

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  
reducible 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 incarcerate 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

payment of what Elmsly owed them; he insisted for furthcoming of the sums paid, alleging the payment was reducible, as being partially made, in defraud of him a creditor who had used diligence.

No 131.

THE LORD ORDINARY, 15th instant, affoizied the defenders.

*Pleaded* in a reclaiming bill; by the act 1621, if a dyvour shall make any voluntary payment, in defraud of the more timely diligence of another creditor, the creditor having used the first lawful diligence, shall have good action to recover what was voluntarily paid in defraud of his diligence: The Lords have sustained repetition of goods delivered by a bankrupt, in defraud of his creditor's diligence, 27th January 1715, Forbes of Ballogie against the Creditors of Forbes, *infra h. t.*; 19th July 1728, Taylor against Smith, *infra h. t.* A bankrupt can sell his estate; and if he can pay away the money among his favourite creditors, it will render of little use the statutes for preventing partial preferences.

THE LORDS refused the bill.

Pet. H. Home.

*Fol. Dic. v. 3. p. 52. D. Falconer, v. 2. No 186. p. 225.*

1758. July 21.

GRANT against SMITH.

A DEBTOR being pressed by his creditors, who were about to poind his effects, made partial sales to several of them of so much of his corn, which was yet green, as might be equivalent to their debts; and the corns were delivered to the buyers by a sort of symbolical tradition, on the sport. These corns were re-purchased from the creditors by a tenant, who, at the next term, succeeded the debtor in his farm. Another creditor, several months after, thinking that these sales could be no bar to his diligence, proceeded to poind the corns, but was stopped by the tenant who had purchased them.—In a competition, it was *pleaded* for the poinding creditor, That the law will not sustain the voluntary and partial deeds of an insolvent debtor; and these sales must be reducible upon the act 1621, as the property could not be transferred to the purchasers, till after they came to take possession of the corns, by reaping them, which was after the poinder's diligence.

*Answered*, The sales were publicly made, and not clandestinely to give a preference to particular creditors; but some creditors having their diligences ready to poind, which would have made them preferable to this competing creditor, the corns were fairly sold to them in payment of their debts, and delivered over to the buyers, remaining upon their risk.

THE LORDS sustained the defences for the purchasers.

*Fol. Dic. v. 3. p. 52.*

No 132.

A bankrupt found entitled to sell growing corn to creditors who were ready to poind.