the Lord of Erection, and which the family of Panmure had in this case, who were specially infeft in the patronages, on the resignation of William Murray, to whom they had been granted by the crown; and on this ground it was that the question turned between the Crown and Lockhart of Lee, for the patronage of Lanark. Lee had got the right to the teinds, but no right to the patronage, and having resigned in the hands of the Exchequer, he obtained from them a novodamus, with a grant of the patronage, which the Lords found the Exchequer could not give without authority from the Crown; all they could do on his resignation was to give a new charter of what he had before, and no more."

1755. *January* 31. EDMUND BRADSHAW and GEORGE ROSS, Assignees under the Commission of Bankrupt, against CAPTAIN WILSON of Loudon, *against* ADAM FAIRHOLM and OTHERS, his Creditors, Arresters.

THIS case is reported in *Fac. Col.* (*Mor.* 4558.) and by KAMES, (*Mor.* 4556.) —The following are Lord KILKERRAN'S notes of the argument at the bar, and of what was said by the Judges:—

"*July* 19, 1754. This case was this day reported; and as it is of great consequence, and may probably go elsewhere, the Lords reasoned upon it, not with a view to determine it, for they resolved that it should be heard in presence; but that the lawyers might, from the Lords' reasonings, get the more light, and be the better directed how to argue the case at the hearing; and having taken the points separately, the Lords were in their reasoning generally agreed upon the general point, that arrestments in the hands of Scotsmen residing in Scotland, were preferable to the assignees from the commission under the statute of Bankruptcy, upon this ground, that the laws of the country where *res est sita* are, without distinction between *mobilia* and *immobilia*, the laws by which the right thereto is to be determined; and that the notion that *mobilia non habent sequelam* was an abstract notion not founded in nature nor agreeable to reason: that it might be true many foreign lawyers follow that notion, as it also is, that there was adjudgment of this Court agreeable to it between *Brown* and *Brown*, in 1744*.

* Lord KILKERRAN has preserved the following note of the cases here referred to:—

"In 1744, *Brown* against *Brown*, That the succession in moveables was to be determined according to the laws of the place where the defunct died, upon the notion that *mobilia non habent sequelam*.

"But in a later case, in summer 1749, a very different system was adopted, viz. That the maxim that *mobilia non habent sequelam* was to be rejected as an abstract notion that has no foundation in the nature of things, and that the succession in moveables, as well as in heritage, was to be governed *secundum leges loci*, where they are situated.

"The next question that occurred, was in summer or in winter 1746. *Alexander Christie* against *Samuel Strailon*, where it was found, the Court being much divided, that after a man is found to have complied with the directions of the statute of bankruptcy, and is acquit, his effects cannot be attached in Scotland for payment of any debt that he owed before the bankruptcy, if that debt was contracted in England.

"The like question again occurred in winter 1747, but as it was only at passing a bill of suspension, it was no judgment.

"But in a day or two thereafter a case occurred, in effect the very same that is now before us, *Thomas Ogilvie* against the other Creditors of *John Aberdeen*,—The case was, John Aberdeen, a Scotsman, residing in London, had surrendered his effects, in compliance with a commission of bankruptcy; and Thomas Ogilvie, who had arrested his effects in Scotland, on a debt that had been contracted in England, entered his claim before the commissioners of bankruptcy, which they refused, in respect of the arrestment he had used on the bankrupt's effects in Scotland. Thereafter Ogilvie pursued a furthcoming, in which the assignees for the commissioners

But it is no less true, that as that decision had passed when many of the Lords were absent, and was, in a case that afterwards occurred in 1749, much disapproved of, I mean the case *Morrison* against the *Earl of Sutherland*, decided 21 *June*, 1749; I mean it was much disapproved by the Lords in their reasoning in the case, upon the same principle already suggested; and if that is so in matters of succession, much more was it thought to hold in the case of legal diligence.

" The next question came upon the specialties of this case. With respect to arrestments at the market-cross of Edinburgh, and pier and shore of Leith, when the arrestees, though Scotsmen, had not their residence in Scotland at that time, the Lords were not so unanimous. The President said that he doubted if such arrestment was effectual, unless it could be maintained that action lay against a man, on account of the *forum originis*, and that forum be now to found an action. To which others, particularly Elchies, that whatever might be the case of an action lying against a person *ratione originis*, that could not apply to this case, where the ground of action arose upon the arrestment; and that in all cases where a man had effects in this country, moveable or immoveable, action lay against him, whether he was a Scotsman or a foreigner.

" The *3d* question was, whether the voluntary assignees of Wilson, *viz.* the Sun Fire Office, and which assignations was of date prior both to the arrestments and the bankruptcy, or the arresters were to be preferred? and the Lords were at one on that question, that the assignation in England did not denude the granter, and, therefore, the arrestments were preferable. One thing I have omitted, that upon the general question, after it had been observed that an assignation in England did not denude the granter, the *President* said that he thought that, nevertheless, the legal assignation, by the commission of bankruptcy, was, nevertheless, effectual to produce action; and if the arrestments had been posterior to the commission of bankruptcy, he should have doubted of their preference, but as the arrestments were prior, and that its drawing back to the date of the first day of payment was purely statutory, and not *juris gentium*, he did not think that that part of the law which was purely English could prevail against the arrestments.

" Another thing was said on the general point, that the only ground on which deference could be had to the statute of bankruptcy was the *comitas* among nations; but so it is that *comitas* must be mutual, and as no regard is paid in England to our *cessio bonorum*, as little should we regard their statute of bankruptcy, &c. &c.

" *N. B.* May it not be added to what is said with respect to that decision, in the case of *Morrison* against the *Earl of Sutherland*, its not being any ways decisive of the present question, that it is really rather a decision to the contrary, as the judgment of the Court of Session, refusing action to the agent empowered

having compeared, and pled preference on the very same ground as is done here, that the common-debtor resided in England, *et mobilia sequuntur personam;* but the Lords found that moveables in Scotland could only be attached by diligence issuing from the courts of Scotland; and that, therefore, the preference could be judged only according to the law of Scotland, and preferred the arresters.

" It appears plain, that *jura incorporalia* are governed as *mobilia*, and are supposed to be situated where the debtor lives.

" But the question is yet to be answered, what is it that makes a *forum* for these arresters, who have no residence here? As to which it is doubted the decision in the case Anderson *against* Ormiston, will not support the *forum* in this case; the cause is, that what gives the *forum* is their having effects joined with their being originally Scots."

by the commission of bankruptcy, is reversed, and that nothing hinders it from being a decision flatly to the contrary, but that it was in judgment in the last resort, reversing the judgment of the Court of Session, put upon this, that they sustained the letter of attorney given by the lunatic himself, the granting whereof was only intended as *argumentum ad hominem* to the Court of Session, and not as implying that without such letter of attorney, the action could not have been sustained.

"*Nov.* 2.—The cause heard, and *Miller* for the arresters. The commission of bankruptcy not awarded till after arrestments; nay, after furthcoming pursued; and the question is, upon what ground of law or expediency this commission should get the better of these arrestments. They appeal to the law of nations, which establishes *fictione*, that moveables are to be considered as situated in the place of his domicile, and all questions concerning them to be determined by the laws of that place.

"This he impugned *first* by explaining the import of the maxim that *mobilia sequuntur personam*, and then by instances, *inter alia* of a man marrying a woman in England, who had no right as husband to what they call *choses in action*, but he will have right to what she has in Scotland *jure mariti*.

"As for *General Churchill* and *Major Johnston*, whenever one is in this country, and has a domicile, he is liable to all arrestments and to all other execution; and as to Captain Johnston, who is a native of Scotland, he is subject *ratione originis*. But when he also has effects in it, there is no doubt.

"*Lockhart* for *Sun Fire Office*, referred to *Jacob's Law Dictionary* for the form of assignments in England. That the present assignation to the Sun Fire Office is a formal and regular assignation by the law of England—a procuratory *in rem suam;* and the only difference between these, and assignations with us, that in England the action can only be brought in name of the cedent, the reason grossly insufficient; as it is, *vide Bacon's Abridgement, folio,* 157, as also its effect, which is very like ours.

"And as to intimation, no such thing is required, except as to the effect of preventing payment, but to no other effect is it required.

"I concur with the legal assignees in this, that in competition with the arresters they have a good right, not on the authority of the Courts of England, but of Captain Wilson himself, for he by his act in England, and not the law of the country, has taken all the proper steps to vest the subject in the assignees under the commission; they are, therefore, in the same condition as if they had been the voluntary assignees of the debtor, and such assignees have been found to have action in this country.

"[The *President.*—It is one question whether there may be action *ratione originis*, and it is another if there can be arrestment *ratione originis*.

"*2dly*, He put the question, how the pleading for the arresters, in the case of Captain Johnston, did consist with their general argument.]

"But then, as I am prior, I must be preferable to them; and as to the objection the arresters make to my particular assignation, that there is no intimation, I answer, that assignment can require no other form of assignation than is required in England. (The answer to all this is, that no intimation at all is necessary in England, because it is no transmission.) He proceeded thus: the error in all this is the considering a *nomen* as having a real lying in Scotland, but there is no such thing; and on the same principle that the law of the country is the rule as to the constitution, and as to the defeasance of a *nomen*, so it must be the rule as

to the assignment. He went on thus : that the arrestments are void and null, unless it can be maintained that Captain Wilson has a *forum* here. And, 1*st*, consider Captain Wilson as a stranger, will his debtor's having a residence in Scotland, will that establish a *forum* against Captain Wilson? Suppose not to be a Scotsman, will it follow, that because my debtor has effects here, that I have a *forum*? Where one has effects here, there is a method, by the arrestment *ad fundandam jurisdictionem*, though that will not do where one has only a *nomen*. But even that method has not been taken; it has been taken for granted that Captain Wilson had a *forum;* and that leads to the question, whether he had a *forum* here? and I say he had none, if it is not that *ratione originis*.

"*January* 6, 1758.—The PRESIDENT said as follows:—'That though a citation at the market-cross of Edinburgh may be good to found an action against a man, who is *origine Scotus*, but then it cannot be said that an arrestment on such dependence can affect any subjects belonging to him, other than such subjects as belong to him in Scotland; and as this debt due by Captain Johnston, is neither due in Scotland nor in England, but is an Irish debt, the arrestment cannot give a real lien on it, which an arrestment certainly does not, being merely a prohibitory diligence.'

"*January* 6, 1758.—Found the assignees preferable for the debt due by Captain Johnston.

"*July* 6, 1758.—The Lords adhered, and preferred the assignees, *reclam. Arbuckle, Colston, Bankton, Kilkerran*, &c."

The following are Lord KILKERRAN'S observations on the case:—

"The two points determined by the interlocutor, 1*st*, The preference of the assignees under the commission of bankruptcy to the arrester. 2*d*, The preference of the voluntary assignee to the arresters, which fall to be separately considered.

"With respect to the first and general point, the preference of the assignees under the commission of bankruptcy; upon reconsidering the case, I very much incline to be of a different opinion, and to think that the arresters are preferable.

"When I say this, I am to be understood to suppose the arrestments to have been habily used, and that the common debtor and arrester have all a *forum* in this country; how far any objections lye to the arrestments on these grounds falls to be afterwards considered.

"But upon supposal that the arrestments are liable to no special objection, I cannot discover the ground in law, upon which the assignees under the commission of bankruptcy should be preferable to arresters, whose arrestments are prior in time to the issuing of the commission of bankruptcy.

"One thing I may without offence say, that when upon giving in of the informations, the Court reasoned upon this case, with a declared purpose not to determine, but that the lawyers might be the better directed how to apply themselves at the hearing; your Lordships declared yourselves of a very different opinion, from the judgment you have now given upon the general point; for, either my memory fails me, or your Lordships were generally agreed that arrestments in the hands of Scotsmen, residing in Scotland, *that is, arrestments liable to no particular objection*, laid on before issuing of the commission of bankruptcy, were preferable to the assignees under the commission. What might have been the case, had the commission been prior to the arrestments, was, by some of your Lordships spoke of doubtfully, (and I well remember by whom); but as the ar-

restments were prior, and that the retrospect, or drawing back of the bankruptcy, to the first stage of payment was statutory, purely English, and not *juris gentium*, it was agreed that the assignees could not prevail against the arrestments that were prior to the commission. I might go a little farther, and say, that it was then understood to be the mind of the Court, that the preference of creditors was to be determined, not by the laws of the country where the creditor had his residence, but by the laws of the country *ubi res fuit sita*, be they *mobilia* or *immobilia*; and that in this respect there was no difference between *nomina* and other *mobilia*, as by all the lawyers that have wrote on this subject, these *loco mobilium habentur*, and that the brocard *mobilia non habent sequelam* is an abstract notion, not founded in reason, nor in the nature of the thing.

"These things, I say, the Court then seemed to be agreed in; and at that time the only thing the Court differed in was with respect to the particular objections to the arrestments; and with respect to these alone, was there then any difference of opinion in the Court.

"Pardon me for having reminded you of what your opinions then were; perhaps I am in the wrong, as it is not from the opinions you *were* of, but from the opinions you may now be of, that the case must be judged; and I have only mentioned it as what may have tended to lead me into the opinion I am now of.

"And now as to the point itself, I have known it controverted in this Court, whether an arrestment of effects in Scotland was not to have effect, though not laid on till after issuing of the commission of bankruptcy; and yet at the same time own that the judgment was given in favour of the assignees. The case was *Christie* against *Straiton*, in 1746, upon this ground, that the debtor being by the law of England discharged by the surrender of his effects, that discharge behoved to protect him in any part of the world; but supposing that to have been rightly found, and which, by the bye, it only was by the casting vote of the Judge in the chair for the time, in absence of the President; yet that decision will not apply to prove that an arrestment, prior to the commission of bankruptcy, should be overhauled by a subsequent commission of bankruptcy. For then the rule applies, that the creditor who has once acquired an interest by the laws of his country, cannot be deprived of that interest by the after proceedings in any other country; and, accordingly, I well remember a case which occurred in winter 1747, between *John Ogilvy*, and the assignees under the commission of bankruptcy of *John Aberdeen*, a case very much the same as the present, where your Lordships found the very reverse of what you have now found, and preferred the arresters. So far may be true, that Ogilvy's arrestment was not of a *nomen*, but of moveables, properly so called; but I am not sensible that that should make any difference.

"I take it to be a rule of common sense, that a creditor may affect his debtor's effects in whatever part of the world he finds them; I take it to be no less plain, that these can only be affected, according to the laws of the country where they are situated; if they be found in Scotland, and consist in land, by adjudication; if moveables, properly so called, I mean *corpora*, by arrestment or poinding; if *nomina*, by arrestment in the hands of my debtor's debtor, that being the only method known in the law of Scotland for affecting a debt due to my debtor; and the subject being so affected, whatever right, whatever interest is thereby acquired, cannot be defeated by after proceedings in any other country.

" One exception possibly may be in cases where a *comitas* is of mutual consent observed among different nations; but I hope I shall not be thought to speak too strongly, when I say that a *comitas* is not to be so much as named in a question with England. It is well known that they allow no such *comitas* to us, nor indeed to any other nation; and there can be no *comitas* where it is not mutual.

" The assignees, sensible of the force of this reasoning, found themselves obliged to admit, that an adjudication, prior to the commission of bankruptcy, or a poinding, cannot be overhauled by a subsequent commission of bankruptcy; they admit an interest in these cases that cannot be defeated. But then, say they, the case of an arrestment is different, for that an arrestment is no other than a prohibitory diligence, by which no interest is acquired; and that being once supposed, they then say, the rule is, that in whatever country it be, that the first complete right is acquired, that right carries the subject; or, as it is in the most plausible manner expressed in the answer for the voluntary assignees, wherever a debtor has a *forum* in two different countries, as they on this arrestment suppose Captain Wilson to have both in Scotland and in England, in whatever of these *fora* any of the contending parties acquire the first complete right, that party falls to be preferred wherever it be that the competition arises; and this I own, is the most plausible thing that has been said in this case.

" Nevertheless, I cannot agree to any part of this declaration. The foundation of the whole of it rests on this, that a creditor acquires no right, no interest by an arrestment; it is no more than a prohibitory diligence as to moveables, as an inhibition is to heritage. Now, that it is not merely a prohibitory diligence, but that the arrester acquires an interest is to me plain, and what determines me to be of that opinion is this, that it is preferable to an assignation though prior, if the assignation be not intimated prior to the arrestment: and I cannot see how any man that admits that to be law, can say that it is no other than a prohibitory diligence. The very characteristic of a prohibitory diligence is, that it has no operation *retro* preceding its date; such is an inhibition which affects nothing; and, therefore, a deed granted after inhibition will be effectual, where that deed is granted in implement of an obligation granted prior to the inhibition; but an arrestment has effect *retro*, and it is preferable to a prior assignation, which I think is demonstrative that it is a *nexus realis*, and not merely a prohibitory diligence.

" And that being now supposed, then the rule, however plausible, that the first complete right, in whatever country it be obtained, determines the preference, will not apply, for how will that right, however complete in another country, overhaul the right which I have acquired by the laws of this country?

" Then let us but consider upon what foundation it is that the right is said to be complete in England; is it any other than this, that the assignation under the commission of bankruptcy is by the law of England a complete assignation? But in the name of goodness, will an assignation, however complete by the law of England, have the effect to defeat the interest I have acquired by an arrestment, when an assignation, had it been granted in Scotland, of the same date, could not have competed with it? This is to me out of all sight.

" And this leads me in the last place to say, that if the rule laid down by the assignees, that the first complete right in whichever of the two nations it be obtained ought to determine the preference, can stand upon no other foundation than a *comitas* between the two nations, of which enough already, I shall

only farther say, that if any man should argue in any of the Courts of England for a preference, by a judgment in Scotland, on effects in England, he would be laughed at; and really I can hardly keep my countenance, when I see and hear it pled, that we should show them a good example.

" I am as sensible as any body can be how proper it were that some *comitas* should be observed between the two parts of the united kingdom, but that can only be done by statute, which some time or other will be, unless we by our too great complaisance mar it, &c.

" I do not know whether I should take notice of what has been argued from England being the *locus contractus*. That the *locus contractus* determines the *solennia instrumentorum*, I understand; but that I can attach effects no where else but in *loco contractus*, is what I do not understand, and much less what is pled in one of the papers, that wherever the *locus contractus* is, that ought also to be held to be the *locus solutionis;* and, therefore, pass it over in silence."

1755. *February* 8. IRELAND *against* The CREDITORS of JOHN NEILSON of Corsock.

THE deceased John Neilson of Corsock, and William Ireland of Caldow, entered into a minute of sale, whereby it was agreed that William Ireland was to dispone to Neilson the lands of Caldow. As Ireland had not made up his titles to the lands, he granted a trust-bond to Neilson for L.600, whereon Neilson led an adjudication of the lands in December, 1742, and was infeft.

Neilson afterwards became bankrupt, and upon his death his creditors led adjudications against the lands of Caldow, as well as the lands of Corsock. The proceedings of these adjudications were stopped by a sale being brought of the lands, at the instance of Richard Neilson, the apparent heir of John Neilson.

After the sale had proceeded so far that the rental and value was proved, and the sale was ready to be advised, a petition was presented to the Court in the name of William Ireland, the grandson of the deceased William Ireland of Caldow, representing that the said William Ireland elder, had in the contract of marriage of his son William Ireland, dated 15th December, 1736, disponed in favour of his son and his heirs, the said lands of upper and nether Caldow, heritably and irredeemably: That notwithstanding Corsock knew of this contract of marriage, and that Caldow was thereby divested of all right and title he had to these lands, he fraudulently entered into the foresaid transaction with Caldow, for the purchase of the same; and that Caldow being a weak facile man, Corsock had imposed upon him, and got the lands at an undervalue. That the said petitioner having made up titles to his said father's contract of marriage, had adjudged the lands of Caldow in implement thereof; therefore, praying, that as Corsock's right to the lands of Caldow was founded upon the foresaid fraudulent transaction betwixt Caldow and him, posterior to the petitioner's father's contract of marriage, the same lands of Caldow ought to be struck out of the sale of Corsock's estate.

This petition was remitted to Lord Murkle Ordinary. The creditors, besides denying that Corsock had been guilty of any fraud, pleaded, " That suppose