there was any other objection to the trust, but that it deprived creditors of their legal right of using diligence, it was impossible to apply that objection in the present instance, when the opportunity of using the diligence upon which the competition was maintained was the very-trust right the pursuers now reprobated. This was an invincible objection to the diligence the pursuers founded on; and examples had occurred, where the right of creditors to use diligence had, when pushed too far, and adverse to justice, been controlled by the Court. No. 4.

3tio, By the trust-conveyance, the trustees were invested with a right not only *qua* trustees but as *creditors*; so that they were entitled to act either in the one capacity or the other. Whenever therefore they had recovered their debtor's effects in virtue of a legal and valid title of possession, they were entitled as creditors to *retain* those effects for payment of their debts, in a competition at all events with other creditors, neither more just nor more onerous, attempting to wrest them out of their hands. If they had made a dividend in America of the funds recovered there, their right of *retention* could not have been challenged; and it did not occur that the principle could be altered, when the effects, instead of being brought home by the respective creditors as their own, were brought home *in cumulo* by the trustees.

The Judges were all of opinion that the enactments of the statute 1696 could have no regard paid to them in a foreign country: That the trust disposition was therefore effectual in Virginia, and was a sufficient legal title for the trustees to apprehend the possession of the funds; and as they had thus got possession upon a fair and legal title, they were authorised to hold them in property for payment of their own debts, or for the purposes of the trust. The Court was much moved by the favourable circumstances in the situation and conduct of the trustees, and by the ungracious nature of the pursuers diligence.

The following judgment was pronounced: "Having advised the memorials "for the parties, and whole procedure, prefer the trustees of James Dunlop, "and remit accordingly."

Lord Ordinary, *Auchinleck.* For the Pursuers, *Lockhart, Macqueen, Blair.*
Clerk, *Kirkpatrick.* For the Defenders, *Adv. Montgomery, Sol. Dundas, Wight.*

R. H. *Fac. Coll. No. 37. p. 101.*

1770. *December* 18.

ANDREW JOHNSTON and BEATRIX COLQUHOUN, *against* The TRUSTEES for the Creditors of MESSRS. FAIRHOLMS, Bankers in Edinburgh.

No. 5.
Trust-disposition by bankrupts to certain trustees for behoof of their

UPON the 26th of March and 3d April 1764, Adam and Thomas Fairholm granted a disposition of their whole estate, heritable and moveable, in favour of certain persons in trust for behoof of their creditors, with power to sell their whole subjects, recover the debts, and to divide the proceeds from time to time

No. 6. 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.

among the creditors, equally in proportion to their debts, without prejudice to any preferable right or diligence done by any of the said creditors prior to the completion of the present right. It was farther provided, that if the major part of the creditors should think fit to chuse other trustees, those named should denude in their favour.

A numerous meeting of the creditors, on the 2d of April, agreed to the measures proposed. A deed of accession, approving of the trust disposition, was made out and signed; which contained provisions, empowering the trustees to decide all differences that might arise amongst the creditors, or betwixt them and Messrs. Fairholms; and it was farther declared, that if any of the creditors did not accede, it should be lawful for those who did accede to insist in such diligence as they had raised or should raise, the benefit of which to be applied to the common behoof of the acceding creditors, the rights and preferences competent to any creditor prior to the trust being saved and reserved.

Soon after this meeting, the Messrs. Fairholms were rendered bankrupts, in terms of the act 1696, by an acceding creditor.

The pursuers, creditors of the bankrupts, did not accede to the trust, or subscribe the deed of accession; and having, in December 1764 and January 1765, arrested in the banks the monies deposited there by the trustees, thereafter brought an action for reducing the disposition, as contrary to the enactment of the statute 1696, C. 5.

The Lord Ordinary "Sustained the reasons of reduction of the trust dispo-"sition libelled, in so far as the pursuers have an interest therein; and ap-"pointed parties to be ready to debate on the effect of the arrestments found-"ed on."

Two points came accordingly to be argued, 1*mo*, The validity of the trust-deed; 2*do*, The effect of the pursuers arrestments. They were brought fully before the Court; the *first*, in a reclaiming petition for the trustees, with answers for the pursuers; and the *second*, in mutual informations.

Upon the validity of the trust-deed, the trustees pleaded:

1*mo*, When the words of the statute were accurately attended to, they did not, in sound construction, go farther than to void dispositions made to one or more creditors in preference to the rest, but not to render ineffectual fair conveyances executed for the benefit of all, and in order to make an equal distribution among them of the bankrupt's estate. If the Legislature had intended to make void all conveyances by a bankrupt after his bankruptcy, the enactment would have been *general;* but the term, *in preference to other creditors*, which was the criterion as to deeds struck at by the statute, plainly supposed the exercise of partiality and injustice in favour of a part, and rendered it of course impossible to construe the enactment as comprehending deeds made for the manifest advantage of the whole creditors.

It was still clearer that the disposition challenged did not fall under the intendment of the statute. The object of the act 1621, C. 18. was to preserve

an equality in the distribution of bankrupt's estates, by preventing them from making gratuitous conveyances to confident persons. This law was imperfect, as it did not prohibit a bankrupt from executing conveyances of his estate to favourite creditors in satisfaction of their debts. To remedy this defect, the statute 1696 was introduced; the equality of division was the principle of both; and though landed property was no doubt at that time the chief object of consideration, it never could be presumed that it was the intention of the Legislature to render ineffectual a conveyance executed for so just and good a purpose as an equal distribution of the personal estate; a measure founded on the very principle the statutes meant to enforce. An act of bankruptcy did not transfer the property of the bankrupt's estate. He was entitled to do every act with regard to his estate that was not restrained by the statutes; and as the statutes did not reach sales of his property or payments when honestly made, far less could they be understood to restrain the most equitable of all acts, the execution of a fair deed, making a proportional distribution of the bankrupt's estate amongst his creditors. No. 5.

The principle adopted by the Legislature in regard to the diligence of creditors, as well against the real as the personal estate of their debtors, was decidedly in favour of the rule of equal distribution to all interested. Instances of this occurred in the statute 1661, relative to the *pari passu* preference in apprisings, and in the Act of Sed. 28th Feb. 1662, which regulated the preference of diligence against the personal estate of a deceased debtor.

2*do*, The decisions of the Court upon this branch of law, whenever the conveyance was fair and in form unexceptionable, confirmed the principle maintained; while those, again, that were adverse, were involved in peculiar circumstances. In the case, 17th November 1725, Muirhead *contra* Creditors of Watson, No. 238. p. 1201. it was found, that a disposition by a bankrupt, in favour of his whole creditors, was not reducible upon the act 1696 at the instance of a posterior arrester. In the case, July 1729, Farquharson *contra* Creditors of Cumming, No. 241. p. 1205. the Court went perhaps too far; and in the next accordingly, 28th Jan. 1735, Mansfield *contra* Brown and Stobo, No. 243. p. 1207. the question underwent a limitation; but in the case 16th Nov. 1757, Trustees for Jackson's Creditors *contra* Simpson, No. 248. p. 1212. the general question came under consideration of the Court, and was decided in favour of the trust-disposition. Principles of Equity, fol. p. 245.

The decisions upon the other side, 12th July 1734, Snee *contra* Trustees of Anderson, No. 242. p. 1206. and 3d Feb. 1736, Earl of Aberdeen *contra* Trustees of Blair, No. 244. p. 1208. were very different from the present. In that of Snee, some very unreasonable stipulations were made in favour of the trustees: They were the bankrupt's relations, whom the creditors had no power to change: They were empowered as arbiters to determine the expense of their own management; and there was a forfeiture imposed upon the creditors who should quarrel the trust-right. In the case, 4th Nov. 1764, Mudie *contra*

No. 5. Trustees of Strachan, No. 252. p. 1217. the trustees had proceeded in a manner extremely irregular; a partial preference had been directly given to two creditors in the disposition, and the creditor who sued the reduction had been in the course of diligence when the trust-deed was executed. In the case, 27th Jan. 1767, Peters *contra* Trustees of Dunlop, No. 253. p. 1218. a direct partial preference had been established to a whole set of creditors, viz. all the bankrupt's friends who had become surety for him in certain bonds due to the Crown; so that the disposition fell directly within the statute; and as this specialty rendered it unnecessary in the House of Lords to take the general question into consideration, it could not be argued upon as a precedent.

3tio, The expediency of giving effect to a disposition of this kind was a material consideration. The establishment of a proper system of law for the distribution of the estates of bankrupts among their creditors had been an object of attention in most countries. That adopted in the present instance, which had been executed with fairness, and not clogged with any unreasonable conditions, was the most expedient and inoffensive to creditors that could be devised. Unless a plan of this nature was sanctioned, not only would injustice be done, but immense losses to creditors would be incurred. If a creditor at hand was premitted to carry off a bankrupt's estate to the exclusion of all creditors at a distance, it would be a reproach upon the law of the country; and if it was declared to be law, that a bankrupt could not by a deed such as the present do justice to all his creditors, the confidence of trade and credit would be destroyed.

Whenever also a bankrupt's estate was situate in foreign countries, as it was impossible that each creditor could follow separate measures for himself; so the estate could not, but by the aid of a conveyance of this nature, be collected for the benefit of the creditors at large.

The arresting creditors answered:

1*mo*, It had been a favourite object in the law of this country, and what all the bankrupt statutes had specially in view, to give full weight to every form and mode of diligence by which creditors might operate payment out of their debtor's effects. Any practice therefore, or decision tending to disappoint the effect of legal diligence, if not authorised by a new statute, must be held as running counter to the genius of the law. The enactment of the statute 1621 never meant to alter or weaken that fixed rule: It was directed to redress abuses of another discription. The legislature did not then intend to put all creditors, the most negligent with the most alert, upon an equal footing; the *pari passu* rankings of adjudgers, and preference of executors, by the statute 1661, and Act of Sed. 1662, were then unknown; so that the clear and express intendment of the act 1621 was to leave the bankrupt's estate fully open to the diligence of creditors.

The statute 1696, C. 5. made no alteration upon this rule; but on the contrary, intended that all the bankrupt's effects should be left open as they stood at the time of the bankruptcy, to be applied for the payment of debts according

No. 5.

to the due course of law, and of that diligence the creditors might think fit to pursue. It was accordingly expresssly enacted, "*That all voluntary dispositions, "assignations, or other deeds,*" granted by notour bankrupts, &c. to any of their creditors, and in preference to others, should be *void and null*, and should be so found at the suit of any of their just creditors. This statute effectually tied up the hands of bankrupts, but farther it did not go; nor did it ever intend or provide that the consequences thereof should be an equal distribution among the creditors of the whole estate. Though it disabled the bankrupt from making any distribution in the way of conveyance, it by no means excluded the diligence of creditors, but, on the contrary, left them at full liberty to act as by law authorised. The *pari passu* ranking of adjudications, by the act 1661, and of executors, &c. by the Act of Sed. 1662, was then well known, and left in full force; and though personal estates were then so inconsiderable as to escape the attention of the legislature, no alteration was made, or farther equality among the creditors introduced; far less was it intended or declared that the distribution of them should be left to the pleasure of notour bankrupts, to the exclusion of the operation of legal diligence.

The distinction taken up upon the words of the statute was a mere criticism that had no operation upon the sense. The statute made no distinction as to the form of the deeds, whether they were granted to the whole of the creditors or only to a part; for if the deeds appeared to be an alienation of any of the effects in favour of creditors, they fell under the prohibition of the act. The deed also, though granted to the whole, was at all events to the prejudice of those creditors who did not accept; as it compelled them to submit to a mode of management contrary to their choice, and to diprive them of the power of using that diligence the law allowed.

2do, The decisions of the Court upon this point were conclusive; so that in consequence of those that had been lately pronounced, it might truly be considered as at rest. The earlier cases of Muirhead *contra* Creditors of Watson in 1725, No. 238. p. 1201; and of Farquharson *contra* Creditors of Cumming in 1729, No. 241. p. 1205. were little to be regarded, and might now, without impropriety, be termed erroneous. The case of Mansfield *contra* Brown and Stobo in 1729, No. 243. p. 1207. went in favour of the present argument. The case of Snee *contra* Trustees of Anderson in 1734, No. 242. p. 1206. and that of the Earl of Aberdeen *contra* Trustees of Blair in 1736, No. 244. p. 1208. were precisely in point; and in that of Snee, the Lords, in the most express terms, declared their sentiments, the following clause being inserted in the interlocutor: "*And farther find, That no disposition by a bankrupt debtor "can disable creditors from doing diligence.*" The case of Simpson *contra* Trustees of Jackson in 1757, No. 248. p. 1212. was perfectly distinguished from the present. Previous to the disposition, the acceding creditors had done separate diligence, had attached the effects, and ascertained their shares: Simpson had done no diligence: The acceding creditors had of course obtained a preference

No. 5. independent of the disposition; so that in these circumstances the general point of law did not fall to be considered. The case, 4th Nov. 1764, Mudie *contra* Trustees of Strachan, No. 252. p. 1217. was a direct precedent; and in the late case, 27th Jan. 1767, Peters *contra* Trustees of Dunlop, No. 253. p. 1218. the judgment of the Court, unquestionably proceeded on the abstract point; which, without adverting to alleged specialties, was in general terms affirmed in the last resort.

3tio, The argument drawn from expediency, when duly considered, had no solid foundation. It had indeed been long a speculative question, Whether such dispositions were beneficial or hurtful? They were for some time considered in a favourable light; but experience discovered the reverse; and then the Court returned to that construction of law, from which, by an inclination to equity, it had been diverted. By such deeds, the hands of the creditors were found to be tied up, and the estates of bankrupts thrown under the management of persons of their own nomination, whose fidelity and diligence were unknown. It became also obvious, that if debtors were allowed, under pretence of executing dispositions in favour of the whole, to circumscribe and frustrate the effect of the diligence of particular creditors, they would easily fall upon schemes to give more substantial preferences to those they wished to favour; so that more bad consequences would flow from such a privilege than were sufficient to overbalance the trivial advantages which it was supposed might result.

The alleged injustice that would be done to creditors at a distance, was an objection that went too far. If this apprehension was well founded, it could be urged with equal force to set aside even prior diligence when the debtor was not a bankrupt, though insolvent at the time. This would be a repeal of the act 1621; yet no reason could be assigned why a bankrupt should have the power, by a voluntary deed, of excluding that diligence which was posterior to his disposition, more than that which was prior to it.

As the bankrupt statutes of Scotland could not operate *extra territorium*, any benefit that might be supposed to arise from a disposition to effects in foreign countries would not thereby be excluded. If a case could be supposed, where effects were so situate that they could be reached by no diligence whatever, such a disposition might be sustained as beneficial; but that never could be conceded, when, as in the present instance, the effects were confessedly in Scotland, and could all be attached by the diligence of this country.

Upon the effect of the pursuers arrestments, the trustees pleaded:

Though the trust-disposition challenged should not be held sufficient to bar the creditors from attaching the estate of the bankrupt by legal diligence, the arrestments used by the pursuers could have no effect; nor could they in virtue of them pretend to draw more than a rateable proportion of the fund *in medio* along with the other creditors. Messrs. Fairholms were not by their bankruptcy divested of the property of their estate: The disposition executed

No. 5.

was therefore effectual in law while not challenged; and no challenge had been made till the money was paid into the bank for behoof of the creditors; which was the same thing as if it had been paid to themselves. If the bankrupts had converted their estate into money, and paid it proportionally among the creditors, such payments must have been sustained; and there was no reason for a different rule, where the money arising from the estate had been lodged in the bank by the express appointment of the creditors. The money so lodged was truly their money; they had each a right thereto in proportion to their debts; it was the same as an actual payment, and must be equally secure against the diligence of dissenting creditors, 23d Jan. 1756, Souper *contra* Creditors of Smith, No. 76. p. 744; 30th July 1766, M'Kell *contra* Trustees of M'Lurg, No. 21. p. 894.

If an arrestment such as the present was found good and preferable, it would not only be inconsistent, but productive of manifest iniquity. A dissenting creditor could not either with justice or congruity contest the right of the trustes to recover for behoof of the creditors, and at the same time convert their actings to his own advantage. If this was allowed, it would give that creditor the exclusive benefit of the disposition and trust granted for behoof of all the rest.

The arrestments in the present case were, in another point of view, inept and insufficient to attach the share of the acceding creditors. Neither the trustees nor the banks were debtors to the bankrupts, but to the creditors *quoad* the shares of those creditors who had acceded; and it was a settled point, that an arrestment used, not against a debtor to the common debtor, but against the debtor's factor, or against the trustees of the debtor to the common debtor, was inept, 12th Dec. 1752, Campbell, No. 74. p. 742; 9th Feb. 1759, Stalker, No. 77. p. 745. If the money recovered had been retained by the trustees, an arrestment used against them by the pursuers would have been inept; and the case was not altered by the money having been lodged in the banks, which being the depositaries either of the trustees or creditors, could not, in the furthcoming, depone that they owed the sums deposited to the bankrupts.

The arresting creditors pleaded:

In the event that the trust-deed was reduced, it followed as a necessary consequence, that nothing done thereon prejudicial to the interest of the pursuers could be sustained. As neither the trustees nor acceding creditors would then have any title to the bankrupts effects, these would fall to be considered as the funds of the bankrupts, and, like all moveable funds in the hands of third parties, effectually attachable by the diligence of creditors. A disposition of this kind by a notour bankrupt, instead of being held equivalent to a payment, had been deemed a fraudulent alienation, and as such prohibited by the act 1696. Though the disponee therefore had not only uplifted the fund, but paid it over to the creditors intended to be favoured, their right could still be no better than that of the disponee; their title still depended upon the disposition; and if that was null or reduced, the fund became truly the bankrupt's property. But, in the present case, the money never had *de facto* been paid over to the acceding

No. 5. creditors, but lodged in the bank; so that if it would have been recoverable though paid over, *a fortiori* must it, while *in medio*, be liable to attachment by legal diligence.

The decisions referred to, 23d Jan. 1756, Souper, No. 76. p. 744; and 30th July 1766, M'Kell, No. 21. p. 894. admitted of an obvious and conclusive answer. In neither of these had the common debtor been rendered bankrupt in terms of the statute: His disposition to trustees was not therefore reduceable; and hence a creditor could not by arrestment carry off what had been recovered by an effectual deed. The decisions, 4th Nov. 1764, Mudie *contra* Trustees of Strachan, No. 252. p. 1217; and 27th Jan. 1767, Peters *contra* Trustees of Dunlop, No. 253. p. 1218, were precisely in point; the pursuers of the reduction having been preferred on their arrestments in the hands of the trustees.

The objection to the competency of the arrestments was founded on the fallacy in taking for granted that the money arrested belonged to the acceding creditors. Whenever the trust was set aside, that money, whether in the hands of the trustees or the bank's, became the property of the bankrupts; the holders came of course to be proper debtors to them; and hence the arrestments had been most competently laid in their hands.

At advising this cause the Bench was full. The decision was given on the general point; and though the deed in the present instance was acknowledged to be extremely fair and unexceptionable, the Judges were of opinion that it could not be sustained: They did not, however, entirely disapprove of such deeds; but thought themselves bound by a *series rerum judicatarum*, in particular by the judgment in the case of Strachan in 1764, No. 252. p. 1217; and by the late case of Dunlop in 1767, No. 253. p. 1218. affirmed, as they understood, upon the general point, in the House of Lords—Four Judges dissented. As the trust was accordingly reduced upon the statute, the Judges, on the second point, were clear it followed as a necessary consequence that the arresters were preferable.

The following judgments were pronounced:

"The Lords, on the petition and answers, adhered to the Lord Ordinary's "interlocutor, sustaining the reasons of reduction of the trust-disposition, in so "far as the pursuers have an interest therein, and reduced accordingly; and "on the report and informations, they preferred Andrew Johnston and Anne "Law, the arresters, on their arrestments produced."

Lord Ordinary, *Gardenstone.* For Johnston and Law, *Rae, &c.*
Clerk, *Gibson.* For the Trustees, *Adv. Montgomery, Macqueen.*

*** THE same day the Court decided a similar question between the trustee for Hog's creditors and William Scott, writer in Edinburgh; the trust-right being reduced, and Scott the creditor arresting in the trustee's hands preferred upon his diligence. See Peters, &c. against Spiers, &c. No. 1. *supra.*

Lord Ordinary, *Barjarg.* For Scott, *Rae.*
Clerk, *Gibson.* For the Trustees, *Ilay Campbell.*

R. H. *Fac. Coll. No. 60. p. 179.*