

1767. *November 20.* ——— *against* ———.

THE question here was, Whether letters of inhibition could be granted upon a bond executed in the English manner? And it was determined unanimously, after some reasoning, that they could not be granted, because the diligence and forms of execution must be regulated by the law of the country where execution is sued for, not by the *lex loci* where the writ is executed; therefore an English bond, though probative in Scotland, or a ground of action, cannot be the foundation of diligence unless the authority of the Judge be interposed, either by decret or by depending action. And it appeared from the report of the clerks, that this doctrine is carried so far in practice that, even upon a promissory-note holograph, letters of inhibition are not granted, because it is not certain, *ex facie* of the writ, that it is obligatory by the law of Scotland.

1768. *March 7.* WILLIAM ELLIOT *against* ———.

THIS was a case concerning bankruptcy in terms of the Act 1696. An heritable bond was granted after the act of bankruptcy, but for a new contraction, not in security of an old debt. With respect to this, the Court had no difficulty, that it did not fall under the Act; but there was another heritable bond, which was granted prior to the bankruptcy, also for a new contraction, whercupon infestment was not taken till after the bankruptcy. Concerning this bond there was some difficulty; but it carried, without a division, that it did not fall under the Act. The great difficulty arose from that clause of the Act which declares that, in the matter of bankruptcy, all heritable bonds are to be considered as of the date of the infestment upon them; but these words are to be understood *secundum subjectam materiam*, that is, of bonds in security of prior debts, concerning which only the Act speaks. If, therefore, the bond in question had been a bond of that kind, at whatever time before the bankruptcy it had been granted, it would have been considered as of the date of the infestment, and so would have been reducible; but as it was for a new contraction, the Act does not relate to it.

And here the whole system of our bankrupt laws may be shortly observed: If a man, being insolvent, disposes any subject to any person who is not his creditor, gratuitously or without a just price, the same is reducible at the instance of his creditors; but such reduction does not in my opinion operate by itself a preference to the creditor-reducer, but only brings back the subject to the common fund of payment to be affected by the diligence of every creditor. *2do.* If it be a disposition *omnium bonorum*, though in favour of a creditor, it is reducible at the instance of the other creditors, but only to the effect of bringing in the dispoone *pari passu* with the other creditors. *3tio.* If the insolvent person disposes in favour of a trustee for the behoof of all his creditors, it is now established that this disposition is also reducible upon the first part of the Act 1621, as being in prejudice of the creditors, by restraining them from doing legal diligence, and obliging them to submit to the administration of a trustee whom they did not

choose; and in a late case this was carried so far, that though the trustee was chosen with the consent of the creditors, and had actually gathered in the effects by virtue of the trust-right, yet a creditor who had not acceded was allowed to arrest in the trustee's hands, and by that diligence to get to himself a preference over the creditors who had acceded to the trust-right; which at once puts an end to all such rights, as it makes the trustee chosen by some of the creditors, only a factor for ingathering the effects for the behoof of the creditors not acceding to the trust: and so much with respect to the first part of the Act 1621, which relates not to the disposition of any particular subject to a creditor for payment or security of his debt. This is provided for by the second part of this Act, which relates only to alienations either for payment or security in favour of one creditor, in preference of the more timely diligence of others; and the effect of the reduction at the instance of the creditor who has done the diligence, is to take the subject altogether from the creditor who had been preferred by the partial favour of the debtor. This I think is clear from the words of the Act of Parliament 1621, though the decisions seem to point otherwise. Thus stood the law before the Act 1696, which so far extended the second part of the Act 1621, that though no diligence had been done by any creditor, yet if the insolvent person granted any deed of security in favour of any of his creditors within 60 days prior to his notour bankruptcy in terms of that Act, the same is reducible at the instance of any other creditor, to the effect, as the Act says, of being rendered void and null; which I think has been very properly interpreted by the decisions to mean that the person who gets such disposition is not even to come in *pari passu* with the creditors who have affected the subject by diligence. Nor do I think that the action of reduction will of itself give a preference to the creditor-reducer, but he as well as the other creditors must do diligence to effect it. It is to be observed that the Act of Parliament 1696 does not relate to payment made to any creditor in money, and therein it differs from the Act 1621; but if it be any subject conveyed by deed, though it be given *in solutum*, or in satisfaction, as the Act expresses it, such deed is reducible upon the Act, as it has been very properly interpreted by the decisions.

1758. July 7. CREDITORS of CAPTAIN WILSON *against* The ASSIGNEES on his BANKRUPTCY.*

CERTAIN creditors of Captain Wilson arrested, in the hands of Captain Johnston, a native Scotsman, but who resided in Ireland, certain debts due by him to Captain Wilson. This arrestment was laid on at the market-cross of Edinburgh, pier and shore of Leith, and also a decret of forthcoming was taken in absence against Captain Johnston, both a considerable time before the commission of bankruptcy was issued against Captain Wilson: but the jury in England found an act of bankruptcy before the date of the arrestment; and the assignees upon the commission of bankruptcy are now competing with these arresters for the sums due by Captain Johnston.

It was objected to the arrestments, *Imo*, That they were null and void even by

* This and the following case were omitted in their proper places.