

1762. July 1.

The CREDITORS of the deceased GEORGE GALBREATH of Balgair *against* JOHN GALBREATH of Balgair.

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A person who, upon surrendering all his effects on a commission of bankrupt in England, had obtained the Lord Chancellor's certificate, became creditor to his brother, on whose estate he claimed to be ranked for the debts due to him. It was objected to his claim, that the debts due to him by his brother were more than compensated by two debts due by him to his brother; one contracted in England, and the other in Scotland, prior to his bankruptcy. The certificate was sustained as a sufficient defence against the debt contracted in England, and the compensation pleaded on that debt, was repelled.

By the laws of England, a bankrupt making a fair discovery and surrender of his effects to the assignees under the commission for behoof of his creditors, is entitled to the Lord Chancellor's certificate, which, by several statutes, operates an absolute release and acquittal of all antecedent debts.

In the year 1754, a commission of bankruptcy under the great seal of England was issued against John Galbraith, then residing at London. He appeared before the commissioners, made a full discovery of his effects, and obtained the Lord Chancellor's certificate.

In the year 1749, George Galbraith, John's elder brother, prevailed on him to become conjunctly bound with him in certain bonds; the whole of which he was afterwards obliged to pay.

By George's death without issue, John succeeded to the estate of Balgair, which were strictly entailed, and also to certain other lands which were not entailed, and which John, therefore, as apparent heir, brought to sale, in order to pay George's creditors.

In the ranking of these creditors, John insisted to be ranked *pari passu* with the other creditors, for relief of the one half of the bonds above mentioned. But it was *pleaded* for the other creditors, That any claim which John could have on that account was compensated by other sums in which, prior to his bankruptcy, he was debtor to his brother George; particularly, a sum of L. 218 : 18 Sterling, part of George's money in the hands of John Walkingshaw, his agent at London, which John had taken up from Walkingshaw, and had never accounted for to his brother; and a further sum of L. 34 Sterling contracted in Scotland.

In *answer* to this claim of compensation, John produced my Lord Chancellor's certificate, certifying, That he had complied with all the requisites of the statute of bankruptcy in England; and insisted, that in virtue thereof, he was discharged of all debts prior to the bankruptcy, in terms of the act of the 5th George II. cap. 30. § 7.

The Creditors having, on the other hand, *contended*, That the Chancellor of England's certificate could not be pleaded as a discharge of a debt in any court of Scotland, THE COURT, after a hearing in presence, and after considering memorials, upon the 24th February 1760, 'found that the certificate by the Lord Chancellor produced, does not afford a defence against the two debts of L. 34 Sterling, and of L. 218 : 18 Sterling, due by John Galbreath to his brother George; and therefore sustained the compensation pleaded on these debts.'

The article of L. 34 Sterling was no further disputed ; but, with regard to the L. 218 : 18, it was pleaded for John Galbreath in a reclaiming petition, That the *lex loci* regulates the conditions of the debt, in form as well as in substance ; which therefore being once regularly constituted according to the laws of that country where it receives its being, must produce action in other countries where other forms and solemnities are requisite : For it would be absurd to suppose, that the debtor, by changing the place of his residence, should frustrate the effect of that obligation which he had granted to his creditor, according to the forms prescribed by the law of that country where it was granted ; or, that the obligation itself should vary as oft as the debtor changed his place of residence ; and that this point had been frequently decided ; Galbreath *contra* Cunningham, No 10. p. 4446 ; Laird of Balbirnie *contra* Arkhill, 21st February 1633, No 11. p. 4446 ; Hyde *contra* Williamson, 7th February 1634, No 12. p. 4447 ; Chatto *contra* Ord, No 13. p. 4447.

Upon the same principle, it has been found, in a variety of cases, That debts contracted in England, when sued in Scotland, must, *quoad* their endurance, be governed by the statute of limitation ; and this rule is laid down in express words in the late Institute, vol. 2. p. 172. § 39.

But, as the constitution and endurance, so likewise the transmission of the obligation is regulated by the laws of that country where the transmission was made ; and so this point has been solemnly determined in the competition of Captain Wilson's creditors, where both the voluntary and legal assignees to Lord Rothes's bonds, without intimation, were preferred to the arresting creditors : because such was the law of England where these debts had been contracted, No 27. p. 2778, and No 87. p. 4556.

As the constitution, endurance, and transmission of the obligation is regulated by the *lex loci*, the extinction of the obligation must be governed by the same law. Thus, payment of a bond granted in a foreign country was found probable by witnesses ; because such was the law of the country where the debt was contracted ; Galbreath *contra* Cunningham, No 10. p. 4446 ; 21st February 1633, Laird of Balbirnie *contra* Laird of Arkhill, No 11. p. 4446 ; 7th February 1634, Hyde *contra* Williamson, No 12. p. 4447 ; Chatto *contra* Ord, No 13. p. 4447.

Thus the cedent's oath has been found good against the onerous assignees, because such was the law of England where the bond was executed after the English form ; M'Morland *contra* Melvill, No 14. p. 4447.

Thus it has been found, that intromission in a foreign country with a Scotsman's effects dying there, did not infer the passive titles of vitious intromission ; because such was not the law of the country where the intromission was had ; Lord Dingwall *contra* Vendosme, No 15. p. 4449 ; Archbishop of Glasgow, *contra* Bruntsfield, No 16. p. 4449.

Thus, by a train of consecutive judgments, the legal assignees under the commission of bankruptcy have been found to have a good title, or right of ac-

No 97. tion, against the bankrupt's debtors in this country, though they had no other right, but by the act of the law where the debtor resided: And therefore, as the *lex loci* has been found in all the particulars above mentioned to be the governing rule, the same rule must govern the present question: Consequently, as the debt upon which compensation is here pleaded was contracted in England prior to the commission of bankruptcy issued against John Galbreath; and as by the law of England, the Lord Chancellor's certificate, fairly obtained, operates a discharge of all the prior debts in England; the debts so discharged by the law of the country where they were contracted, and ought to have been paid, cannot be put in suit in any other country, or allowed of in this case as a ground of compensation.

*Answered* for the Creditors; It is a natural consequence of the division of mankind into different countries and jurisdictions, that statutes can have no effect *ultra territorium statuentis*, especially when the law which is craved to be extended from one country to another is not a law *juris gentium*, but a law *mere juris positivi*: That the English statute now ought to be extended to Scotland, is entirely of the latter kind, is obvious, whether the object or effects of it are considered. It does not extend to all the subjects of the nation, but only to the trading part of it; and did not even affect trading strangers residing in England, till the 21st of James I. The effect of these statutes is, to alter and vary the whole operation of the law, and to divest both the debtor and creditor, the debtor of his estate, and the creditor of his fund of payment, and operates backwards for several years; and they are against material justice, in so far as the certificate secures not only the person of the debtor, but also his future acquisitions, from his creditors; so that the bankrupt may be wallowing in wealth, while his creditor may be starving in a dungeon, to which the bankruptcy of that debtor may have reduced him. It is therefore as plain as can be, that these statutes are entirely *juris positivi*, and which therefore ought not to be extended *ultra territorium statuentis*.

Neither is it the intention of the English law itself, that the effects of the certificate should be extended into other countries, seeing such extension would be prejudicial to England itself. For the bankrupt would have all the advantages of the bankrupt-laws for him, and be subject to none of their disadvantages against him: He would have the advantage, by the security of his person, and future acquisitions, while, on the other hand, the creditor would find it difficult to detect his concealments, or to get him punished for them. Besides, the intention of granting the benefit of the certificate was to retain in England the trading subjects of England, and to invite foreigners to it, by giving security to their persons, and future acquisitions, in cases of misfortunes in trade. But, if the same shield could protect him wherever he went, after having once obtained it, an unfortunate trader would have no temptation to remain in England.

The extension contended for by John Galbreath would be in a great degree unjust to foreigners ; for the statutes of bankruptcy, void all mesne conveyances after the first act of bankruptcy. This may be just, if the statute is to have effect in England ; but it would be unjust with regard to foreigners, who, in another country, know nothing of the act of bankruptcy ; and therefore, in whatever view the extension contended for is considered, it cannot be supposed to be intended by the law of England, nor submitted to by the law of another country.

And this extension is the less to be adopted in Scotland, as no instance can be given where a *cessio bonorum* has been attended to by the courts in England, or where a decret of the courts in this country, proceeding on this action, was ever sustained there to relieve the debtor from diligence : And therefore, as the courts of England do not give effect to the Scottish bankrupt laws, which are much more limited in their influence than their own, it does not occur, why the law of Scotland should give effect to the Chancellor's certificate.

The extension contended for, if granted at all, can only be granted on considerations of equity, for it cannot be granted in the view of strict law. But, it is a maxim in the law of England, That he who pleads equity for himself must allow equity to be pleaded against himself. But, in the present case, John was due a debt to his brother, and nothing can be more equitable than that the present claim should be compensated by that debt ; this, however, John declines, and will not allow equity to be pleaded against himself. It would therefore appear to be the province of a court of justice, not to yield to the claim of equity made for John, when he does not yield to it against him.

And it would be the more unjust to refuse the compensation in this case, that George Galbreath the creditor was in no sort of fault in not claiming his debt before the commissioners of his brother's bankruptcy ; for the commission was issued 14th March 1745, and the English creditors claimed and proved their debts ; so that John obtained a certificate from the commissioners upon the 1st November 1745, which was confirmed by the Lord Chancellor the 20th December. During the dependence of this commission, his brother George was residing in Jamaica, and had no time to send over instructions to claim and prove his debt in England ; and therefore, if George or his creditors are cut out of this ground of compensation, without any fault or even omission on his part, and far less upon that of his creditors, it must appear very hard, and it would require some very cogent principle in law to move a court to give way to such causeless forfeitures of a just creditor's debt.

It has been *pleaded* for John Galbreath ; That the *lex loci contractus* regulates the constitution, transmission, and endurance of the contract, and therefore the extinction of it.

But there is a very solid reason why, in the execution of deeds which constitute or transfer a debt, it is absolutely necessary that the forms must be observ-

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ed, that are in use in the country where the parties are residing at the time ; but it cannot with justice be maintained, that the *lex loci contractus* regulates the endurance of the debt in this country ; and such was your Lordships opinion when you pronounced the decision, Kinloch *contra* Fullerton, No 22. p. 4456. The death of the ancestor, who has not bound his heir, is as effectual a discharge to the heir, in the law of England, as the Chancellor's certificate is to the bankrupt ; yet, by that decision, your Lordships paid no regard to that discharge, and did not hesitate to sustain process against the heir.

It has been *pleaded* for John Galbreath ; That the English statute of limitations having been sustained in Scotland as a good defence against payment of an English debt, the Chancellor's certificate should likewise be sustained.

But to this it is *answered*, That it is far from being an established point, that the statute of limitations ought to be admitted here as a defence against payment of an English debt.

In 1664, No 56. p. 4503. a bond had been granted by Dr Ramsay and other executors of the Earl of Holderness, to John Graden in England, which was allowed to lie over for so many years, that it would have been cut off by the law of England, where the parties lived ; yet the LORDS repelled the objection, and sustained action.

16th July 1708, Executors of John Hay *contra* Earl of Linlithgow, No 58. p. 4504., the Lords sustained the defence of the triennial prescription against an account, and had no regard to the plea, that the pursuer relied upon the limitations established by the law of the country where he resided, and where the contract was entered into.

25th July 1732, Rogers *contra* Cathcart and Ker, No 60. p. 4507. ; in the case of a bill drawn by a supercargo in Virginia upon his constituents in Scotland, which having lain over for six years, the statute of limitations was pleaded in defence, as the *locus contractus* was subject to the laws of England ; but the Lords found that the laws of Scotland must be the rule.

19th January 1737, Murray *contra* Cowan, No 62. p. 4508., the Lords repelled the defence founded on the statute of limitations ; and they did the same in the year 1755, Renton *contra* Baillie, No 67. p. 4516.

*Replied* for John Galbreath ; That, of the whole decisions cited for the creditors, there is but one that has the least tendency to favour their plea. In the case of Graden *contra* Ramsay, the bond was drawn in the Scotch form, between Scotchmen, and bearing a clause of registration for execution in Scotland, clearly importing, that Scotland was the *locus solutionis*.

In the case, Rogers *contra* Cathcart, the bill was drawn upon Scotchmen residing in Scotland, and payable there.

In the case, Murray *contra* Cowan, the action was brought upon the statute of the 9th of Queen Anne, for recovering money lost at play, with the triple value. The defence was laid upon the 31st of Elisabeth, cap. 5. whereby no action can be sustained upon any penal statute made or to be made, unless

within one year of the offence ; and it was argued, that this limitation must regulate the British statute of the 9th of Queen Anne. The answer was obvious, that however the act of Queen Elisabeth might regulate prosecutions in England, it could have no influence upon the like prosecutions in Scotland ; and so their Lordships determined.

As to the case of Renton *contra* Baillie, as the creditors have not stated the particulars of it, so no answer can be made to it.

The single precedent which can apply to the question in hand, is that of Thomson and Hay *contra* The Earl of Linlithgow ; in opposition to which, the Court has not only a number of cases formerly mentioned, but many others, particularly Philip and Short *contra* Stampfield, No 57. p. 4503. ; Rae *contra* Wright, No 59. p. 4506. ; Fulks *contra* Aikenhead, No 61. p. 4507. ; and Rutherford *contra* Sir James Campbell, No 63. p. 4508.

THE LORDS found, ' That the certificate by the Lord Chancellor produced, does afford a sufficient defence against the debt of L. 218 : 18 Sterling, due by John Galbreath to his brother George, contracted in England ; and therefore repelled the compensation pleaded on said debt.'

Act. *W. Grahame, Lockhart.*

Alt. *J. Dalrymple, Burnet, Ferguson.*

*J. M.*

*Fol. Dic. v. 3. p. 228. Fac. Col. No 92. p. 203.*

1763. *July 22.*

BLACKWOOD *against* CATHCART.

JOHN CATHCART, merchant in London, a bankrupt, having obtained the usual certificate of conformity, was afterwards sued in Scotland by Alexander Blackwood, one of his creditors, who had received his dividend under the commission, but who alleged that Cathcart had been guilty of a fraudulent concealment by not giving up a subject belonging to him in Scotland. The COURT repelled the defence, upon the certificate.

1765. *February 26.*—Upon an appeal this judgment was reversed, as the omission did not appear to be fraudulent.—*See APPENDIX.*

*Fol. Dic. v. 3. p. 228.*

1770. *August 3.*

JEAN COALSTON, Pursuer, *against* ARCHIBALD STEWART, Merchant in Queensferry, Defender.

GEORGE STEWART, the defender's brother, was engaged in trade in London from the year 1737 to the year 1749 ; when, having become bankrupt, a commission was awarded, and a certificate, under that commission, allowed by the Lord Chancellor on the 27th June 1750. George after this went to India,

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The Lord Chancellor's certificate upon an English commission of bank-