

1766. July 30. JAMES M'KELL *against* TRUSTEES of ANTHONY M'LURG.

No 21.
Where the
case of an in-
solvent
debtor fell
not under
either of the
bankrupt sta-
tutes, a dis-
position by
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ees, for his
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law.

ANTHONY M'LURG, tenant in Craignel, having failed in his circumstances, his creditors had a meeting, 15th December 1762, in which it was resolved to grant him a superfedere, and to accept of his tack, stocking, and other effects for their payment. They named four farmers in the neighbourhood for managing and disposing of the subjects for their joint behoof; and M'Lurg granted them a missive, obliging himself to execute a disposition of his whole effects to these trustees. The trustees entered directly on the management; and, upon the 8th February 1763, obtained from M'Lurg a disposition in implement of his missive, containing a complete list of the creditors, in which James M'Kell, now to be mentioned, is stated a creditor for L. 51 Sterling. Upon the 17th March, the trustees sublet the farm to Andrew M'Lamroch, to whom they also sold the stocking; and M'Lamroch, at Whitsunday, entered into possession of the farm with the stocking. The foresaid James M'Kell waiting a catch, arrested in M'Lamroch's hands that very day the stocking was delivered to him; who having raised a multiple-pounding, the Lord Ordinary being of opinion that the trust-right must stand till it should be challenged in a reduction, preferred the trustees before the arrester; reserving reduction as accords. The Court, so far from having any difficulty in adhering to this interlocutor, went a great way farther. They were unanimous, That where the case of an insolvent person comes not under either of the bankrupt statutes, a disposition by him to trustees for his whole creditors, must be effectual in law. And, to support this opinion, one of the Judges quoted a decision, 13th November 1744, Snodgrafs *contra* Trustees of Beat's creditors, where the same was found. (D. Falconer, v. 1. p. 4. *vide infra* Div: 3. Sect. 1. b. t.)

In this case the Court had no occasion to determine whether creditors are bound to submit to the management of trustees named by their insolvent debtor. A bankrupt may and ought to convey to his creditors his whole effects for their payment; but he cannot legally bind them down to any particular form of management, whether by trustees or otherways. Therefore, every trust-deed of this kind, when brought under reduction, whether upon the bankrupt statutes, or upon common law, ought to be reduced as far as concerns the bankrupt's nomination of trustees. But, on the other hand, every such trust-deed ought to be sustained, as far as to operate a division of the bankrupt's effects equally and proportionally among his creditors. The reason is, That neither by the bankrupt statutes, nor by common law, can there lie any objection against a disposition by a bankrupt to his whole creditors *nominatim*, nor against a disposition to a single person for behoof of the whole creditors; the person being named not as a trustee to manage for the creditors independent of them, but merely as a name to hold the subject for the creditors.

Where such a disposition is granted, it remedies a gross defect in the bankrupt statutes, *viz.* permitting creditors to take, by force of legal execution, what they are not permitted to take by the bankrupt's voluntary deed.

Thus, it seems to be settled, that an insolvent person, who is not in the terms of either of the bankrupt statutes, has it in his power to do justice to all his creditors, by dividing his effects equally among them; and, as it was never intended, by either of the bankrupt statutes, to bar the exercise of this equitable power, it is probable, when the principles of equity are better understood than at present, that the Court will sustain every disposition of this kind, even though made by a notour bankrupt.

Sel. Dec. No 249. p. 321.

* * * See M'Master, Inglis, and Company, against Campbell. Fac. Col. 10th July 1788. p. 49. (*voce PROCESS.*)

No 21.

S E C T. III.

Alienations in favour of Conjunct and Confident Persons.

1621. June 15. PATRICK FINLAW against PARK.

AN assignation made by a brother to a brother, the maker being bankrupt, and *statim ante fugam, vel meditatione fuga* declared null, by way of exception, in prejudice of a creditor who had arrested; albeit the arrestment was posterior to the assignation.

Kerse, (CREDITOR.) MS. verso of fol. 56.

No 22.

1622. February 27. DEMPSTER against ———.

IN an action of double pointing, the Lords sustained an assignation made to a confident person by a bankrupt, upon the assignee's declaration, that he took it for the behoof of a third person, who was a creditor, albeit the declaration was disconform to the assignation, and clause therein contained, bearing, that it was made for sums addebted to the cedent himself.

Kerse, (CREDITOR.) MS. verso of fol. 56.

No 23.

1729. March 13. MOWAT against SCOT.

A DISPOSITION of a certain comprising made by one brother to another is quarrelled by another creditor. *Alleges*, No disposition made *inter conjunctas personas*, can prejudice any other creditor, as the act of Parliament bears, made against bankrupts.—THE LORDS declared the clause in the act, only to concern dispositions and alienations made by bankrupts.

Balmanno, MS. p. 54.

No 24.