

the statute. And it is absurd to say, that because he was the first mover of an action against the relict for constituting his debt, he ought to be preferred to the other creditors, seeing her right is founded upon a voluntary conveyance of the defunct, and not upon a confirmation.

THE LORDS found Cruickston preferable for his expences, as the Ordinary should modify the same, to be paid out of the first and readiest of the subject, and found the whole creditors come in *pari passu*. See COMPETITION. See PROCESS.

For the Creditors, *Haj.*

Alt. *Ipe.*

Clerk, *Gibson.*

Bruce, No 134. p. 176.

1724. July 3.

Mr ALEXANDER SUTHERLAND, and Others, Arresters, against The other CREDITORS of Mr DAVID WATSON.

MR WATSON having sold his office in the Bill-Chamber to Mr Robertson, upon the 27th of August 1723, he took a bond for the price thereof payable to his creditors, according to the respective sums due to them, as in a former disposition of his effects, 2d May 1723, or as they should be ranked by the Lords of Session. And the bond contained a provision, That the creditors should accept of the funds conveyed to them by the first disposition; and what should accrue to them by the bond, in full of all their debts; and also with this provision, That if any of the creditors should use diligence for incarcerating Mr Watson, or should decline or neglect to testify in writing to Mr Robertson or Mr Watson, their agreeing to the above-mentioned condition betwixt and Candlemas then next, such creditor should lose his share of the sum contained in the bond, and which should accrete to the creditors agreeing to the condition.

The disposition to which this bond referred, was to all his creditors therein named; of his whole estate heritable and moveable, and of the half of the dues of the said office, reserving the other half for the subsistence of himself and family; but the disposition was also clogged with a proviso, That if any creditors did diligence by arrestment and adjudication or otherwise, (without the consent of the other creditors, or major part of them) then the creditors so doing diligence should forfeit their right in the subject disposed, and the same should accrete to the other concurring creditors.

Within sixty days of the date of these deeds, Mr Watson became notour bankrupt in the terms of the act 1696; and Mr Sutherland and others of the creditors did not accept of these conveyances, but arrested the price of the office in Mr Robertson's hand, and they craved to be preferred thereto as the first arresters.

It was argued for the other creditors, That Mr Watson having taken the bond in question, payable directly to his creditors, equally among them, it was the

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A bankrupt disposed his subject, taking the bond for the price payable to his creditors, with the proviso, that they should accept of certain funds, in full. Before the creditors had accepted, arrestments were used in the hands of the debtor in the bond. In a competition, the arresters were preferred. The Lords specially mentioned their *ratio decidendi*, viz. that the bond was conditional, depending on the acceptance of the creditors. Had the bond been simple, and to the creditors equally, they would have been preferred.

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something as if he had granted an assignation of the bond in favour of his creditors, and the same had been intimated to the debtor of that date, which being prior to the arrestments, he was fully denuded of that debt in their favour; and therefore a subsequent arrestment by one or more of them could not deprive the creditors of their prior *jus quasitum*. 2do, As such a conveyance was agreeable to all the rules of equity, so it was not reducible upon either of the acts 1621 or 1696; for there being no diligence used at the instance of the arresters, before the granting of the bond, they could not subsume, in terms of the act 1621, that there was any partial preference made in prejudice of their more timely diligence: And, as to the act 1696, it only annuls such deeds as are granted to a bankrupt's creditors, *in preference* to other creditors; but by this bond, no preference is given to one creditor more than another, but all are equally brought in.

It was *answered* for the arresters, That the bond in question was taken payable to the creditors as they *should be ranked by the Lords of Session*; which supposed that the price was affectable by diligence, there being no other form of ranking before them but in the course of diligence, which the arresters having first used, they were (even by the quality in the bond) the preferable creditors. 2do, There was a provision in the bond, that the creditors should, betwixt and a certain time, declare their acceptance of their proportion of the subjects in the disposition and bond, as in full of their debts: From which it was argued, that till the acceptance was declared, Mr. Watson, who was possessed of the bond, might have altered it; so that the subject was still in his power, and the arresters having affected it, they carried the right to the sum, which was still *in bonis* of Mr. Watson till the acceptance. 3tio, The act 1696 disables a bankrupt from doing any thing to the prejudice of his creditors; and consequently he cannot even deprive them of the chance of their diligence; for as creditors are not obliged to accept of any voluntary grant, but are at liberty to use diligence, if the bankrupt were allowed to rank them equally, it would deprive them of the preference they might gain to themselves. 4to, The bond and disposition were so qualified and clogged by the clauses above mentioned, that the creditors neither could nor were obliged to accept of them: There was a direct preference given to some of the creditors beyond others, by the provisions in the bond and disposition; for by these, such creditors as did diligence, or did not accept betwixt and a certain term, were to lose their right, and that acceded to the accepters, which was just all one as if he had disposed to a few of his creditors, leaving out the rest.

THE LORDS preferred the arresters.

Reporter, Lord Cullen. Act. Boswell & Falconer. Alt. Hay & R. Craigie. Clerk, Dalrymple.

Pol. Dic. v. 1. p. 85; Edgar, p. 63.

* * * The *ratio decidendi*, mentioned on the margin, is in Lord Kames's handwriting, on the session-papers in the Advocates' Library.