with the consent of the creditors, and had actually gathered in the effects by virtue of the trust-right, yet a creditor who had not acceded was allowed to arrest in the trustee's hands, and by that diligence to get to himself a preference over the creditors who had acceded to the trust-right; which at once puts an end to all such rights, as it makes the trustee chosen by some of the creditors, only a factor for ingathering the effects for the behoof of the creditors not acceding to the trust: and so much with respect to the first part of the Act 1621, which relates not to the disposition of any particular subject to a creditor for payment or security of his debt. This is provided for by the second part of this Act, which relates only to alienations either for payment or security in favour of one creditor, in preference of the more timely diligence of others; and the effect of the reduction at the instance of the creditor who has done the diligence, is to take the subject altogether from the creditor who had been preferred by the partial favour of the debtor. This I think is clear from the words of the Act of Parliament 1621, though the decisions seem to point otherwise. Thus stood the law before the Act 1696, which so far extended the second part of the Act 1621, that though no diligence had been done by any creditor, yet if the insolvent person granted any deed of security in favour of any of his creditors within 60 days prior to his notour bankruptcy in terms of that Act, the same is reducible at the instance of any other creditor, to the effect, as the Act says, of being rendered void and null; which I think has been very properly interpreted by the decisions to mean that the person who gets such disposition is not even to come in *pari passu* with the creditors who have affected the subject by diligence. Nor do I think that the action of reduction will of itself give a preference to the creditor-reducer, but he as well as the other creditors must do diligence to effect it. It is to be observed that the Act of Parliament 1696 does not relate to payment made to any creditor in money, and therein it differs from the Act 1621; but if it be any subject conveyed by deed, though it be given *in solutum*, or in satisfaction, as the Act expresses it, such deed is reducible upon the Act, as it has been very properly interpreted by the decisions.

1758. *July* 7. CREDITORS of CAPTAIN WILSON *against* The ASSIGNEES on his BANKRUPTCY.*

CERTAIN creditors of Captain Wilson arrested, in the hands of Captain Johnston, a native Scotsman, but who resided in Ireland, certain debts due by him to Captain Wilson. This arrestment was laid on at the market-cross of Edinburgh, pier and shore of Leith, and also a decreet of forthcoming was taken in absence against Captain Johnston, both a considerable time before the commission of bankruptcy was issued against Captain Wilson: but the jury in England found an act of bankruptcy before the date of the arrestment; and the assignees upon the commission of bankruptcy are now competing with these arresters for the sums due by Captain Johnston.

It was objected to the arrestments, 1*mo*, That they were null and void even by

* This and the following case were omitted in their proper places.

the law of Scotland. *2do*, That, supposing them valid by the law of Scotland, the assignees were preferable to the arresters.

As to the first point, The President said it was now established that both the *locus originis* and the *locus rei sitæ* gave a forum, so that, as Captain Johnston was both a native Scotsman and had an estate in the country, he was in all respects amenable to the Court; for he thought the *animus remanendi* was too slender a thing, and by its nature too uncertain, to make the jurisdiction of a Court depend upon it, so that he thought even the *forum originis* was sufficient to make him subject to the jurisdiction of the Courts here, without distinction whether he was abroad *animo remanendi* or not. But he said he thought debts in Ireland, such as he accounted the debt in question to be, could not be affected or attached except by diligence issuing from the courts there, according to the laws of that country; for though the rule laid down by the doctors of the civil law was that *mobilia non habent situm*, yet that had been departed from in our practice, particularly in the matter of succession, and it had been found that *mobilia*, particularly *nomina, habent situm* in that country where the debtors reside, and which is also the *locus solutionis*, if there be no paction to the contrary, and where execution must be sued for. According to this rule, bonds, as well moveable as heritable, due by debtors in Scotland, will go in succession according to the rules of our law, suppose the creditor had his residence and died in a foreign country, where the rules of succession were different; and he thought the same rule should obtain in the matter of diligence affecting those *nomina, viz.* That the law of the country where the debtors reside should be the rule; and he considered the case to be the same as if Captain Johnston had had in his hands cattle, or any other moveables belonging to Captain Wilson. He therefore thought that, in this respect, the arrestment was not valid to attach or hold the subject, which, lying out of the territory, could not be affected by the diligence of the Scotch law.

As to the other point, he was very clear that the retrospect of the English statute could operate nothing *extra territorium;* and my Lord Coalston went so far as to say that the assignment, being the operation of the law in England and not the deed of the party, could not give the assignees a title to sue in the Courts of Scotland, though he acknowledged it had been frequently otherwise determined.

The Justice-Clerk and Prestongrange agreed with the President in the conclusion, but differed in the principles. They thought, as to the first point, that the arrestment was valid and effectual, and such whereupon the arrester could have recovered a decree of forthcoming against Captain Johnston, upon which he might have adjudged his estate in Scotland; but they thought that the English statute of bankruptcy was to be the rule in this case, for this reason,—that, according to the doctrine of Voet, in his treatise *de statutis*, and of other doctors of the civil law, *mobilia non habent situm*, but follow the person of the creditor, and are governed by the laws of the country where he has his domicile *animo remanendi;* and if this be true of moveables in general, it will hold more especially of *nomina*, which, being *res incorporales*, have properly no *situs*, but are attached to the person of the creditor *et ossibus ejus inhærent*, and are to be considered as if the money had been paid to Captain Wilson, and was in his coffers.

On the other side, it was said by Lords Coalston, Bankton, and Auchinleck, that the President's opinion seemed to contradict itself; for he admitted that Captain

Johnston had a *forum* here, and that an arrestment, by the law of Scotland, at the market-cross of Edinburgh, pier and shore of Leith, was valid: if so, why may not a decreet of forthcoming go against him? And if he pays upon such decreet, surely that will be a good defence to him against paying over again in Ireland, or any other country in the world, as much as voluntary payment. Nor is the case parallel of the *corpora* of goods belonging to Captain Wilson being in the possession of Captain Johnston, for these *corpora*, not being within the territory, could not be attached by the diligence of our law; but Captain Johnston's person being here *fictione juris*, any personal decree could go against him; and the consequence of the President's doctrine is, that if my debtor's debtor resides in a foreign country, though he may be a native of this and have an estate in it, yet I cannot get at him otherwise than by sueing him in that foreign country, which in some cases may be impracticable, as in England, where there is no method known of attaching a debt due to my debtor. If this were law, it would be a great bar to commerce and credit, by depriving the subjects of this kingdom, in many cases, of the benefit of the salutary diligence of arrestment.

With respect to Prestongrange and Justice-Clerk's opinion, they said it went so far as to set aside even arrestments of Scotch debts in the hands of Captain Wilson's debtors residing here; that the rule of law upon which their opinion was founded was departed from by our practice in the matter of succession, and, *a fortiori*, it should be so in this case where the consequence of it would be to annul legal procedure, and to deprive men of the benefit of legal diligence.

Upon a full hearing in presence, the assignees were preferred by a small majority.

1759. *November* 16. CHAPMAN *against* BRYSSON.*

[*Fac. Coll. II.* No. 211.]

Two parties, A and B, agree to tailyie mutually their lands in favour of one another and a certain series of heirs, and accordingly B took a disposition of his lands to himself and certain heirs, of whom A was one, with prohibitive and resolutive clauses, but without any clause irritating the contravener's right; but upon this entail no infeftment was expede, nor was the entail recorded, so that B's right to the lands was merely a personal right. B sold the lands to C, and having charged him for payment of the price, he suspended, alleging that A had interpelled him from payment, and accordingly A appeared in the process, insisting that B could not sell the lands because they were under an entail of which he was the third substitute; and further, he said that he had executed an inhibition against B, previous to the sale: The question was, Whether B could sell the lands?

The President, and all the Lords, except my Lord Kaimes, were of opinion that this entail, wanting a clause irritating the contravener's right, did not bar onerous alienations, and that the inhibition could not go farther than the obligation which was the ground of it, so that, as B was under no obligation not to alienate for an onerous cause, the inhibition could operate nothing; neither was C *in mala fide* to bargain with B though he knew of the entail, because he knew at the same time that, by law, the entail did not hinder him from selling.

* The decision in this case is mentioned already, but the argument of Lord Kaimes was, by mistake, omitted.