No 57.

And a petition against this interlocutor was refused, " without any prejudice to any other action or actions already brought, or hereafter to be raised at the instance of the petitioner, and to the defences against the same."

The trustee having, in the course of the argument, been described as an officer of the Court, it was *observed* on the Bench, That this was a mistake. The object of the bankrupt statutes is to take the management of sequestrated estates out of the hand of the Court, and to place it with the creditors, by whom the trustee is appointed, and by whose direction he is obliged to act, the regulations of the act of Parliament being always observed. It is quite beyond the province of the trustee to take upon himself the active management of a colliery; and the committee of creditors who were named as commissioners to advise and assist him in matters of ordinary management, were equally unfit for such an undertaking. It was necessarily put under the direction of operative men, who alone were responsible for their mode of conducting the operations. Both the trustee and the commissioners, therefore, must be assoilzied, whoever might be found liable.

Lord Ordinary, *Cullen.* Act. *Clerk.* Agent, *Ja. Smyth, W. S.*
Alt. *Cathcart, Connell.* Agents, *M. Montgomerie, T. Johnstone.* Clerk, *Home.*

J. *Fac. Col. No 91. p. 200.*

SECT. IX.

Impeding of Legal Diligence.

1714. *July* 15. William Carse *against* Sir John Halyburton.

No 58.
The user of a simulate disposition to stop poinding found liable, to the creditor offering to poind, for his damage.

William Carse, a creditor to Sir George Hamilton, being debarred from poinding his debtor's houshold plenishing by a disposition thereof, conform to an inventory, made to Sir John Halyburton, produced at the poinding, the Lords on the 17th of June last, No 19. p. 9125., *voce* Moveables, found the said disposition with symbolical possession *retenta possessione* of the disponer for three years and a half before the offering to poind, and two years and a half since, did not convey the real right of the property of the goods to Sir John; whereupon the said William Carse pursuer insisted against Sir John for payment of his debt, which was within the value of the plenishing contained in the inventory produced for stopping of the poinding.

No 58.

The defender *alleged*; That his disposition being for a just and onerous cause, as was sufficiently instructed, it was no ways simulate or fraudulent; and the Lords having already found that the property was not transmitted in respect of his neglect to take possession, he acquiesced in that interlocutor that the pursuer might prosecute his diligence against his debtor's effects; but the defender had acted *bona fide*, and having transgressed no law could be liable to no penalty.

It was *answered*; Whether the disposition was onerous or gratuitous, *perinde est*; it was but simulate to cover the debtor's possession from the diligence of his creditors; and for the same reason that the Lords had found that the property was not transmitted to the defender, it follows that the poinding would have affected the plenishing, if the pursuer had not been debarred, which was a fraudulent deed on the defender's part, and thereby the defender became liable to the pursuer's damage; and although there be no special law in the case, yet all damages arising by the fraudulent deed of any party in the common course of justice ought to be made up; and as the frauds of debtors have encreased for covering their effects, so the Lords of Session by their decisions have been in use to discourage such practices; and it has been a common practice to defraud creditors by such simulate dispositions, which ought to be curbed; or if brought in question, and the use of such dispositions to stop diligences not found liable, it would in the consequence authorise that method of fraud in all time coming, and the former interlocutor would be of no effect; because the debtor would get another cover, and after that a third, and creditors would never get access; whereas one example of the just punishment of such simulate dispositions to disappoint the diligence of creditors would prevent the like in all time coming.

"THE LORDS found the defender liable to produce and exhibit the plenishing in the inventory in as good condition as they were in at the time that the poinding was stopped, or so much thereof as may satisfy the pursuer's debt, or to pay the damage, the goods in the inventory being above the value of the pursuer's debt."

Fol. Dic. v. 2. p. 342. Dalrymple, No 112. p. 156.

*** Forbes reports this case:

IN the action of forthcoming at the instance of William Carse against Sir John Haliburton, the Lords, 17th June 1714, No 19. p. 9125., *voce* MOVEABLES, having found, that the disposition in favour of Sir John did not convey the real right and property of the goods disponed to him by Sir George Hamilton; William Carse now insists, that the defender might be found liable to make payment of the debt owing to him by Sir George, upon the following grounds; *imo*, A poinding unwarrantably stopped, must be held of the date of the stop as to all effects, and more especially with regard to the unwarrant-

No 58. able stopper; consequently the defender must put the pursuer in the same condition, as if he had then completed his poinding, which would have entitled him to the goods, and these being far above the value of his debt, might have been converted to the payment thereof; 2*do*, The defender is liable to the pursuer, *ex facto doloso*, he having made use of the disposition in his favour as a colour to cover the common debtor's goods from the diligence of the pursuer, a lawful creditor, which was a plain collusion betwixt him and the common debtor to defraud other creditors. This collusion is inferred from very pregnant circumstances; as, 1*mo*, The disposition is granted *retenta possessione naturali*, which always presumes simulation; 2*do*, Two distinct inventories of the goods, of very different values, are signed, of the date of the disposition, and yet the disposition mentions but one inventory, which can receive no other interpretation than to serve a turn; and so it was, that the defender produced the big inventory at the poinding, that he might cover the whole, and keep the pursuer from offering the value and taking the goods; whereas, in this action of forthcoming, he produced, at first, only the little inventory, that no more might be imputed in payment of his debt, and to shew, that he did not debar the creditors from any excresce by the disposition; 3*tio*, After stopping the poinding, the defender suffered the debtor to possess, without the least intention of satisfying his own debt, or keeping the subject entire; which is an irrefragable presumption of collusion, and that he kept the disposition for no other purpose than to cover and protect him against the diligence of his creditors.

Answered for the defender, 1*mo*, He cannot be liable to the pursuer for stopping his poinding; for if he were liable, it behoved to be *ex quasi delicto*, there being neither contract nor *quasi* contract betwixt them; but there seems nothing unlawful or unwarrantable in the defender's part, in endeavouring to prefer himself by making use of his disposition; since it is lawful for every man to make the best of his own right he can. Because the defender did compete and endeavour to get preference upon a which, in the event, has been found not preferable, must he not only lose his own debt, but be liable in pursuer's? He is in the common case with every creditor who competes with a less preferable right with another creditor that has a better; though that creditor be in the event preferred; yea, though it should happen that, by the competition, the subject should perish, yet that does not make the creditor succumbing in the competition liable for the other debts;—because it is both allowable and rational for every man to follow forth his own right, for recovering his own payment, as far as that right can carry him; 2*do*, That the disposition to the defender was not collusive, appears from his deponing upon, and instructing by writ the onerous cause thereof. He did not think himself obliged, or that it was proper for him to apprehend the natural possession, because his disposition was not in satisfaction, but in security, which he by mistake thought had given him an hypothec, so as to hinder the subject to be carried off to his prejudice.

Replied for the pursuer; It does not alter the case, that the defender was a true creditor; for he may throw away his own as he pleases, or rather there may be an understanding betwixt him and the common debtor, for his payment another way. The disposition to the defender is absolute, and not in security; and though it were in security, it behoved to be completed by natural possession, otherwise it could not convey the property. No 58.

THE LORDS found, that the defender having stopped the pursuer's poinding, by virtue of a simulate disposition, ought to make the goods and plenishing forthcoming to the pursuer in the same state they were in at the time the poinding was stopped; which if he failed to do, the LORDS found him liable for the debt due to the pursuer, in place of damages, the debt being within the value of the goods contained in the inventory and disposition produced for stopping the poinding.

Forbes, MS. p. 84.

1727. *July* 6. NIVEN *against* GRIEVE. No 59.

IN a case of the nature of the above it was *pleaded* for the creditor, That he, who unwarrantably stops a poinding, without any colourable title, ought to be liable for the debt, in name of damages, without regard to the extent of the subject, against which the poinding is directed; because, as the creditor is deprived of all means of proving, save by the delinquent's oath, which it would be hard to subject him to, there can be no other method for ascertaining his full damages, but to decern for payment of his debt. THE LORDS, notwithstanding, found the defender only liable *in valorem* of the subject intromitted with. See APPENDIX.

Fol. Dic. v. 2. *p.* 343.

1733. *July* 11. BLAIR *against* GRAHAM. No 60.

Thereafter it was found, that a party, who, upon a simulate disposition *retenta possessione*, did stop a poinding, was liable for the debt; but an offer made by the defender, to make the goods forthcoming *ipsa corpora*, conform to an inventory referred to in the disposition, was found relevant to assoilzie him. See APPENDIX.

Fol. Dic. v. 2. *p.* 343.