

less can the user of a horning pretend to have affected the moveables without a gift, or render creditors *in mala fide* to take payment.

THE LORDS found, That denunciation with insolvency was not sufficient to give the pursuer the benefit of the act of Parliament 1621, unless the common debtor had been commonly reputed bankrupt, or that the pursuer can qualify; that the defenders were some way partakers of the fraud.

No 129.

1716. December 7.—TWEEDIE, as a creditor to John Din, arrests in the hands of James Din and others, and pursues a furthcoming, in which the defenders, being five in number, deponed they were noways debtor to John Din; but that each of them had received a certain number of sheep from him, in payment of just and lawful debts. And the pursuer having *alleged*, That the pretended payment was posterior to his diligence by horning and caption; and that his debtor was insolvent and bankrupt, which he alleged afforded preference to him upon the penult clause of the act of Parliament 1621.—THE LORDS found the defenders might lawfully take payment of their just debts, unless it could be instructed, that they were partakers of the common debtor's fraud in conveying away his goods from being affected by the pursuer's diligence.

The pursuer insisted on certain qualifications of the defenders being *participes fraudis*; whereupon, a probation being allowed, it was proven, that the common debtor, being possessor of a grass-room, the pursuer had, in the night time, sent a messenger with a caption to apprehend him; that the messenger missing his person, did search the room of his possession for moveables, where he did find nothing but three firks, all the other cattle and flocks being driven off his ground; and that the very same morning the five defenders were convened at a place distant from his possession, where they met with the common debtor, and had a notary and witnesses present, to take instruments upon the division of the common debtor's sheep among the five defenders; and all this about the rising of the sun the same morning that the common debtor's possession was searched; and the morning after, the common debtor's house had been searched for apprehending his person.—Which qualifications the LORDS found sufficient to elide the allegation of *bona fide* payment, and presumed them to be partakers of the common debtor's fraud.

*Dalrymple, No 142; 163. p. 196. 228.*

1724. February 19.

GEORGE GORDON, Writer in Edinburgh, *against* JOHN BOGLE, Writer to the Signet.

JAMES TWEEDIE, merchant in Edinburgh, being debtor to William Brook and Company, merchants in London, and likewise to Samuel Dawson and Jeremiah Lupton, diligence by horning and caption was used against him by Mr Gordon;

No 130.  
A debtor apprehended by caption, delivered to his creditor

No 130.  
goods out of  
his shop, in  
payment.  
The creditor  
found not  
liable to re-  
peat to other  
creditors, on  
either of the  
bankrupt sta-  
tutes.

factor for Brook and Company, and also by Mr Bogle, trustee for Dawson and Lupton: Mr Bogle, in prosecution of his diligence, being determined to poid the debtor's goods, was prevented by his delivering him such quantities as was thought would answer the sums charged for, which he gave to John Robertson, merchant in Edinburgh, to be kept for the use of his constituents till they should be disposed of: Mr Gordon coming in a few days thereafter to Tweedie's shop in order to poid, found nothing therein for his purpose, but, understanding what had been done, he arrested in Mr Bogle's hands, upon which Mr Bogle caused poid the goods in the possession of the said John Robertson.

In an action of furthcoming at Mr Gordon's instance, he insisted, That Mr Bogle should be liable to him in payment of the sums due to Brook and Company, or the value of the goods abstracted, upon the acts of Parliament 1621 and 1696, since his poiding and payment was disappointed by a voluntary deed of the common debtor; for though Mr Bogle might have had a legal way of affecting the goods, yet he having neglected that, and contented himself with a voluntary conveyance, the law must take place, and the pursuer's legal diligence be preferred.

It was *answered* for Bogle, That the payment made by the debtor was not voluntary, since it was to secure himself from a caption and the bad consequences of a formal poiding; nor was it fraudulent because made to a creditor equally preferable by his diligence at the time of the delivery of the goods; and therefore in no sense could it fall under either of the statutes.

THE LORDS found that Tweedie, the common debtor, being apprehended by a caption at Mr Bogle's instance, might lawfully pay Mr Bogle, by delivering him goods to the value of his debt; and that Mr Bogle was not liable to repeat, on the acts of Parliament 1621 or 1696.

[This interlocutor was reclaimed against, chiefly upon this ground, That it did not appear that ever Mr Bogle's caption was put in execution:—THE LORDS appointed the petition to be answered; but parties agreed.]

Reporter, *Lord Dun*, Act. *Jo. Horn.* Alt. *Dun. Forbes.* Clerk, *Mackenzie.*  
*Fol. Dic. v. 3. p. 52. Edgar, p. 36.*

No 131.  
Payments in  
money by a  
debtor to  
some of his  
creditors,  
found not re-  
ducible upon  
the act 1621.

1751. January 26.

GEORGE FORBES, against WILLIAM BREBNER.

GEORGE FORBES, merchant in Aberdeen, used diligence by horning against George Elmsly, merchant there, his debtor, who, after being denounced, made payment to William Brebner, merchant there, and others, his creditors, of certain sums he owed them: And thereupon George Forbes incarcerated him; and having arrested in the hands of these creditors, as debtors to Elmsly; and they having deponed they were not his debtors, but, on the contrary, had received