

was more reason for so finding, than now, that, since the decision in the case of Bell of Blackwoodhouse *, it is the first infestment that carries even such personal right. But be that as it will, the LORDS, as has been said, gave no special judgment upon it.

Kilkerran, No 17. p. 64.

1758. July 6.

ROBERT SYM, Trustee for JACKSON'S CREDITORS, against GEORGE THOMSON.

JACKSON, a considerable merchant in Dalkeith, had due to him in the north of England debts to the amount of above L. 800.

In October 1752, finding his circumstances desperate, he went, with Thomson, one of his creditors, for a few days into the north of England; where he granted to Thomson an assignment, in the English form, of the above debts; and then both returned together to Scotland.

Within sixty days after this assignment, Jackson became notour bankrupt, in terms of the law of Scotland.

Robert Sym, acting as trustee for the other creditors of Jackson, brought a reduction of this assignment, as granted fraudfully to their prejudice by Jackson.

Pleaded for the trustee for the creditors, The assignment was an offence and fraud at common law. When a man becomes bankrupt, equity points out, that his creditors should all get their shares of his effects, according to the merits of their respective debts. The statutes of bankruptcy in England bring in all creditors equally. The same is the law of Holland and France; and indeed of all commercial nations. The statutes of Scotland, the acts of sederunt, the decisions of the court, have all, for a long time, been favouring the equality of creditors: but, in the present case, this equality has been broke, and a fraudulent preference granted to one creditor to the prejudice of all the rest.

2do, The assignment is reducible on the act 1696. That act proceeds on a narrative, 'That notwithstanding the acts of Parliament already made against fraudulent alienations by bankrupts, in prejudice of their creditors; yet their frauds and abuses are still very frequent.' Here the narrative makes no distinction whether the fraudulent alienation has been made in Scotland, or has been made in a foreign country: all it regards is, whether a fraud has been committed, and whether it can come under an act of Parliament in Scotland. This statute goes on, and enacts, or rather declares, 'That all and whatsoever voluntary dispositions, assignments, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvor or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days before, in favour of his creditor, either for his satisfaction or further security, in preference to other creditors, to be void and null.' Here the statute makes no distinction, whether the assignment by the bankrupt, to the prejudice

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A Scotch merchant went into England and executed, in the English form, an assignment of debts due to him there, in favour of one of his creditors. Returning to Scotland he was rendered bankrupt within 60 days. The assignment reduced, as made *in fraudem legis*.

* Rem. Dec. v. 2. No 8. p. 15. voce COMPETITION.

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of his creditors, be granted in Scotland, or granted in England. The only thing it inquires is, whether it was an assignation granted by a bankrupt in prejudice of his creditors? It saves no sort of assignations, for it includes all and whatsoever, granted directly or indirectly; and declares them to be void and null: after which, a court cannot make that distinction which the statute hath not made. It cannot save assignations, to the prejudice of creditors, granted by a bankrupt who has passed over the border for a little, when yet the statute hath declared all and whatsoever assignations, and granted directly or indirectly, by such a person, to such purposes, to be void and null. In a statute correctory of fraud, if courts chuse to go beyond the letter of the statute, it ought to be in the way of extension, and not of limitation. They ought to correct fraud, not to open a door to it; to assist the common law, not to show the deficiencies of it; to void all fraudulent assignations, instead of supporting any upon a distinction not founded in the express letter of the statute.

And in this view, the reduction of the assignment in question is founded in the spirit, as well as the letter of the statute. For as the statute is intended to bar alienations granted by a bankrupt in prejudice of his creditors; so every case contrived to cover such frauds, falls under the meaning and purview of the statute; the case in hand would fall under the spirit of the statute, even though the words of it had not been so express as they are. Though the words all and whatsoever, directly or indirectly, had not been there, they ought to have been supplied by interpretation: and now that they are there, they cannot be frittered down by a contrary interpretation; they may be extended, but they cannot be limited.

3^{tho}, The consequences of a contrary doctrine, if established, would be exceedingly hurtful both to Scotland and England: it would open a door for infinite frauds to the bankrupts of both nations; who would then have nothing to do but to step over the border, grant their fraudulent preferences, as they pleased; and then, when they returned to their own country, they and their favoured creditors would be safe, and righteous creditors disappointed.

There is no making a distinction betwixt the retrospect of the statute 1696, and the consequence of it. For if the court should find, that the retrospect of it should not have effect in the present case, then, upon the same principles, the first time the point came to be tried, it would be found, that the consequence of the statute could not bar a similar assignment; the effect of which would be, to enable a bankrupt in Scotland, *after* he was declared to be a bankrupt, to grant in England fraudulent assignments, similar to the present one. The refusing to give force to the retrospect of the statute, is but a step to the refusing to give force to the consequence of it. The one must follow the other; and therefore, by the decision sought by Thomson, the act 1696 is not only to have no retrospect as to fraudulent assignments made out of the country, but is even to have no effect as to preferences out of the country, granted *after* the bankruptcy is ascertained and notour: And, in consequence of this, one having obtained a *cessio*

bonorum, might, upon his getting out of prison, go into England, and convey his effects, as he pleased, without those to whom he granted his preferences being accountable therefor.

Answered for Thomson, The equality of creditors is a mere speculative point; it is but at best the conclusion of abstract reasoning. The Roman law preferred creditors according to the priority of their diligence; there can be no breach of morality in a creditor's getting payment of his fair debt the speediest way, or the most secret way that he can.

The words of the act 1696 are indeed general; but so are those of all general laws; and it was never intended, that this law, though general in its effects in Scotland, should have effect over debts due by persons in England, and payable in England; nor is there any instance where a mere positive institution, a retrospect too, the creature of a statute, and not of the common law, should be the rule for deciding differences concerning such debts.

'THE LORDS reduced the assignation, and remitted to the Lord Ordinary to proceed accordingly.'

A.A. *J. Dalrymple, Brown, Lockhart.*

Adv. *Geo. Pringle, A. Pringle, Advocatus.*

Fol. Dic. v. 3. p. 55. Fac. Col. No 116. p. 211.

J. Dalrymple.

1780. August 10.

DUGALD CAMPBELL against NEIL MAGGIBBON and COLIN CAMPBELL.

DUGALD CAMPBELL, MAGGIBBON, and COLIN CAMPBELL, were, among several other persons, creditors of Archibald Fletcher. In December 1778, some of these last-mentioned persons used diligence against him; and Dugald Campbell then charged him upon letters of horning. In the following month, Fletcher indorsed to Macgibbon and Colin Campbell, who lived in the same neighbourhood with him, two bills, towards payment of the debts which he owed to them. In the beginning of March thereafter, and within sixty days of the date of the indorsations, Dugald Campbell executed a caption against Fletcher, by incarcerating him. He then brought a process against Macgibbon and Colin Campbell, concluding, upon the act 1696, for reduction of these indorsations.

Pleaded for the pursuer, The act 1696 declares, 'all and whatsoever voluntary dispositions, assignations, or other deeds, which shall be found to be made and granted, directly or indirectly, by the dyvor or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favour of a creditor, either for his satisfaction, or farther security, in preference to other creditors, to be void and null.' This statute, then, is not confined to dispositions and assignations alone, but extends to all other deeds, by which, whether directly or indirectly, or whether, for the satisfaction or farther security of a particular creditor, the bankrupt endeavours to give him a preference over the rest. According-

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Found that an indorsation to bills of exchange, by a debtor to two of his creditors, who lived in the neighbourhood with him, made within 60 days of his bankruptcy, was an alienation that fell under the act 1696.