and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed. But it is said that, admitting the general rule, the particular circumstance of the testimony given by the attorney for the party forms an exception. The Court would certainly feel itself under no difficulty which way to act, if the party for whom Harborne was the attorney, were before the Court; but he being dead, and no discovery appearing to have been made by him, the circumstance of the attorney for the party being a witness, to invalidate the security against the representative of his employer, seems to be a strong confirmation of the general rule. There is nothing so dangerous as to permit deeds and conveyances after the death of the parties to them, to be liable to have new terms added to them, on the disclosure of the attorney in a matter in which he could meet with no contradiction. But this opinion is perfectly without prejudice to any application which may be made in the lifetime of the party. I give no opinion how far the Court might sanction such a requisition, on circumstances of this kind being disclosed. I wish to be understood as confining myself par-**[665]**-ticularly to the mode of application, and to the evidence by which it is supported in the present case. The Court therefore must discharge the rule, but certainly without costs.

Rule discharged without costs.

SILL AND OTHERS, Assignees of Skirrow a Bankrupt, *against* WORSWICK.
Wednesday, July 13th, 1791.

[Referred to, *Phillips* v. *Hunter*, 1795, 2 H. Bl. 408; *Scott* v. *Bentley*, 1885, 1 Kay & J. 283; *In re Elliott*, 1891, 39 W. R. 297; *In re Queensland Mercantile and Agency Company*, [1891] 1 Ch. 544; [1892] 1 Ch. 219; *In re Belfast Ship Owners' Company*, [1894] 1 Ir. R. 332; *Minna Craig Steamship Company* v. *Chartered Mercantile Bank of India*, [1897] 1 Q. B. 63, 460; *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 47; *Dulaney* v. *Merry*, [1901] 1 K. B. 540.]

If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the West Indies, the assignees may recover the money in an action for money had and received (*a*).

Assumpsit for money had and received to the use of the Plaintiffs, with the usual counts. Plea, the general issue; which was tried before Mr. Justice Wilson at Lancaster, on the 27th of August 1787, when a special verdict was found in substance as follows.

That William Skirrow on the 2d of January 1782, exercised the trade of a woollen draper at Lancaster; that he was then indebted to one James Pilkington, in 100l. and upwards, and on that day became a bankrupt; that on the 16th of January a commission issued on the petition of Pilkington, that on the 28th of January he was declared a bankrupt; that on the 5th of March an assignment was made of all his estates and effects, &c. to the Plaintiffs: that before and when he became a bankrupt, he was indebted to the Defendant Worswick in 230l. 17s. 7d. and that the said debt was contracted at Lancaster aforesaid, and at the time when it was so contracted and always afterwards both Skirrow and Worswick resided at Lancaster, which was their place of abode; that on the 4th of January the Defendant Worswick, knowing that Skirrow had become a bankrupt, did verify and prove by affidavit in writing, before the Mayor of Lancaster that Skirrow was indebted to him the Defendant in 230l. 16s. and upwards, for money lent, &c. That on the same day and year last aforesaid the said affidavit was certified and transmitted under the common seal of the said Borough of Lancaster, to one Thomas Moore and one Luke Tyson then being persons resident in the Island of St. Christopher, which said Island then and there, and before, and at the passing of a certain act of parliament made in the fifth year of the reign of our

(*a*) [The principle of this case was recognized in that of *Phillips* v. *Hunter*, post, vol. ii. p. 402, decided in the Exchequer Chamber, Eyre, C.J., diss.]

Sovereign Lord George the Second, intitled, "An act for the more easy Recovering of Debts in his Majesty's Plantations in America," [666] and on the 29th day of September which was in the year of our Lord 1732, was, and thenceforth hath been, and still is, one of the British plantations in America; that the defendant Worswick appointed the said Thomas Moore and Luke Tyson, so being resident in the said Island of St. Christopher, his attorneys to sue for, recover, and receive, of and from the said William Skirrow, or of, and from, all, or any of his factors, agents or consignees, in the British West Indies, all such sum and sums of money, debts, goods, chattels, and effects whatsoever, as were in any wise due, owing and belonging to him from the said William Skirrow.

It was then stated, that Moore and Tyson having received the affidavit so certified and transmitted, and being so authorized by Worswick the Defendant, did on the 6th of March 1782 implead Skirrow in the king's court of the island of St. Christopher in a plea of trespass on the case, &c. for the recovery of the said sum of 230l. 17s. 7d. in which Skirrow was indebted to Worswick the Defendant: that on the same day a writ of attachment grounded on the said plea according to the form of a certain law of the said island in that case made and provided, did, at the request of Worswick the Defendant, duly issue out of the said court of our said lord the king, by which said writ of attachment the provost marshal of our said lord the king, of the said island, or his lawful deputy, was commanded by our said lord the king to attach all and singular the goods and effects of the said Skirrow, in the said island, to answer to the said Worswick in his plea aforesaid: that on the 7th of March 1782, the provost marshal did, according to the laws and customs of the said island attach divers sums of money as the proper monies and effects of the said William Skirrow (the bankrupt) in the hands of one Thomas Worswick the younger, who then and there was a merchant and resident in the said island of St. Christopher, within the jurisdiction of the said court; which said sums of money were the proper monies and effects of the said William Skirrow (the bankrupt) before and at the time when he became bankrupt as aforesaid, and were received before the time when he became bankrupt as aforesaid, in the said island by the said Thomas Worswick the younger, by the order, and to the use of the said William Skirrow (the bankrupt), and then and there, to wit, &c. did remain and were in the hands of the said Thomas Worswick the younger unaccounted for. It was afterwards stated that judgment was recovered in the court of St. Christopher's and execution awarded, and that Moore and [667] Tyson as attorneys for the Defendant received on the 14th of May 1783, the sum of 230l. 17s. 7d. from Thomas Worswick the younger, the garnishee; that this money was remitted to and received by the Defendant in England before the commencement of the present action; that he was requested by the Plaintiffs to pay it over to them, which he refused, insisting upon his right to retain the same, &c. and that he had not proved his debt under the commission, nor in any other manner received satisfaction for the same, except as aforesaid, &c. &c.

This was first argued in Easter Term 1789, by Lawrence, Serjt., for the Plaintiffs, and Le Blanc, Serjt., for the Defendant. The argument on behalf of the Plaintiff was as follows.

In this case there are two questions: 1. Whether the assignment of the bankrupt's effects to the Plaintiffs did not pass all the right which he had to the money in the hands of the garnishee? 2. Whether, supposing the assignment to have had that effect, the Plaintiffs are not intitled to recover, notwithstanding the proceedings in the West Indies? As to the first question, there can be no doubt, but that if this transaction had taken place in England the assignees would be intitled to the money attached by virtue of the stat. 13 Eliz. c. 7, s. 2; the only doubt is, whether they are so intitled, the attachment having been executed in the Plantations. Now as the bankrupt himself might, before his bankruptcy, have assigned this money by deed or otherwise, in satisfaction of a debt, or to trustees for the benefit of creditors; the question is, whether an assignment under the bankrupt laws, does not operate as fully as such an assignment by the bankrupt himself? The Court will, if possible, put this construction on the assignment by the commissioners, because the persons who are most likely to become the subjects of those laws, namely, traders of the most extensive dealings and connections, have, in general, great part of their property abroad, which justice requires should be divided among their creditors. The law expresses no distinction as to the property of a bankrupt being in one country rather than another.

The words of the statute of Eliz. are "money, goods, chattels, wares, merchandizes, and debts wheresoever they may be found or known;" these are general words, and must be construed to extend to all places. They are not, in practice, confined in their operations. A ship at sea is often assigned under a commission of bankrupt, by virtue of those words. If any distinction can be attempted to be made, between the case of a ship at sea, and the present, it [668] must be on the ground that the country in which the debt is attached is governed by different laws. But it is not contended that the Great Seal has authority to extend its proceedings beyond the limits of this country, as to all the purposes for which it acts; it can neither compel an appearance before commissioners, nor has it any power to affect the person in another country; but the assignment of a bankrupt's property being a statutable conveyance for the benefit of creditors, must in reason be taken to convey all that property, without regard to local situation. The assent of every subject of the realm, is implied to proceedings which take place by virtue of an act of parliament. This doctrine is laid down 8 Rep. 137 a. and has been since recognized in the case of *Wadham* v. *Marlowe* (*a*). So in the present case there was an implied assent to the assignment, both by the Defendant and the bankrupt, neither of whom shall now be permitted to deny the effect of that assent.

It is said by Chief Baron Comyns, 1 Com. Dig. 519, that the commissioners of a bankrupt may sell his goods in Ireland; if the commissioners may do this, so may the assignees; the property therefore vests in them. It was the opinion of Lord Talbot (Cooke's Bank. Laws, last edit. 522) that the effects of a bankrupt in the Plantations were liable to a commission here, and that the right was vested in the assignees. Whether the attachment in the West Indies will prevent the Plaintiff from recovering must depend on this, namely, Whether the effects at the time of the attachment were the property of the bankrupt or not? If the property were his, it passed to the assignees, and there could be no right to attach it: but a debt owing to him was clearly his property. In the case of *Lewis* v. *Wallace*, Sir Thomas Jones, 223, it was holden that where a debtor had assigned to his creditor a debt due to him from a third person, the assignor had nothing in it but as trustee for the assignee, and that it was not liable to an attachment by another creditor. So here the debt of the garnishee, after the assignment by the commissioners, was only in trust for the assignees. In *Le Chevalier* v. *Lynch* (Dougl. 169, last edit.) Lord Mansfield said, that it had been determined at the Cockpit, upon solemn consideration, that bills by English assignees might be maintained in the Plantations upon demands due to the bankrupt's estate, which shews that he considered that the right to such debts was vested in them: and though he also said, that where, [669] after the bankruptcy, and before payment to the assignees money owing to the bankrupt out of England was attached bonâ fide by regular process, according to the law of the place, the assignees cannot recover the debt, this doctrine only goes the length of shewing, that a debtor having been obliged by process, which he could not resist, to pay to the creditor attaching, should not be again compelled to pay to the assignees: but this only applies to the debtor who has paid the money, and not to the creditor who has received it. It is like the case of a recovery by an administrator, whose letters of administration are afterwards revoked, and another administrator appointed: in which case the debtor cannot be compelled to pay a second time, having paid to the former administrator, under legal authority which he could not resist. *Allen* v. *Dundas*, 3 Term Rep. B. R. 125. The second administrator must resort to his remedy against the former. 2 Bac. Abr. 11. In the case of *Bradshaw and Another, Assignees of Wilson*, v. *Fairholme* (Decisions of the court of session from 1752 to 1756, p. 198), the court of session in Scotland decided that the attachment of Captain Wilson's debts in Scotland by creditors in England, could not be supported against the assignees. In *Mackintosh* v. *Ogilvie* (Hil. 21 Geo. 2, in Canc. See 4 Term Rep. B. R. 193, *Hunter* v. *Potts*), Lord Hardwicke granted a writ of ne exeat regno against one who had obtained arrestments of a bankrupt's property in Scotland, and said, that the Court would prevent the creditor from having the effect of the arrestment, if the judgment was not before the bankruptcy; and the solicitor-general said that after such arrestments and foreign attachments the money had been recovered back in an action for money had and received.

(*a*) Cooke's Bank. Laws, 518, last edit.; and see a full note of this case, ante, 437.

In *Solomon* v. *Ross*, and *Jollett* v. *Deponthieu* (ante, 133), the assignment of a bankrupt's effects to curators in Holland was admitted to have such an effect in this country, as to make void all proceedings in foreign attachment. So also in *Neale* v. *Cottingham* (ante, 133), the assignment by commissioners in England was allowed to have a similar effect in Ireland. Pari ratione therefore, the assignment in the present case, by the commissioners in England, ought to extend to the property of the bankrupt in the West Indies.

Le Blanc, Serjt., contrà. The assignees in this case did not interfere to prevent the attachment. The Defendant having obtained an advantage by using legal diligence, is intitled to re-**[670]**-tain it. Though two questions were made on the part of the Plaintiffs, the only one to be considered is, what effect the different statutes of bankrupts have with respect to foreign countries. Now these statutes are merely local, being confined in their operation to this country. The colonies are, in this respect, to be considered as foreign countries. It was contended that the assignment must have the effect of a conveyance by the bankrupt himself: admitting this, the voluntary conveyance of the bankrupt himself could not defeat the claims of a creditor, or take away what was obtained by legal process. It might operate as the assignment of a chose in action, which, till reduced into possession, is liable to the just demands of a creditor. The several statutes relating to bankrupts are confined to the country in which they were passed, because they were originally considered to be of a penal nature, confiscating the property of the bankrupt: and penal laws are strictly local. The first case in which they were in any degree extended, was that of Captain Wilson (*a*). As to the argument drawn from the words of the statute 13 Eliz. c. 7, "wheresoever found" it might with as much propriety be said that lands in a foreign country would pass by the assignment of the commissioners, lands being mentioned in the statute as well as goods. The case of *Wadham* v. *Marlowe* turned upon the form of the action, and the question whether an express consent to the assignment was not necessary to be stated, in order to maintain an action of debt on the reddendum of a lease? As to the authority of Com. Dig. 519, it is merely a dictum, no cases being cited in support of it; and if it be allowed, it can only be reasonably understood to mean that the commissioners may sell the effects in Ireland, subject to the claims of creditors. As to the opinion of Lord Talbot cited in Cooke's Bankrupt's Laws, the question is, what right vested in the assignees, whether such as will clothe them with all the privileges of the statutes of bankrupts. In England they have a power over the whole property of the bankrupt, but in other countries the general import of the words of the statute must be restrained by the laws and customs of those countries: still the question remains the same, namely, what right vests in the assignees? That right is admitted to be, such as the bankrupt himself had; but any assignment of his would have been subject to his creditors' demands. As to the case of *Lewis* v. *Wallace* cited from Sir Thomas Jones, if the debtor in St. Christopher's were a trustee **[671]** for the assignees here, they ought to have made that defence to the attachment; or they might have appealed to the privy council. The case of *Le Chevalier* v. *Lynch* proves only that the assignees should not be turned round by the debtor's saying that he was only liable to the bankrupt himself; and that creditors in another country should not come in under the commission, unless they would renounce the priority they had gained; but this shews that they could not be compelled to give up that priority.

In that case Lord Mansfield approves of the extent of the doctrine laid down by Lord Hardwicke, and concludes with saying, that where money owing to the bankrupt out of England is attached bonâ fide by the law of the place, the assignees cannot recover the debt; that is, they cannot recover it all. As to the argument drawn from the case of an administration being revoked, admitting the principle, that a debtor having once paid his debt to a person having legal authority to receive it, shall not be liable again to pay it, yet this principle is not applicable to the present case, unless it can be shewn that the assignment of a bankrupt's effects has, with respect to foreign countries, such a relation back as to give the assignees a preference to creditors in those countries. As to those creditors, the assignment is considered as voluntary, and like other voluntary assignments, subject to their claims. The assignees in such

(*a*) An account of this case is given in the judgment of the court, by Lord Loughborough.

case stand in the place of the bankrupt himself, but cannot recover a chose in action till it is reduced into possession. As to *Wilson's case* (1 Atk. 128), the principal question there was, whether drawing and re-drawing bills was a trading within the bankrupt laws; the point now in dispute was not agitated. In the case of *Mackintosh v. Ogilvie*, there was no ground to restrain the Defendant from going out of the kingdom, neither does it appear from the statement of it, either that he had gained an undue priority or that he had no right to retain an advantage which he had legally acquired. In *Solomons* v. *Ross* the money was actually in the hands of the debtor, and when all parties were before the chancellor he might use his discretion in compelling it to be paid for the general benefit of all the creditors. In *Jollett* v. *Deponthieu* the curators filed their bill pending the attachment, having used diligence to prevent it. But in the present case the assignees took no steps to prevent the attachment, to do which they had sufficient time. In *Neale* v. *Cottingham* also **[672]** the proceedings were depending before a court of equity, and all parties present. Here the proceedings were at an end, the judgment executed, and the money paid over. Those were likewise cases in equity, but the present action is in a court of law.

That assignments by commissioners of bankrupts are considered as voluntary with respect to the colonies or foreign countries, and as such take place only between the assignees and the bankrupt, but do not affect the rights of other creditors, (who having gained a lawful priority are entitled to keep it,) appears from the case of *Cleve* v. *Mills* (Cooke's Bankrupt Laws, 370, last edit.) *Richards and Others* v. *Hudson and Others* (c), and *Waring* v. *Knight* (Cooke's Bankrupt Laws, 372, last edit.), in all which cases Lord Mansfield's doctrine is uniform as to this point, and perfectly agrees with *Le Chevalier* v. *Lynch*, and with the opinion of Lord Hardwicke recognized in that case. Conformable to this, is the right which a consignor of goods has to stop them in transitu on the event of the insolvency of the consignee, and to retain them against the other creditors. So here, the Defendant has by due diligence stopped the debt in question in St. Christopher's, and shall not be compelled to refund to the assignees, who took no previous steps to prevent the attachment.

Lawrence replied, that though the plantations were to be considered in this respect as foreign countries, yet this was not the assignment of a chose in action. It was an assignment of goods and effects in the hands of the garnishee; by that name they were attached, as appears on the face of the special verdict. Now it is not necessary to have possession in order to transfer the property of a personal chattel, though the want of possession is sometimes evidence of fraud. Neither is money in all cases a chose in action; here it was considered as specific effects, and so denominated in the attachment. To the argument, that, if the words of the statute 13 Eliz. had a general effect, lands in foreign countries would pass by the assignment, as well as goods, it may be answered, that in all countries certain forms are to be observed in passing lands, without which a conveyance of them is not valid: but no such forms being necessary in transferring personal property, that may be conveyed by a mere contract; and an assignment by commissioners of bankrupt, is as good a contract as any other. The authority before cited from 1 Com. Dig. 519, is not restrained by any words, to shew that the property of a bankrupt in Ireland **[673]** which is vested in the assignees is subject to the claims of creditors in that country. The material point of Lord Hardwicke's decision mentioned by Lord Mansfield in *Le Chevalier* v. *Lynch*, was, that "he would make no order till the Scotch creditors had abandoned their priority." The principle upon which Lord Mansfield there holds that the debtor shall be answerable to the assignees must be, that the property vests in them. The observations made on the part of the Defendant on that case, are only applicable to the point there before the Court, that of a debtor of the bankrupt being sued; but in the present case, the action is brought against a creditor. In *Solomons* v. *Ross* the attachment was completed, and execution would have followed if security had not been given, which was equal to actual payment; but there Mr. Justice Bathurst compelled the party to give up his security: the only ground of which compulsion must have been, that the property was vested in the curators; otherwise, the decree would have been contrary to justice. Though in the next case of *Jollett and Another* v. *Deponthieu and Another*, the bill was filed pending the attachment, yet

(c) At the Cockpit, 1762, cited in argument, 4 Term Rep. B. R. 187, *Hunter* v. *Potts*.

the question was, in whom the property was vested at the commencement of the attachment, and it was decided in favour of the curators or assignees. The same principle is also admitted in the case of *Neale* v. *Cottingham*, by the Chancellor of Ireland. As to the case of *Waring* v. *Knight*, Lord Mansfield decided there on a ground not now tenable, that the form of the action was improper: but in *Kitchen* v. *Campbell*, 3 Wils. 304, it is decided, that either an action of trover, or for money had and received would lie by the assignees, under the circumstances of those cases. Although the attachment in the present case was obtained by the sentence of a court of justice, yet where the truth of the case on which that sentence was founded was not known, the money ought in justice to be recovered back, notwithstanding such sentence.

The authority cited from *Richards* v. *Hudsons* at the Cockpit, was only an obiter opinion of Lord Mansfield, and not necessary to decide the point there in question. In the case of *Cleve* v. *Mills*, the doctrine of Lord Mansfield on this head likewise was obiter, and goes no farther than that of *Le Chevalier* v. *Lynch*, namely, to shew that the debtor of a bankrupt having paid his debt by virtue of process which he could not resist, should not be himself obliged to pay it a second time. But, independent of authorities, the Court will not hold out so great **[674]** a temptation to fraud, as to prevent the effect of the assignment extending to the colonies; since, if the law were so understood, some creditors would be continually gaining an undue preference to others, by the goods of a trader being sent out of the kingdom on the eve of his bankruptcy, and the equal spirit of the bankrupt laws would consequently be defeated.

After these arguments, it was agreed, that the case should wait the determination of a similar one (*Hunter and Others* v. *Potts*, 4 Term Rep. B. R. 182), then depending in the Court of King's Bench, which, it was understood, was to be argued before the twelve judges in the Exchequer Chamber.

But no such argument having taken place, the case was argued a second time in this court, in the present term, by Adair, Serjt., for the Plaintiffs, and Hill, Serjt., for the Defendant.

On the part of the Plaintiffs, Adair rested on the authority of *Hunter* v. *Potts*, which, he said, was decisive of the present case, unless some material ground of distinction between the two cases could be shewn.

On behalf of the Defendant, Hill Serjt., argued in the following manner;—He submitted to the Court two propositions.

I. That the debt received by the Defendant for the recovery of which this action was brought, did not vest in the Plaintiffs by the assignment of the commissioners; and therefore, as they had no claim but under that assignment, they never had a right to the debt, nor consequently to the money received for it.

II. Supposing they ever had a right, they had lost it by their own fraud or laches.

I. That debts due to bankrupts in the island of St. Christopher do not vest in assignees under a commission of bankrupt, will be proved, 1st. From the rules established for determining the extent and operation of statutes in general in the plantations. 2d. From the wording of the statutes of bankrupts. 3d. From determinations both in law and in equity. After which, answers will be offered to the arguments used and the authorities cited on the side of the Plaintiffs.

1. As to the rules for determining the extent and operation of statutes in general over the plantations, there appears in 2 P. Wms. 75, and Salk. 411, to be an established distinction between plantations in new uninhabited countries, and plantations in conquered countries; that with respect to the former, it is necessary that in them the laws of England should prevail, **[675]** otherwise they would be without laws; but with respect to the latter there is no such necessity, and therefore in them the old laws of the conquered countries are in force till new laws are given by the conquerors (7 Co. 17 b. 4 Burr. 2500. Cowp. 209). Now the Island of St. Christopher was jointly conquered, and possessed by the English and French, till ceded by the treaty of Utrecht entirely to the English: but there is no difference between a country conquered and a country ceded by treaty; the distinction therefore above noticed is applicable to that island; and the consequence is, that in general statutes passed in this country have there no validity or force. This rule with respect to plantations in conquered countries has never been controverted, since the time when the determinations above alluded to took place: and even with respect to plantations in uninhabited countries, it has been construed not to extend to statutes

of particular police; of which kind are the bankrupt laws (4 Burr. 2500). This receives farther confirmation from,

2. The wording of the statutes of bankrupts. The first now in use is 13 Eliz. c. 7, by which a power is given to the commissioners to assign debts "wheresoever they may be found or known." But when that act was passed, the English had no plantations, and in the subsequent statutes of James 1, (1 Jac. 1, c. 15, 21 Jac. 1, c. 19), at a time when they had several, those words are omitted. Yet it must then have been obvious to the Legislature, that those plantations had powers of making laws for themselves, and that statutes passed in this country would not be in force in those plantations, unless they were particularly mentioned, or comprised under general words necessarily including them. When indeed the Legislature has designed to include the plantations, it has expressly mentioned them, as in stat. 25 Geo. 2, c. 6, s. 10. But though the bankrupt statutes are numerous, no mention is made of the plantations in any of them. On the contrary, some are so pointed, as to shew that the Legislature had no notion of their extending out of the kingdom. This appears by the provisions relating to foreign attachments, all of which are confined to attachments in England. Thus the stat. 1 Jac. 1, c. 15, s. 13, provides, that debts due to bankrupts shall not, after the same are assigned by the commissioners, be attached as the debts of the bankrupt by any other person, according to the custom **[676]** of the City of London or otherwise: which words or otherwise, must mean (as was admitted by the counsel for the assignees in *Hunter* v. *Potts* (4 Term Rep. B. R. 184)), according to any other custom of attachment. The stat. 21 Jac. 1, c. 19, is still more explicit; for the provision in sect. 9, respecting attachments is confined to "London, or any other place, by virtue of the custom there used." There are many cities in England, in which, as well as in London, there are customs of foreign attachment; these the Legislature had in view, but not the laws of foreign countries. Therefore neither the intention nor the words of those provisions extend to the attachment in this case, found by the special verdict to have "duly issued according to the form of a certain law of the island in that case made and provided." The stat. 7 & 8 W. 3, c. 22, s. 9, has expressly declared what laws in the plantations are void, and by so doing has impliedly confirmed the law on which the attachment in the present case issued, which does not fall within the description of any of those which are by that statute declared to be void. As therefore it is a valid law, and not within the provision of any of the bankrupt laws against foreign attachments, the Defendant had a right to proceed upon it. This is likewise proved by stat. 13 Eliz. c. 7, because, as is observed by the Court, Cro. Car. 150, that statute has made no provision against foreign attachments. But that statute, and those of James I. are the only laws on which the claim of the Plaintiffs was, or could be argued to be maintainable.

3. As the statutes of bankrupts were never established in any of the king's foreign dominions by any legislative act, and as they could not, by the settled rules of construction, be extended to foreign countries, it was long doubted whether any or what notice could be taken of them in such countries. But it was at length settled, that the assignment of the commissioners operated as a voluntary assignment, binding as between the assignees and the bankrupt, but not affecting the rights of other creditors, and therefore not preventing their proceeding to attach debts due in those countries to the bankrupt. This Lord Mansfield held at the Cockpit (*Cleeve* v. *Mills*, Cooke's Bankrupt Laws, 370, last edit.), at the sittings at Guildhall (*Waring* v. *Knight*, ibid. 372), and in the Court of King's Bench, with the concurrence of the other judges of that court (*Le Chevalier* v. *Lynch*, Dougl. 169, last edit.). This was also the opinion of Lord Chancellor Hardwicke, and of Lords Commissioners **[677]** Smythe and Bathurst (infra, *Mawdesley* v. *Parke*): but the precise time when this was first settled, does not distinctly appear. It is however to be found in a case (Dom. Proc. Feb. 1749) arising on the lunacy of Mr. Morrison, cited incorrectly by the counsel for the Plaintiffs, in *Hunter* v. *Potts*, as the case of Mr. Morris (4 Term Rep. B. R. 185), and not there stated as to the principal point, which is most material in the present case. Mr. Morrison being a bond creditor of the respondent, was under a commission of lunacy here, and the respondent removing into Scotland, his committees instituted a suit there; but the Court in Scotland held, that the committees could not maintain their suit in that country. The reason against that decision, given in the appellant's printed case (page 1), was, that "mobilia sequuntur personam, and as Mr. Morrison was in England, the administration of his personal estate, granted by the usual authority where he resided, must be taken every where to be of equal force with a voluntary

assignment by himself, and that assignments made under commissions of bankrupt in England, had been holden in Scotland of sufficient authority to commence a suit, and receive money there due to the bankrupt." The utmost insisted upon as the right of assignees of bankrupts, was, agreeable to Lord Mansfield's opinion, a right to sue for and recover in Scotland debts there due. But as that was the whole, the case by no means proves that the debt could not have been attached, if the creditor of a lunatic, or of a bankrupt (to a proceeding by whom the case was compared) had proceeded by foreign attachment. In the section of Lord Kaim's Principles of Equity (b. 3, c. 8, sect. 4, p. 360, second edit.), referred to in the argument for the Plaintiffs in *Hunter* v. *Potts*, it is laid down as settled, "that an assignment in the English form of a debt in Scotland, does not transfer the jus crediti, and though first in time, will not avail against a more formal assignment bonâ fide," and afterwards the same author says: "We may safely conclude, the statutory transference of property from the bankrupt to the commissioners cannot carry any effects in Scotland;" but adds, "the English bankrupt statutes, however, must not be totally disregarded (sect. 8, p. 368) by us." He afterwards allows the same operation to the assignment of the commissioners, as is mentioned by Lord Mansfield, "that in the forms of the law of Scotland, there appears nothing to bar the assignees from bringing a **[678]** direct action against debtors of the bankrupt; as the bankrupt himself might have done before his bankruptcy." On the same principle Lord Hardwicke decided in *Wilson's case*, which, as cited by Lord Mansfield (Cooke's Bankrupt Laws, 373, last edit.), was thus: "Wilson a bankrupt had had effects in Scotland, and some of his creditors had proceeded against the effects there (there being a custom in Scotland analogous to the foreign attachment in London), upon which an application was made to the Lord Chancellor to stay their proceedings (the parties who set such proceedings on foot living in England). But Lord Hardwicke said, it could not be done, for our bankrupt laws were not in force there, and therefore the parties had a right to proceed. But he said that if the effects there were not sufficient to satisfy the party's debt, and he applied for a dividend under the commission here, in that case he would postpone him till the other creditors were paid in the same proportions he had received." This is the same rule that is always observed with respect to legal and equitable assets: the Court cannot take away the legal right of creditors by specialty to be paid, in preference to simple contract creditors, out of legal assets; but with respect to equitable assets, every specialty creditor, who receives part of his debt out of legal assets, is postponed till all the simple contract creditors are paid out of the equitable assets, as much as the specialty creditor has received out of the legal assets. In *Wilson's case* Lord Hardwicke did the like, with respect to the bankrupt's creditors who lived in England, and attached the bankrupt's effects in Scotland. That case therefore is a determination in favor of the right insisted on by the Defendant in the present action; for if the creditors in that case had not a right to secure their debts, by the means they used for that purpose (which were similar to those used by the present Defendants), as they lived in this country, Lord Hardwicke might, and ought to have prevented their gaining any advantage by the foreign attachment. This opinion of Lord Hardwicke and Lord Mansfield is founded on a principle long ago established, that the assignees of a bankrupt are in the same, and no better situation than the bankrupt himself, and therefore take, subject to every equity to which he was subject. This appears (1 Atk. 188, *Browne* v. *Jones and Others*) from the case of *Taylor* v. *Wheeler*, 2 Vern. 564, **[679]** where the mortgagee of a copyhold neglected to have the mortgage surrender presented at the next court, by which, by the custom of the manor, it became void at law; but the Lord Keeper decreed the assignees under a commission of bankrupt against the mortgagor to pay principal, interest and costs, or be foreclosed. That case shews that the assignment of commissioners of bankrupt, even in England, has only the operation of a voluntary assignment; for in that case, if a purchaser for valuable consideration, without notice, had acquired the estate, he would have excluded the mortgagee. The right of the creditor to take advantage of the law of foreign attachment against the assignees, is a consequence of the assignment to them not operating as a transfer for a valuable consideration, but as a voluntary assignment. A voluntary assignment of a debt in England would not prevent its being attached by the custom of London, and therefore, as the assignment of commissioners of bankrupt operates in foreign countries as a voluntary assignment, it cannot prevent debts in those countries being attached by the creditors of the bankrupt;

particularly, as the assignment of the commissioners even here operates as a voluntary assignment, except in cases where an express provision is made to give it a more forcible operation, such as there is with respect to foreign attachment here, by custom, and as there is also by stat. 1 Jac. 1, c. 15, s. 5, with respect to the disposition by the commissioners of the bankrupt's real and personal estates, notwithstanding any prior voluntary settlement; which provisions would have been unnecessary, if the assignment were of itself more forcible than a voluntary assignment. That part of the argument for the assignees in *Hunter* v. *Potts* (4 Term Rep. B. R. 184), which tends to prove that they take as representatives, is a confirmation of their taking as volunteers, except in cases where they are enabled by statute to take in a stronger manner. When indeed the statutes of Elizabeth and James were passed, on which alone the present case depends (as was admitted by the counsel for the assignees in *Hunter* v. *Potts* (ibid. 183, 184)), the law was taken to be, that debts due to the representatives of debtors were liable to be attached for the debts of the original debtors. In the case of intestacy, the only doubt as to administrators taking subject to foreign attachment, was owing to there being no such office as that of an administrator at common law; for which reason it was doubted (1 Roll. Rep. 105, 106, *Spink* v. *Tenant*. 5 Co. 82 b. *Snelling's case*), whether a custom could be applicable **[680]** to them. But notwithstanding that doubt, it was holden that debts due to administrators were liable to be attached by the creditors of the intestate, in those places where there was a custom of foreign attachment (ibid. and 1 Roll. Abr. 554 (K.), pl. 2).

In the case of *Cleeve* v. *Mills*, Lord Mansfield held, "that the statutes of bankrupts do not extend to the colonies, or any of the king's dominions out of England, but the assignments under such commissions are considered as voluntary, and as such take place between the assignees and the bankrupt, but do not affect the rights of any other creditors." In *Waring* v. *Knight*, "Sims the bankrupt went to Gibraltar, and the Defendant sent a power of attorney there to commence a suit against the bankrupt, which was done, and a decree obtained, and his goods taken in execution and sold, and the debt paid to the Defendant, to recover which, the action was brought." Lord Mansfield held, "that this money, being recovered by sentence in a foreign court, could never be recovered back by the assignees, our bankrupt laws not extending to any of our foreign settlements. He also said, it had been for a long while doubted, whether the assignees could recover a debt due in a foreign country to the bankrupt; but of late it had been determined they might (in a case at the Cockpit); so a debt may be recovered here due to a bankrupt in a foreign country, where the law obtains analogous to our bankrupt laws, which other countries will take notice of, and consider it in the same light as if the bankrupt had made an actual assignment:" by an actual assignment, his Lordship must have meant a voluntary assignment, agreeable to his opinion expressed in other cases. The case of *Le Chevalier* v. *Lynch* was a determination against the assignees, and in point with the present, and that, after the same right had been insisted on for the Plaintiff as is now contended for, except that the action was against the garnishee. But that circumstance was not (nor could be, as shall hereafter be shewn) the ground of the determination, notwithstanding what was said in the argument for the Plaintiffs in *Hunter* v. *Potts* (4 Term Rep. B. R. 187).

The case of *Mawdesley* v. *Parke and Beckwith* (Lincoln's Inn Hall, Dec. 13th, 1770, before the Lords Commissioners Smythe and Bathurst), was this:—"The Defendants were assignees under a commission of bankrupt against Campbell and Hayes, and after the assignment to them from the commissioners, several of the bankrupt's cre-**[681]**-ditors in Rhode Island attach a debt due from the Plaintiff to the bankrupt, in pursuance of an act of Assembly there, authorizing such process. The Plaintiff coming to England, the assignees brought an action at law against him, and the bill was filed for an injunction, the Plaintiff offering to pay what, if any thing, should appear to be due to the assignees, after deducting what should be recovered against him by the Plaintiffs in the foreign attachment. The assignees by their answer insisted, that the property of the bankrupts was vested in them before the writs were served on the Plaintiff, and therefore that he had no money or effects belonging to the bankrupts in his hands, and consequently that the Plaintiffs in those writs were not intitled to recover any thing. An injunction had been granted, and on shewing cause why it should not be dissolved, the Lords Commissioners Smythe and Bathurst continued the injunction to the hearing, and refused to order the Plaintiff to bring the

money into court, but directed that he should give security to be approved of by the Master, to pay the Defendants what (if any thing) should be decreed to be due: and they were of opinion that the assignment did not divest the property out of the bankrupts, as the debt was due in the plantations, but only gave the assignees a right to sue for it; that the creditors there had also a right to sue for it, who, having commenced a suit first, and recovered judgment there (on which there were appeals here depending, as was said at the bar, and was the fact, though it did not, nor could appear on the pleadings, being subsequent to them), had gained a priority over the Defendants; though it was admitted that there had been two cases (*Solomon* v. *Ross*, ante, 131, 132), one determined by Mr. Justice Bathurst sitting for Lord Northington, the other (*Jollett and Another* v. *Deponthieu and Another*, 132, n.) by Lord Camden, where commissions of bankrupts were issued in Holland, and some of the bankrupt's effects were attached in London, and the attachments were ordered to be discharged, and the money or effects paid to the assignees; and though it was argued by the counsel for the Defendants, that the rule in that respect ought to be reciprocal, yet it was answered that the bankrupt laws were not received in the plantations, and therefore this case was not like those two which were mentioned, there being bankrupt laws in Holland."

The distinction in that case was well founded. For as Scotland, with respect to its laws, continues, notwithstanding the [682] union, in the same situation as a foreign country, so do the plantations, when not included in acts of parliament.

But all questions arising on the laws of any particular country, in respect to their operation in foreign countries, especially such as relate to war or commerce, are to be determined by the law of nations, one maxim of which is equality (*a*)[1]. The bankrupt laws therefore of all foreign countries ought to be allowed their operation here, on a presumption, that our bankrupt laws would be allowed to have effect in those countries. But in the plantations there are no bankrupt laws which could operate here; our bankrupt laws therefore ought not to be extended to them. It was on this ground they were at first disregarded in the plantations; but, as appears from *Mr. Morrison's case*, commissions of lunacy and bankruptcy were afterwards considered as investing the commissioners or their assignees with a power of seizing and recovering the effects of the lunatic or bankrupt, though not as giving them any right before seizure or recovery. This having become the usage in the plantations (which is one mode by which statutes may be in force there, as appears by 25 Geo. 2, c. 6, s. 10), so far they are in force there, and so far they have been allowed to be by Lord Hardwicke and Lord Mansfield, and no farther.

Thus much being advanced in support of the first proposition stated in the outset of the argument, answers shall next be attempted to the reasoning used, and authorities cited on the other side of the question, particularly in the case of *Hunter* v. *Potts*.

It was said in arguing that case (4 Term Rep. B. R. 187), that the case of *Le Chevalier* v. *Lynch* was not applicable, because the action was against the garnishee, and that nothing could be more clear, than that a person who had been compelled by a competent jurisdiction to pay the debt once, should not be compelled to pay it over again, and it was farther said, "that *Cleve* v. *Mills* and *Allen* v. *Dundas*, went upon the same principle." But to this it may be answered: 1st, that not one of the cases above cited for the Defendant were determined on that principle; that in *Waring* v. *Knight* the action was against the Plaintiff, who recovered the money from the bankrupt, and in *Mawdesley* v. *Parke* the garnishee was the sole Plaintiff, and the Plaintiffs in the foreign attachment were not before the Court; yet both those cases were determined in the same manner as when the actions were [683] against the garnishees. 2dly, the garnishee is the proper person against whom the action should be brought; for he must be the correspondent of the bankrupt, and ought to give him and his assignees due notice. If he does give them notice, they ought to defend the suit, or else be bound by it. On the other hand, if he does not give due notice, he ought to pay the money over again (*a*)[2], for the fault was in him in not giving it.

(*a*)[1] On this, cap. 30 of Magna Charta is founded.

(*a*)[2] If money be attached and paid thereon, and afterwards the original creditor sues for the same, and the attachment happens to be ill pleaded, or otherwise avoided, the party must pay the money over again, and hath no remedy either in law or equity. 2 Show. 374, *Anon.*

He ought to suffer by his own laches, rather than the Plaintiff in the foreign attachment, who has been thereby prevented from coming in under the commission. The other case of *Allen* v. *Dundas* was on quite a different subject. The point there decided was, that payment to one who had a probate as executor of a forged will, notwithstanding the probate was afterwards revoked, was a good discharge against a subsequent rightful administrator. The reason of which is, that the party was not in fault, and the law will protect parties who are not in fault; but it will not protect those who are in fault, as every garnishee must be, who does not give due notice to the principal, when time is allowed for that purpose. Here more than thirteen calendar months appear, by the special verdict, to have been allowed for that purpose.

As to the supposed change of opinion of Lord Hardwicke and Lord Mansfield (4 Term Rep. B. R. 188), it was said, that Lord Hardwicke in the case of *Mackintosh* v. *Ogilvie* granted a writ of ne exeat regno against one who had obtained arrestments of a bankrupt's property in Scotland, and this was placed among the decisions said to be expressly in point. But in fact it was no decision at all concerning a foreign attachment, but a Scotch arrestment, which was indeed compared with a foreign attachment. What the circumstances of that case were does not fully appear, but according to the note of it, the person who made the arrestments had got the money into his hands, which, it is presumed, is by the Scotch law inconsistent with every species of arrestment. There must therefore have been something unjust done by the Defendant, which might be the reason for granting the ne exeat regno. However, as far as it concerns the present case, it was but an obiter and extra-judicial opinion. Lord Mansfield, when at the bar, is made to say (4 Term Rep. B. R. 188), "there had been many instances **[684]** where, after such arrestments and foreign attachments by creditors, the money had been recovered back again by the assignees under the commission, in actions for money had and received." But as not one of those many instances appear, and as in three several instances his Lordship determined the contrary, it is more than probable that the note was mistaken. The case of *Ballantine* v. *Golding* (Cooke's Bank. Laws, last edit. 522) cited in the argument of *Hunter* v. *Potts*, to prove Lord Mansfield's change of opinion, related not to the assignment, but to the certificate, and the former is only in question in this case; a change of opinion therefore, with respect to the last, if there had been any, would be no proof of a change with respect to the first. But there was no change of opinion at all, for in that case the debt was contracted, and the certificate obtained in Ireland; and therefore the debt was legally discharged, and could not be revived by the bankrupt's coming afterwards into England. What was said by Lord Mansfield that "a discharge by the law of one country will be a discharge in another," is to be understood with reference to the case then before him; but, whatever it was he said, the case was not determined upon it, but put off to another day, when the point was given up on the authority of *Burrows* v. *Jemino* (2 Stra. 733). Now the point determined in *Burrows* v. *Jemino*, was, that the sentence of a foreign court of competent jurisdiction is decisive; so that the principle, if applicable at all to the present case, is rather against than for the Plaintiffs, as there was a sentence in St. Christopher's in favour of the Defendant.

Another argument for the assignees was, "that with respect to personal property, the Lex Domicilii, and not the Lex rei sitæ is permitted to prevail;" to prove which, many cases were mentioned, and others referred to, as collected in *Bruce* v. *Bruce* (Dom. Proc. Ap. 1790). But in that case, the principle contended for was controverted, and the appellant, who rested his case upon it, failed. If he failed on the fact, there could be no determination on the principle; if on the law, the determination was contrary to the principle. The case therefore either proves nothing on either side, or else it makes against the Plaintiffs in the present action. And though many of the cases there cited, prove that the succession to an intestate's personal estate is to be determined by the law of the place where he had his **[685]** domicile, yet in none of them is there so much as a dictum, that debts due to him may not be attached by the law of the country where due. But admitting the rule, that the Lex Domicilii is to prevail, yet it is begging the question to draw any inference from that rule to the present case. For that would be going on a supposition, that by the law of this country, the property of debts due to bankrupts in St. Christopher's vests in the assignees under a commission of bankrupt here, which is the very point in question.

If it does not vest, then the law of the country, which is the domicile of the bankrupt, and the law of the country where the debt is due, are the same, and by the law of both countries the Plaintiffs have no property in the money for which they have brought this action, but had only a right to sue for it in St. Christopher's, which as they have not done, but acquiesced till it was recovered by the Defendant, he is intitled to it. Two authorities, Cro. Eliz. 683, and Skinn. 370, were cited, that an alien enemy may maintain an action here as administrator. But that affords no argument against the Defendant; rather the contrary, for an administrator sues en auter droit, and if the intestate were an alien enemy, the administrator could not maintain any action; which is implied Skinn. 370. The cases of *Pipon* v. *Pipon* and *Bruce* v. *Bruce*, relate only to questions of the succession to the effects of intestates; and as that of *Kilpatrick* v. *Kilpatrick* (4 Term Rep. B. R. 185) is among them, and not particularly stated, it is to be presumed to be of the same kind. In Precedents in Chan. 207, and 1 Bro. Parl. Cas. 38, the question was on the construction of marriage articles made in France, which was decided in this country, to which the parties had fled. The decision seems to have been, that the construction must be made according to the law of France. But whether it was or not, that is now settled to be the rule of construction in like cases, and if applicable at all to the present case, is against the Plaintiffs, as the debt was contracted at St. Christopher's. With respect to *Richards* v. *Hudson* (ibid. 187) and *Beckford* v. *Turner* (4 Term Rep. B. R. 188), the first relates only to rights not clearly stated, nor, as far as appears, applicable to this case; the other is against assignees, and mentioned only to be answered. Three cases (in the notes ante, 131, 132, 133,) were holden to have removed all doubts. But the two first, as far as appears, passed without argument, and in *Mawdesley* v. *Parke* were distinguished from **[686]** that case (as has been already observed), inasmuch as there are no bankrupt laws in the plantations, whereas in Holland there are; for which reason they are also equally distinguishable from the present case. With respect to the first of them, *Solomons* v. *Ross*, as Lord Commissioner Bathurst could not but know of his then late determination, he must have been the best judge of it, and if it was not applicable to the case then before him (i.e. *Mawdesley* v. *Parke*), it certainly cannot be to the present, as both cases arose in the plantations, that of *Mawdesley* v. *Parke* at Rhode Island, in which there was a law for foreign attachments stated and admitted in the pleadings; but no such law was stated in *Hunter* v. *Potts*, and therefore the Court could not suppose that there was any. That is likewise a material distinction between the present case and *Hunter* v. *Potts*, especially as it seems admitted by the Court (4 Term Rep. B. R. 192), that if there had been such a law in that country the determination would have been different. As to the case before Lord Camden of *Jollett* v. *Deponthieu* (ibid.), he took no note of it, and as he did not, and no argument appears in the printed note, it is reasonable to suppose there was none, and consequently that the point passed unnoticed in that case as well as the other. With regard also to the case of *Neale* v. *Cottingham*, before the Chancellor of Ireland, no arguments are there stated; and besides, as the bankrupt laws were then introduced in Ireland, that case is likewise within the distinction taken in *Mawdesley* v. *Parke*. Notes of cases without the grounds on which they were determined, ought to have but little weight, in opposition to cases decided on argument, and supported by general rules and principles, which are more to be relied on than particular opinions; especially when those opinions are not reconcilable (ibid. 186), as they were admitted not to have been, by the Counsel for the Plaintiffs in *Hunter* v. *Potts*, previous to that case. But there was no inconsistency in the decisions on this point. For though it was said in that case (ibid), that "there were several decisions expressly in point," yet it is submitted, that there is not one to be found, till that case was decided, in which the point determined was "that a creditor of a bankrupt cannot, after an assignment by the Commissioners, recover by foreign attachment in the plantations his debt, from a debtor of the bankrupt there," which is the point in the present case.

Another argument for the Plaintiffs was, that as all the parties were inhabitants of England, they were bound by the bankrupt laws, the evasion of which it was a fraud to attempt. **[687]** But this argument takes that for granted which is to be proved, namely, that the bankrupt laws vest the property of debts in St. Christopher's in assignees of bankrupts; which is the point on which the case depends; for if the property of the debt in question did not vest in the Plaintiffs by the assignment, the Defendant had a right to attach it. Though he is bound by the laws of this country,

yet unless those laws do in this respect extend to St. Christopher's (which is the point in dispute), he had not acted contrary to them in taking a legal course to secure his debt, which the jury have found to be a just debt. Every fair creditor has a right to make use of any legal means to secure his debt, and the using those means cannot be a fraud. Besides, there were similar circumstances in the case of *Waring* v. *Knight*. If indeed this argument were allowed, it would put the English in a worse situation than other nations, which would be both unjust and impolitic. The fraud is not in the Defendant, but in the Plaintiffs, which brings the argument to the second proposition submitted to the Court, viz.

II. That supposing the Plaintiffs ever had a right to recover the money which they demand, they have lost it by their own fraud or laches.

Their claim is founded on the assignment of the Commissioners, which was on the 5th of March 1782. The present action was not brought till Trinity Term 1787. It is impossible that they should not from the bankrupt's examination, and the inspection of his books, have known of this debt due to him in St. Christopher's; and if they also knew of the proceedings there, then their acquiescence from the 5th of March 1782, to the time when judgment was obtained in St. Christopher's, was a fraud. But if they did not know of the proceedings, (which is incredible,) it was gross negligence (2 Wils. 354) not to make an inquiry, of which they ought not to be permitted to take advantage. They acquiesced above five years before they brought the present action, and nine have elapsed before it is determined. And as far as appears, no application was made to the Defendant till just before the action was brought. Many of the creditors under the commission must be dead, or not to be found; and those who are living have probably given up all thoughts of any future dividend, by which means the Plaintiffs will, of course, keep to their own use, all, or the greatest part of what, if any thing, shall be recovered of the Defendant, who has lost **[688]** the opportunity of obtaining any satisfaction for his debt, and has been put to great expence; all which would have been prevented, if the Plaintiffs had defended the action in St. Christopher's. For then, either judgment would have been given for them at a far less expence than what has been incurred, and the Defendant would have had an opportunity of proving his debt under the commission and receiving his dividend; or, if the judgment has been given against them, they might have appealed to the King in Council, which would have been the proper way of proceeding (2 Lord Raym. 1447), and would have been speedily determined. But they suffered judgment to go against the bankrupt and the garnishee by a competent jurisdiction, which not being appealed from ought to be decisive. It is not to be considered as res inter alios acta, since there is that privity between the Plaintiffs and the garnishee that the judgment against the garnishee was, in effect, a judgment against the assignees, especially as it was not possible to make them parties. Though they are assignees under a commission of bankrupt, yet their acts and defaults are binding on the other creditors under the commission by whom they are chosen, to whom they are accountable, and who have a right to inspect their books and proceedings. This appears from the case of *Troughton* v. *Gitley*, Ambl. 630, where one of the assignees encouraged an uncertificated bankrupt to set up again in his trade, which he did, and carried it on for four years successively, and then died; upon this the assignees filed a bill against his administrator for his personal estate, and though it is clear that all effects acquired before a bankrupt obtains his certificate belong to his creditors under the commission in preference to any others, yet Lord Camden decreed in favour of the new creditors, and held that the case fell within the principle, that if a man having a lien stands by and permits another to make a new security, he shall be postponed like the common case of a first mortgagee suffering a second mortgage without giving notice of his security: his lordship therefore thought that the creditors under the commission ought to lose their priority. The same principle is applicable to this case. If indeed the Plaintiffs were to recover, it would encourage future assignees to delay the getting in debts till it was impossible to distribute them among all the creditors, and what was not distributable would be retained by themselves. **[689]** On this last proposition therefore, as well as on the general question, it is submitted that the judgment of the Court ought to be for the Defendant.

Cur. advis. vult.

On this day LORD LOUGHBOROUGH, after stating the special verdict, proceeded in the following manner,

The question is, whether the assignees of the bankrupt have a right to recover this money, as money had and received to their use? The objection made to it is, that the money was recovered by process in the Island of St. Christopher, in which the bankrupt laws of England have no direct binding force. A variety of cases have occurred on this question; and there is some confusion in the reports of them, which made a very deliberate consideration of it necessary. Not that I think it appears from the mere terms of the case itself, that the decision of this particular case could be attended with any great difficulty, or that any great question could arise out of it. The whole which has been argued has been as to the operation of the bankrupt laws in countries not subject to the jurisdiction of the courts of this country. In the present case, it is difficult for me to conceive that this question can arise out of the facts stated. For the simple state of the case is no more than this. The Defendant resident in England, and a creditor of Skirrow in England, has received money which was due to Skirrow in the Island of St. Christopher at the time of his bankruptcy, and which at that time was subject to no lien whatsoever. The money being remitted to Worswick in England, and being clearly money which at the time of the act of bankruptcy was the property of the bankrupt, and subject to no lien whatever, he is, primâ facie, accountable for it to the assignees. The defence he makes is, that he recovered this money by legal process in the island; but he states also that the process was founded on an act done by him in England, and under the aid of the law of England. For the foundation of the recovery was an affidavit of debt made before the Mayor of Lancaster. Without that affidavit he could have instituted no proceeding in St. Christopher's; the money would have remained subject to the demand of the assignees whenever they had been appraised that such a debt was due, and had sent out proper powers. These propositions cannot be doubted. Then it is not a question whether the bankrupt laws have an operation at St. Christopher's, but whether they operated at Lancaster. It is a question, whether **[690]** a creditor resident in England, subject to the laws of England, shall avail himself of a proceeding of that law to enable him to get possession of a debt from those who are intitled to that debt, and who have the distribution of it for the benefit of all the creditors, and to hold that possession against those creditors.

But the argument has gone into a more general consideration of the cases which have arisen under different circumstances, in which the bankrupt's property being dispersed abroad, or he himself having changed his residence, advantage has been taken of his local situation, or of the local situation of the property which has been attached. This leads me to a short consideration of the cases on this subject, in which I see no difference, if their circumstances are rightly understood and rightly applied. First, it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person (*a*). The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country. In the case of *Pipon* v. *Pipon* (Ambl. 29), a party had possessed himself of a debt which was due to the intestate a subject of Jersey, and whose personal property was therefore governed by the law of Jersey. Lord Hardwicke was applied to by his other relations resident in England, stating that they should be excluded from a share according to the distribution of Jersey, but that they should be entitled to a share according to the distribution of England; and they therefore prayed by their bill, that the administratrix might be restrained from taking the property to Jersey. Lord Hardwicke very wisely and justly determined that he would not restrain the administratrix, he would not direct in what manner she was to dispose of the property or to distribute it. Having acquired the right to

(*a*) [As to what constitutes a man's domicile so as to govern the distribution of his personal property, see *Bruce* v. *Bruce*, 2 Bos. & Pul. 229 (*n*), *Marsh* v. *Hutchinson*, ibid. See also *Scrimshire* v. *Scrimshire*, 2 Haggard, 405. *Hunter* v. *Potts*, 4 T. R. 185.]

it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate.

[691] Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of *Solomons* v. *Ross* (ante, 131) and *Jollett* v. *Deponthieu* (ante, 132), where the laws of Holland, having, in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates, the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts. In those cases the Court of Chancery felt very strongly the principle which I have stated, and it has had a very universal observance among all nations. But it may happen, that in the distribution of the law in some countries, personal property may be made the subject of securities to a greater or less extent, and in various degrees of form. It is in those cases only that any difficulty has occurred. A question of this nature came before Lord Hardwicke very largely in the bankruptcy of Captain Wilson. With the little explanation I am enabled to give of that case, in which the court of session entirely concurred with Lord Hardwicke, the distinctions will be apparent. There were three different sets of creditors who claimed, subject to the determination of the court, on the ground that Wilson had considerable debts due to him in Scotland. By the law of Scotland debts are assignable, and an assignment of a debt notified to the debtor, which is technically called an intimation, makes a specific lien quoad that debt. An assignment of a debt not intimated to the debtor gives a right to the assignee to demand that debt, but it is a right inferior to that of the **[692]** creditor who has obtained his assignment and intimated it. By the law of Scotland also, there is a process for the recovery of debts, which is called an arrestment. Some of Wilson's creditors had assignments of specific debts intimated to the debtors, and completed by that intimation prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had arrested the debts due to him subsequent to the bankruptcy, and were proceeding under those arrestments to recover payment of those debts. The determination of Lord Hardwicke and that of the Court of Session entirely concurred. The first class I have mentioned, namely, the creditors who had specific assignments of specific debts, intimated to the debtors prior to the bankruptcy, were holden by Lord Hardwicke to stand in the same situation as creditors claiming by mortgage, antecedent to the bankruptcy. All therefore he would do with respect to them was, that if they recovered under that decree, they could not come in under the commission without accounting to the other creditors for what they had taken under their specific security. With respect to the next class of creditors Lord Hardwicke was of opinion, and the Court of Session were of the same opinion, that their title, being a title by assignment, was preferable to the title by arrestment: and they likewise held, that the arrestments, being subsequent to the bankruptcy, were of no avail, the property being by assignment vested in the assignees under the commission. It is in this sense that an expression has been used by Lord Mansfield, in one or two cases, in which his language rather than his decision has been quoted with respect to the law of Scotland, namely, that the effect of the assignment under a commission of bankrupt was the same as a voluntary assignment. For so the law of Scotland treats it in contradistinction to the assignment perfected by intimation, and to an assignment which the party might be compelled to make. But it does not follow that it is an assignment without consideration. On the contrary, it is for a just consideration; not indeed for money actually paid, nor for a consideration immediately preceding the assignment. In that respect, therefore, it is a voluntary assignment. But taking it to be so, it excludes and is preferable to all others attaching, it is preferable to all the arresters,

it is preferable to all creditors who stand under the same class, and to all who have not taken the steps to acquire a specific lien till after the act of bankruptcy [693] committed. In a variety of cases enumerated in Lord Kenyon's opinion (4 Term Rep. B. R. 192), the same idea has prevailed, which I think is founded on the clearest and most evident principles of justice. If the assignees in this case had sent a person over to St. Christopher's to act for them, if they had given notice of the assignment, the Court of St. Christopher's ought unquestionably to have preferred the title of the assignees to the title of the creditor using the process of attachment, because the law of the country, to which the creditor making the demand was subject, had, on a just consideration, vested that property in the present Plaintiffs. As I take the determination in the Court of Chancery in the case of *Solomons* v. *Ross*, and the other case, to be founded, not on any policy or technical notions of the law of England, but on general law, preferring the title of the assignees to the title of the arresting creditor, the Court in St. Christopher's ought also to have preferred the title of the assignees. When I have laid this down, it by no means follows that a commission of bankrupt has an operation in another country against the law of that country. I do not wish to have it understood, that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided. But another case may possibly occur, of a suit brought against the bankrupt personally, and a case of this sort was stated in the argument, *Waring and Others* v. *Knight* (*a*). I have not been able to get a particular account of that case. It is shortly stated in Cooke's Bank. Law, 372, that a person having committed an act of bankruptcy had gone over to Gibraltar, that a commission of bankrupt was taken out against him, and that the Defendant brought an action against him in Gibraltar, and obtained judgment, and under the judgment payment of his debt. Whether the person was resident at Gibraltar prior to the bankruptcy, whether the debt was contracted at Gibraltar, whether he appeared to the commission in England, none of [694] these circumstances are stated. But the decision would undoubtedly be very materially varied by those circumstances. Lord Mansfield held, that the Defendant, having recovered the debt against the bankrupt who was personally present at Gibraltar, was not answerable to the assignees for the money. I am told in one account of that case, that it turned on the form of the action. But this is clear, that there being no certificate, the Defendant in that case had a right to sue the bankrupt. A bankrupt in this country without a certificate, may be sued; and though his goods could not be taken in execution, being vested in the assignees, yet his person might. There was therefore a good commencement of the suit against the person of the bankrupt at Gibraltar. How the debt was contracted, and how the suit was carried on, the report gives no account. However, it is at most but a decision at Nisi Prius, and is the only case which seems at all to stand against the current of authorities, which hold that the operation of the bankrupt laws, with respect to the personal property of the bankrupt, when that property is brought into this country by any one who has obtained it, is to carry a right to recover it to the assignees for the benefit of all the creditors. But, as I said before, it is not necessary to go the whole length of that discussion, because, on the circumstances of this particular case, the question is merely whether a creditor of the bankrupt resident in England, and knowing of the bankruptcy, shall avail himself of a process which he has commenced in England, so as to retain his debt from the assignees, and gain a preference over the other creditors. This is a proposition too clear to require any discussion. The consequence therefore is, that there must be

Judgment for the Plaintiffs.

End of Trinity Term.

(*a*) [Vide post, vol. ii. p. 413.]