

BANKRUPT.

1027

No 125

who had right, as judicial assignees, to have followed furth the claim competent to their debtor. See 12th June 1734, Snee, *infra b. t.* 3d February 1736, Earl of Aberdeen, *infra b. t.*

THE LORDS, found the assignation reducible upon the act 1621, there having been diligence by horning at Messrs Fairholm and Arbuthnot, and Alexander Arbuthnot's instance, prior to the granting of the assignation; and preferred the arresters.

C. Home, No 263. p. 421.

1793. June 18.

The CREDITORS of THOMAS DUNBAR against SIR JAMES GRANT.

THOMAS DUNBAR of Westfield having become insolvent, a variety of adjudications were led against his estate, of which that obtained by Mr Cuming of Altyre on the 29th November 1788 was the first effectual, and in February 1789 a summons of ranking and sale was executed against him.

On the 2d May 1789, Mr Dunbar granted to Sir James Grant a bond of corroboration, accumulating into one sum, bearing interest from Whitfunday 1788; the principal and interest due at that term on the following claims, viz. A bill payable in 1781, upon which no diligence had followed; a bond, in which Sir James was cautioner for Mr Dunbar; a bond and a bill, in which Sir James, though in reality only cautioner for him, was *ex facie*, joint obligant. The three last had been paid by a trustee for Sir James, who afterwards assigned the securities to him.

Upon the bond of corroboration Sir James adjudged on the 4th August 1789. And on his producing this interest in the ranking, the common agent, besides stating a variety of objections to the original grounds of debt, on which no judgment was given, contended, that the bond of corroboration was reducible on the act 1621, as being prejudicial to the prior diligence of other creditors.

Sir James Grant, on the other hand, pleaded, The act 1621 was intended solely to repress the fraudulent transactions of bankrupts. It states, in its preamble, the mischiefs arising from their gratuitous deeds in favour of conjunct and confident persons in defraud of lawful creditors. It declares liable to reduction, *imo*, All alienations of that description. *2do*, Any voluntary payment or right made by a dyvour, or an interposed partaker of his fraud, to one creditor in defraud of the prior diligence of another, at the instance of the party injured, and it punishes with infamy all parties concerned in such transactions.

The statute must therefore have had in view deeds of a very different complexion from the bond now in question, which can be considered in no other light than as a renewal of the voucher for a just debt, and which, so far from being fraudulent, it was the duty of the debtor to grant. Its sole object was to save the expence of a decree of constitution, which, with an adjudication follow-

No 126.

A bond of corroboration falls under the second clause of the act 1621.

No 126.

ing thereon, might undoubtedly have been obtained within year and day of the first effectual, as all objections would have been reserved *contra executionem*. The advantage gained by the accumulation of the debts was insignificant, and if at all worthy of notice, could not be the ground of a total reduction.

Besides, the sole effect of the bond was to enable Sir James to rank *pari passu* with other creditors, an object which is so much a favourite of the law, that in order to accomplish it, the Court are accustomed to dispense with the usual forms of judicial procedure.

As the statute contains no accurate definition of a bankrupt, while its certification is at the same time very severe, it ought to be strictly interpreted. No instance can be found where an objection similar to the present has been sustained. And even upon the 1696, the enactments of which are much more definite and precise, no deed equally harmless has been reduced; 7th January 1762, Cowan against Mansfield's Trustees, *infra b. t.*; Fountainhall, 15th July 1697, Creditors of Hunter, No 124. p. 1024.; 19th November 1783, Spottiswood against Robertson Barclay, *infra b. t.*; 31st July 1724, Creditors of Watson against Cramond, *infra b. t.*; February 1728, Creditors of Graitney, *infra b. t.*

Answered, The act 1621 contains two distinct enactments, which have always received the most liberal interpretation.

By the first, every gratuitous act of the bankrupt which tends to diminish the value of his property, is reducible at the instance of prior creditors, Erskine, b. 4. tit. 1. § 29.

By the second, he is in like manner prevented from making a voluntary payment even to an onerous creditor, in prejudice of the prior diligence of another. Under the former, even family provisions, otherwise unexceptionable, are comprehended; under the latter, not only payments in cash, or by bond, bill, or indorsement in security; Bankt. b. 1. tit. 13. § 28. but even necessary acts, such as the fulfilling a minute of sale, provided they have been done without the compulsion of legal diligence; Bankt. b. 1. tit. 10. § 104.

The bond now in question not only enabled the creditor to come in *pari passu* with other creditors, which he could not otherwise have done, but confirmed and accumulated exceptionable grounds of debt. A bond much less hurtful was reduced; 19th January 1788, Scott against Bruce*. Upon the same principle, the Court found, that a person bankrupt in terms of the act 1696, could not grant a bond of corroboration; 1st March 1791, Creditors of Mackellar against Macmath, *infra b. t.*; and it has been frequently found, that such bonds are struck at by a prior inhibition; 29th January 1696, Wilson and Logan against Penman, Fount. v. 1. p. 706. *voce* INHIBITION; 19th June 1782, Watson against Marshall, Fac. Col. No 45. p. 72. *voce* INHIBITION.

No argument can be drawn from the certification of the statute, as deeds are frequently reduced on both clauses of it, granted by persons ignorant of their own insolvency, and where consequently that certification cannot apply.

Some of the Judges were a good deal moved by the hardship to the creditor, who had time in this case to have led an adjudication independent of the bond,

* Not collected. See Appendix.

and by its object having been not to give him a preference to other creditors, but to bring him in *pari passu* with them. A great majority of the Court, however, were of opinion, that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature.

It was farther *observed*, that the case of Spottiswood against Robertson Barclay, having been settled by compromise, could be of no weight in point of precedent.

THE LORD ORDINARY sustained the objection; a reclaiming petition was refused, without answers; and upon advising a second, with answers, the Lords 'adhered.'

Lord Ordinary, *Ankerville*.

For the Creditors, *Honyman*.

For Sir James Grant, *James Grant, Maconochie*.

Clerk, *Gordon*.

Fol. Dic. v. 3. p. 52. Fac. Col. No 61. p. 133.

D. Douglas.

S E C T. II.

Payment, whether Challengeable.

1675. November 11.

VIETCH against PALLAT.

IN *anno* 1648, James Sanderfon merchant in Edinburgh being debtor to James Nairn, and David Rodger being cautioner for Sanderfon, was distressed, and paid the debt, and obtained assignation from Nairn, and as assignee raised horning, and charged and denounced Sanderfon; and in *anno* 1652 took a gift of Sanderfon's efcheat, and obtained general declarator thereupon; and in *anno* 1649, James Sanderfon became debtor to Robert Brown for some wines sent to him from Bourdeaux, to the sum of 3000 pounds, whereupon he did also charge and denounce Sanderfon *anno* 1649; and in the same year Sanderfon obtained decret against Sir Robert Stuart for 2000 pounds Sterling. In *anno* 1655, Sanderfon grants assignation to Robert Brown to 700 pounds Sterling, as a part of the 2000 pounds Sterling, and thereafter Sanderfon having obtained three bonds from Sir Robert Stuart in *anno* 1662, containing 800 pounds Sterling, Sanderfon grants a new assignation to Robert Brown of the third part of the said sum of 800 pounds Sterling, which assignation relates the former assignation to 700 Sterling as a part of the 2000 pounds Sterling, and both assignations are granted in satisfaction to Robert Brown of the said sum of 3000 pounds. In *anno* 1666, Sir George Maxwell of Pollock interposeth for Sir Robert Stuart, and gives his bond to Robert Brown for 100 pounds Sterling, on condition that the bond and assignation granted by Sanderfon to Brown should be delivered up, which accordingly

No 127.

A bankrupt having granted assignation to one of his creditors, in prejudice of another, who had done more tedious diligence by horning, &c.; the prior creditor having affected the subject assigned, by taking a gift of efcheat, was found to have action of repetition against the assignee who had received payment.