

After advising a reclaiming petition for Sir William Forbes and Company, with answers, the LORDS altered the judgment pronounced by the Lord Ordinary; and found, That the granting of the promissory note by the bankrupt did not fall under the statute of 1696.

No 224.

It seemed to be the opinion of the Court, that if there had been any concert between the parties, for the purpose of giving a preference to Sir William Forbes and Company, in consequence of the vendition granted to the person who had interposed as cautioner, the judgment of the Lord Ordinary might have been sustained; but no agreement of this kind appeared. And although Sir William Forbes and Company, or their agent, might have been informed of the bargain between the cautioner and the bankrupt, this did not derogate from the validity of the agreement between Sir William Forbes and Company and the cautioner.

A reclaiming petition was afterwards preferred for the trustee on Swinton's sequestrated estate, and refused without answers.

Lord Ordinary, *Monboddo*.
Clerk, *Home*.

Act. Maconochie, Mat. Ross.

Att. Solicitor General.

Fol. Dic. v. 3. p. 62. Fac. Col. No 116. p. 220.

Graigie.

S E C T. VIII.

Effect of Reduction on the act of 1696.

1696. December 16. CREDITORS of HUNTER, Competing.

It is held in the case from Fountainhall between these parties, of this date; No 124. p. 1023. that the word *declare* in the act of 1696 does not import a retrospect.

No 225.
This act has
no retrospect.

Fol. Dic. v. 1. p. 81.

1704. December 1. JAMES MAN *against* ALEXANDER REID and Others.

JAMES MAN, as a creditor to Wales; arrests in the hands of Reid and others, and pursues a furthcoming, libelling the quantity and value of goods belonging to the common debtor introrried with by the defenders. It was *alleged* for the defenders denying the libel, That any introrried they had was by virtue of a prior and preferable title. THE LORDS ordained the defender to depone, *ut constat de debito*; and sustained the defence, that the introrried was by virtue of a preferable title.

No 226.
A disposition
by a bank-
rupt to a cre-
ditor being
reduced on
the act 1696,
and that cre-
ditor have
done no di-
ligence, (as
others had.

No. 226.

done by ar-
resting,)
trusting to his
disposition,
the Lords
found the dis-
position so
entirely null,
that it could
not subsist
even to bring
him in *pari*
passu with
the other cre-
ditors.

The defenders deponed upon their respective intromission, and that Wales having disponed his moveables, and the goods and shop to them, for payment of their respective debts, the said goods were sold by a voluntary and public roup to the best avail; whereof the defenders bought certain quantities, which they imputed in payment of their debts; and they produced the common debtor's disposition as their title, which they alleged, being prior, was preferable to the pursuer's arrestment.

The pursuer raised a declarator of bankrupt upon the 5th act of Parliament 1696, in which he prevailed, and reduced the disposition granted by Wales, and thereupon doth now insist in his furthcoming, and crave decret for the sums acknowledged.

The defender *alleged*: That albeit Wales be declared bankrupt, and the disposition reduced as within 60 days; yet the same neither was nor could be simply reduced, but only in so far as the defenders thereby got preference to the pursuer, which could only bring him in *pari passu* with them; and this being alleged in the declarator of bankrupt, was reserved to be proponed in the furthcoming: And, for enforcing of the defence, they opponed the words of the act of Parliament, which do declare all voluntary dispositions made by dyvors or bankrupts, at, or after, within 60 days of their becoming bankrupt, in preference of other creditors, to be void and null; which did not simply annul the writ, or render it ineffectual, but only in as far as it prefers; and therefore such dispositions would be good and effectual against all posterior creditors; and generally all reductions on the act of Parliament 1621, or on the common law, in defraud of creditors, are not simple, but qualified reductions, in so far as creditors are defrauded, and the same deeds do subsist as to all other effects. And, in this case, the fraud was only in so far as Man, a lawful creditor, was omitted; whereas, if the disposition had been made to him with the rest, neither he nor any of them could have quarrelled the deed: And the decisions of the Lords are agreeable to this rule; as 18th January 1678, Kinloch *contra* Blair, No 14. p. 889. where an adjudger having reduced a prior voluntary disposition upon the act of Parliament 1621, the Lords nevertheless allowed the said voluntary disposition to come in *pari passu*; and Gray *contra* Gray, Stair, v. 2. p. 109. *voce* DEATH-BED, where a disposition, on death-bed, made to the disponent's son-in-law in fee, and his only daughter, in liferent, being quarrelled by the heir of the daughter, THE LORDS reduced the disposition, in so far as the fee was provided to the son-in-law, but sustained it for the liferent; because the husband having lived with the wife five years after the disponent's death, it was presumed he would have infest his wife as heir, and had the courtesy, if he had not relied on the disposition.

It was *answered*: The act of Parliament is opponed, bearing expressly, That dispositions made by dyvors, in preference, shall be void and null; and the pursuer subsumes, and hath proven, that this disposition is such, and therefore null to all intents and purposes, in competition with the pursuer, and cannot sup-

port the defender's intromission; and the reason is, because bankrupts mentioned in that act of Parliament, are disabled from doing any deed for conveying their means heritable or moveable, that the same may lie open to be affected by the diligence of creditors; and that act doth give a more full and ample security to the creditors than the act 1621 did; for, in the said former act, there was no notoriety of bankrupt, and oft-times no insolvency required, as in the case of diligence, although that diligence did not specifically affect the subject disposed; yet the user of the diligence had interest to reduce posterior voluntary deeds without so much as proving insolvency; therefore those deeds did subsist as to all other effects. *2do*, Whereas it is *alleged*, That if Man had disposed to all equally and proportionally, none could have quarrelled; and that the pursuer is only prejudged in as far as he is omitted: It is *answered*, That is not the case, and the pursuer is not obliged to debate what would have been the effect of such a disposition; whether in law he might have repudiate it, and affected the subject with his diligence; but it is sufficient for him to allege, that in this case there is a preference, and therefore the law hath annulled the deed. *3tio*, As to the practiques, the last has no contingency with this case; and in it there were several specialities, as, that the pursuer was the defender's own son quarrelling a disposition, made by his grandfather by the mother, in favour of his father, on death-bed; which disposition, if the mother had been preferred to the fee, would have afforded a courtesy; and the mother having survived five years, the Lords did only reduce the disposition as to the fee. The other practise does more approach the case; but it was determined without debate, having only occurred to the Lords at advising; and was also founded upon the former law; which, because of the new devices of bankrupts, has been amplified and extended by the act 1696.

'THE LORDS found Wales's disposition null, and that it could not be a ground to compete with the pursuer's diligence in whole or in part.' See No 113. p. 1006. and No 168. p. 1083.

Fol. Dic. v. 1. p. 84. Dalrymple, No 51. p. 65.

1706. February 8.

WILLIAM HAMILTON of Withaw against The CREDITORS of CLELAND.

IN the ranking of the Creditors of Cleland, William Hamilton of Withaw craved preference for the sum of L. 721 : 1 : 9 Sterling, and the annual rents on it resting by Cleland, as collector of supply for the shire of Lanark, to the commissaries of the army, and assigned by them to him, upon these grounds: *1mo*, The collector's estate was really affected, and liable to quartering, at the instance of the Fisk, for his intromissions with the supply, a public privileged debt, as well as the estates of heritors are liable for their several proportions: For the King's

No 206.

No 227.

A disposition by a bankrupt to some of his creditors, was found null *ab initio* upon the act 1696; and was not sustained, as a