1770. *December* 18. ANDREW JOHNSTON and BEATRIX COLQUHOUN *against* The TRUSTEES of FAIRHOLM'S CREDITORS.

BANKRUPT—ARRESTMENT.

Trust-disposition by Bankrupts to certain trustees for behoof of their Creditors, reduced upon the Act 1696, c. 5.
Non-acceding Creditors, using arrestments with the public banks, where the trustees had lodged the bankrupt's funds, preferred upon their diligence.

[*Faculty Collection, V.* p. 179; *Dictionary, Appendix I.; Bankrupt,* 5.]

COALSTON. Once and again I have had occasion to give my opinion that such trust-dispositions are not reducible by common law, nor upon the Act, 1621; neither do I think that they are reducible upon the Act 1696. That act relates to dispositions made in preference to other creditors. A disposition to all the creditors, that they may come in *pari passu,* is not a preference to any. Still the creditors may do diligence if this is done before the disponees complete their disposition. As to decisions of this Court, when a uniform tract appears, I will follow the beaten path. But there are decisions on both sides: Such as *Watson's Creditors,* in 1725; and *Jackson's Creditors,* in 1757, on the one side; and *Snee, Moodie,* and *Dunlop's Creditors* on the other. A good answer to Moodie's case is stated in the papers now in Court. In *Snee's* case there was a strong objection to the form of the disposition. The great argument in those cases arose from this, that powers were put into the hands of trustees not named by the creditors. That, however, does not occur here; for the trustees are taken bound to denude. When there are decisions on both sides, I will rather follow the sense of the statutes, as I understand them, than any decision. The opinion of the nation is for trust-rights notwithstanding all embarrassments thrown in their way.

MONBODDO. A trust-right is neither reducible at common law nor upon the statutes 1621 and 1696. I am clearly of opinion that creditors are not barred from doing diligence. No principle of law or equity can prevent this; but then it must be diligence in the hands of the debtor of the bankrupt. The creditor must not sit with his hands across and wait till the trustees have recovered the money. Money lodged in the bank by the trustees is the same thing as money already paid over to the creditors. As to the decisions of the Court, a *series rerum similiter judicatarum* makes law in every country; but here there is no such series.

PRESIDENT. I am unwilling to enter into the question of the expediency of such trust-rights, because I know that many of my brethren differ in opinion from me. I am sorry to see this question now agitated. I thought that it was settled. The Act of Sederunt, 1735, proceeded upon a narrative of the bad consequences of trust-rights. In the case of *Jamieson* against *Digges,* it was

the opinion of the Court, that the general question should not be disputed. The case of *Moodie* was determined upon the general point. The case of *Montgomery* against *The Creditors of Nathaniel Duke of Leaths*, from an interlocutor of Lord Auchinleck's, was no less in point. So also was the case of *Dunlop*. In the decree of the House of Lords, affirming that judgment, no specialties are mentioned.

Alemore. Surely I am much mistaken if the case has not been frequently decided. However, since we must have it over again, with all my heart; I shall give my opinion, not doubting but in a year or two I shall be called to give it again. What is the common law? If the civil law,—the great principle of it is *vigilantibus non dormientibus leges sunt scriptæ*. The whole genius of our law is to prefer creditors, according to priority of diligence. That is the plan of the Act 1621. The Act 1696 meant that no debtor should have it in his power to alter the situation of any of his creditors. The creditors' right is not merely his bill or his bond, but the diligence which he is entitled to. It is said, I do not mean to exclude diligence. How so? If you cut me out by your trust-right before I know any thing of the matter. Show me the law of any people upon earth that have found trust-rights to be the common law of any country, Roman, English, French, Dutch. How were those laws so short-sighted as not to see that this was the common law? Are we alone so perspicuous as to discover this to be our common law. If specialties are to be presumed, in the judgments of the House of Lords, none of them will bind us; for they are shortly expressed: and we may always make out some specialty in every case. If all creditors concur, a trust-right is good; but by what law now existing can the majority control the minority?

Kaimes. Suppose I have 20 creditors, and find my affairs going wrong; in order to provide against the partiality of the law, which favours the diligence of one to the disappointment of another, I dispone my whole effects to them all, what law prevents me? A man has generally too many creditors to remember them all. He, therefore, dispones to A, B, C, for the behoof of all, with power to creditors to vary this nomination, and appoint whom they please. A, B, C, are only put *in dicis causa*.

Pitfour. The common law is on the side of trust-rights. In former times dispositions *omnium bonorum* were generally to favourite creditors. The Court did not reduce them, but constructed them as they ought to have been granted; that is, for behoof of the whole creditors. There is another evidence that trust-rights are favoured by the common law. When one comes out upon the Act of Grace, he is obliged to grant a disposition to all his creditors. It was never doubted that such disposition was good, unless the Act, 1696, stood in the way. In the question upon a disposition granted by *David Beat*, in 1744, to trustees, all the arguments against such dispositions were used by Charles Erskine, afterwards Justice-Clerk. He had a feeble antagonist in myself, and yet he was unsuccessful. [This affected modesty is disgusting, for every one knows that Lord Pitfour is a great lawyer, and that he is zealous, beyond measure, in supporting his own opinions.] *Beat* fell not within the statute 1696, and therefore his case was determined at common law. The only difficulty is from the statute 1696. I cannot see where the difficulty lies. The whole strain of that statute breathes

the contrary. The words of the Act exclude the construction put upon it. Can the Act mean that the debtor shall do no deed for facilitating justice and equality among the creditors, without preferring any one? The Act refers to the case where some creditors are preferred to others. This trust-deed is not only not hurtful, but is necessary for the safety of the creditors. The same principle of our law appears in the preference of adjudications *pari passu*. And also in the case of executors-creditors. If a man makes a deed to his creditors, A B, &c. he might chance to omit some, and hence a partial preference might arise: it is proper therefore to name a trustee for the behoof of all. I remember, very well, that, when trust rights came in, they were so fair that the world approved of them. The first bias against them occurred in the case of *Snee;* that was a monstrous trust-right, evidently partial. This inflamed the Lords against trust-rights, and occasioned the general declaration subjoined to the judgment in the case of *Snee*. If the Court had meant that a man could do nothing in order to produce an equality among his creditors, they would not have given the judgment which they gave in the case of *Beat*, 1744. If the bankrupt named the trustees, and did not leave them to be removed by the creditors, there might have been a difficulty: but that is not the case here. I can see no *series rerum similiter judicatarum* to the contrary. None of the decisions apply to the circumstances of this case.

AUCHINLECK. I considered this point to be as much fixed as any thing in law. It was thrice determined in the case of *Dunlop's Creditors*. In the Outer-House I have pronounced many judgments upon it: it is established also in justice. Every creditor may, by our law, attach his debtor's effects. No debtor has power to put the creditor's payments in the hands of a factor. As to the argument of inexpediency and expediency, much may be said on both sides. If we encouraged trust-rights, we shall have a shoal of unfair destructive trust-rights. It is said that the trustees are to be named by the creditors.—But what right has a bankrupt to create a copartnery among his creditors, and to provide that every thing shall be determined, as in a copartnery, by a majority of the votes? That is in prejudice of the creditors, as it prevents them from employing a factor of their own, and doing for themselves. It is not enough to cobble trust-rights, and mend this hole and that hole: they are rotten altogether.

KENNET. The resolution in the case of *Snee*, 1734, determines the point that the diligence of creditors cannot be debarred by a trust-right. The case of *Moodie*, in 1756, was determined contrary to my opinion, by a great majority of the Court. I should be sorry to see this altered, by the Court varying its ideas, or by the judges being altered. The point was certainly determined upon a hearing in presence, appointed on purpose to determine the point.

JUSTICE-CLERK. It is certain that the hearing in presence was in order to fix the law. My own private opinion is for trust-rights. The case of *Moodie* however, has been followed out by many decisions: every practitioner about Court knows this: there are recent decisions, numberless, to the same purpose. I myself have given many decisions in the Outer-House upon that point, and parties have acquiesced. This shows the opinion of the bar in that matter. I have no reluctance at giving my judgment against the trust-right—for it may

be the means of uniting the nation to concur in promoting the noble and generous intention of the Court to improve the law, and establish it on a better footing. [Alluding to a bill which the judges had been deliberating upon.]

GARDENSTON. In a matter of law I may hesitate, but a matter of fact shall always determine me. After so many decisions upon this point, it is neither proper nor decent to vary. Were we to pronounce a different judgment now, it would be a solitary decision, and consequently of no authority.

On the 18th December 1770, " The Lords sustained the reasons of reduction of the trust-disposition libelled, in so far as the pursuers have an interest therein ;" adhering to Lord Gardenston's interlocutor.

Act. D. Rae. *Alt.* J. Montgomery, &c.

Diss. Kaimes, Pitfour, Coalston, Monboddo.

N.B. On report of the Lord Gardenston, the Lords repelled the objection to the arrestment, " that it was laid on in the hands of the trustees after the money of the debtor had been recovered of them, and lodged in the bank ;" without a vote. The same judgment had been given, *25th February* 1770, *Monro* against *Trustees of Dunlop*.

1770. *December* 22. HUGH M'KAY *against* CHARLES BLACKSTOCK.

EXECUTOR—LIS ALIBI PENDENS.

The Executor of a party, deceased in Jamaica, had found security in terms of the law of the island. He was sued in the Courts of Jamaica by a creditor of the deceased. Happening to come to Scotland, the pursner had him apprehended on a *meditatione fugæ* warrant. The Lords ordered him to be set at liberty.

BLACKSTOCK was creditor to the deceased Hugh M'Kay of Jamaica, to whom the above-mentioned Hugh M'Kay was executor, and in that character had found security for his intromissions in Jamaica, in conformity to the laws of the island. Blackstock commenced an action in the Courts of Jamaica against M'Kay, as executor, for the recovery of his debt ; but, M'Kay having come to Scotland during the dependance of that action, Blackstock gave in an application to the Sheriff of Edinburgh, and had him apprehended as *in meditatione fugæ*, and incarcerated by a warrant which ordered him to be detained until he should find caution *judicio sisti*, in any action brought, or to be brought against him for payment of the debt in question, in the courts of Scotland. M'Kay presented a bill of suspension and liberation, on advising which the following procedure took place.

COALSTON. It was determined, in *Sir Archibald Grant's* case, that an executor having found security in England, was not bound to account here. This is reasonable, for otherwise matters would become inextricable. The only diffi-