

No 252.

the good of the whole creditors; and that, supposing the disposition were to be reduced, the pursuer would not, on that account, be entitled to a preference, as the rest of the creditors had been prevented from using the same diligence which she had done, from an opinion that the disposition was a sufficient security.—The trustees insisted, That at least they were entitled to retain the subjects, or prices thereof, of which they were lawfully possessed, for their own behoof, and that of the other creditors, before the period of the pursuer's arrestments.—*Answered*, That the debtor was rendered bankrupt precisely in terms of the act; and the disposition being to the prejudice of the pursuer's lawful preference, was reducible upon that act; that the trustees and other creditors had themselves to blame, as they trusted to an illegal deed.—THE LORDS reduced the disposition, and preferred the pursuer, in virtue of her diligence, to the effects in the hands of the trustees.

See This Case at large, No 179. p. 1104.

\*.\* See M'Kell against M'Lurg, No 21. p. 894.

1767. January 27.

THOMAS and ALEXANDER PETERS, Merchants in Glasgow, against ALEXANDER SPIERS, ANDREW BLACKBURN, and Others, Trustees for JAMES DUNLOP, Merchant in Glasgow.

No 253.  
A disposition by a bankrupt, to trustees, for behoof of his creditors, does not prevent creditors, not acceding, from attaching their debtor's effects, by diligence.

IN July 1763, the ship *Betsy* arrived at Greenock, loaded with tobacco, chiefly on account of James Dunlop merchant in Glasgow; but having on board 16 hogheads tobacco, for behoof of Messrs Thomas and Alexander Peters.

Mr Dunlop having gone to Greenock, on purpose to enter his tobacco, Messrs Peters wrote him, desiring he would enter their tobacco at same time with his own; the entry was accordingly made, and the entry-duties repaid to Mr Dunlop by Messrs Peters, who not being able to obtain from Mr Dunlop either their tobacco or its value, brought an action against him, concluding either for delivery of the tobacco, or payment of L. 250 Sterling as the value. And, upon the dependence, they, in September 1764, arrested in the hands of Josiah Cortin, collector of the customs at Port-Glasgow, as debtor to Dunlop.

In November 1763, Dunlop executed a disposition of his whole estate, real and personal, in favour of Messrs Spiers, Blackburn, and others, as trustees for behoof of his creditors; and, a few days after executing this trust-deed, Dunlop was rendered bankrupt, in terms of the act 1696 by diligence executed by the direction of the trustees, in order to prevent any undue preference among the creditors.

The Messrs Peters having obtained decret against Dunlop, brought a process of furthcoming against Cortin, who appeared, and acknowledged, that at the time of Messrs Peters arrestment, he had in his hands L. 291 : 16s. belonging to

Dunlop, as debenture duties upon tobacco. The Messrs Peters *insisted* for decret of forthcoming against Cortin, who made no opposition; but Messrs Speirs and Blackburn, Dunlop's trustees, appeared in the forthcoming, and, founding upon the trust-right, *insisted* to be preferred to the Messrs Peters, upon the sum in the hands of Cortin; and the Lord Ordinary preferred the trustees.

Messrs Peters brought an action of reduction, founded upon the acts 1621 and 1696, for setting aside the trust-right; and this action of reduction being conjoined with the process of forthcoming, the LORD ORDINARY, upon advising a representation for Messrs Peters, with answers for the trustees, July 18. 1766; found, 'In respect it is not denied, that the conveyance to the trustees was granted after James Dunlop became bankrupt, for the behoof of his creditors, and that the Messrs Peters are neither parties, nor have acceded to it, they are not thereby barred from the benefit of the diligence; therefore alters the former interlocutor, and prefers the Messrs Peters, upon their arrestments, to the sums arrested; and decerns in the preference, and also against the defender Josiah Cortin, and James Dunlop the common debtor for his interest, for payment accordingly.'

The trustees applied to the Lord Ordinary, for an alteration of the above interlocutor; to which the LORD ORDINARY, November 21. 1766, adhered, 'In respect that the Messrs Peters have formerly condescended on certain diligences against James Dunlop, which rendered him bankrupt, in terms of the act of Parliament 1696, said to be in the hands of the trustees, which is not denied by them.'

The trustees reclaimed to the whole Lords, and *pleaded*, That the meaning of the act 1696 was to prevent fraudulent conveyances, by bankrupts, in prejudice of their just and lawful creditors, but not to make void or ineffectual deeds executed for the benefit of the whole creditors. That nothing was more equitable, than a fair and equal distribution of a bankrupt's effects among all his creditors. That, where the preference of creditors is established by the priority of diligence, the consequence always must be, that creditors who reside in the neighbourhood of their debtor, will secure themselves a preference to other creditors, equally onerous, who reside at a distance. That, in this case, the diligence founded on by the Messrs Peters was posterior to the trust-right. That the tobacco, from the value of which the sum *in medio* arose, though for form's sake entered in the name of Dunlop, was in fact sold by the trustees, and could not, therefore, be affected by Messrs Peters' diligence against Dunlop, posterior to the trust-right; as was determined by the Court, Souper against Smith, No 76. p. 744. That, in the present case, it was only in consequence of the diligence done by the trustees themselves, that Dunlop could be brought under the act 1696; and to make use of these diligences, executed for behoof of the whole creditors, for the purpose of cutting down the rights of these creditors, would be repugnant to every principle of justice and equity.

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*Answered* for the Messrs Peters: Experience has shown, that trust-dispositions seldom answer any good purpose; the act 1696 expressly enacts, that all voluntary right granted by bankrupts, within 60 days of their bankruptcy, to any of their creditors, either in satisfaction or security of their debts, shall be void and null; that the trustees could not dispute, but Dunlop was notoriously bankrupt, in terms of the act 1696, within less than 60 days of the date of the trust-right; that it was neither just nor equitable, that by a deed of the bankrupt's, a creditor, without his own consent, should be deprived of the aid of the law, for recovering payment from his debtor, or be obliged to trust to the activity and fidelity of those whom the bankrupt might think fit to trust with the management of his subjects; that such trust-dispositions had never been sustained by the Court to the prejudice of creditors, who had not acceded thereto; Snee and Company against Trustees of Michael Anderson, No 242. p. 1206.; Elizabeth Mudie against Trustees of Strahan, No 252. p. 1217. That these debenture-duties must still be considered as *in bonis* of Dunlop, and affectable by the legal diligence of his creditors.

'THE LORDS, upon advising the petition and answers, adhered to the Lord Ordinary's interlocutors.'

For Messrs Peters, *William Wallace.*

For the Trustees, *Alex. Wight, and Advocatus.*

*Fol. Dic. v. 3. p. 66. Fac. Col. No 50. p. 98.*

*A. Elphinston.*

The case was appealed:

*December 18. 1767.*—The House of Lords ORDERED and ADJUDGED, That the appeal be dismissed this House, and the interlocutors therein complained of be hereby affirmed.

1769. *February 24.*

WATSON *against* ORR, and Others, Trustees for the Creditors of PATRICK TOD.

A PERSON insolvent, but not bankrupt in terms of the act 1696, disposed his effects to trustees, for behoof of his whole creditors.

After the effects had been reduced into money by the trustees, one of the creditors who had attended their meetings, but had never received any dividend, arrested in the hands of the trustees, and of some of the purchasers from them, and pursued furthcoming.

'THE LORDS preferred the trustees, in respect the common debtor was not bankrupt in terms of the act 1696.'

Reporter, *Luchinleck.*

*A&T. G. Buchan-Hepburn.*

*Alt. Geo. Wallace.*

*Fol. Dic. v. 3. p. 66. Fac. Col. No 89. p. 340.*

*G. Fergusson.*

No 254.

The trustees of a person insolvent preferred to arresters, in respect the debtor was not bankrupt in terms of the act 1696.