No 128.

Duplied for the defender: He is not pleading upon his right of hypotheck, but upon his diſpoſition which he lawfully took, and diſpoſed of the ſubject, by virtue thereof, for payment of his rent, without any trouble or interpellation from the purſuer. The diſpoſitions mentioned in the deciſions cited by her, were not granted by tenants to their maſters; and the ſubjects diſponed were ſtill extant unuplifted.

THE LORDS found, That in the caſe of a maſter obtaining a diſpoſition from his tenant, though in a competition another creditor doing diligence might be preferred; yet the maſter having obtained payment *bona fide* by virtue of the diſpoſition, he cannot be liable to repeat what he received, more than if he had poinded.

Fol. Dic. v. 1. *p.* 77. *Forbes, p.* 344.

1715. *June* 7. ALEXANDER TWEEDIE *againſt* JOHN DIN, and OTHERS.

No 129.
Denunciation with inſolvency not ſufficient foundation to reduce poſterior payments made by the common debtor, unleſs at the ſame time he had been commonly reputed bankrupt, or the receiver were *particeps fraudis*.

ALEXANDER TWEEDIE having ſold a ſtock of ſheep to John Din, for which he got his bond; he regiſtrate him at the horn, and a few months thereafter, endeavouring to poind, he found the ſheep diſpoſed upon to ſome neighbours; and having arreſted in their hands, and purſuing a furthcoming, they deponed, they had got the goods, but that they had bought them, for payment of debts due to them by the common debtor, or wherein they were cautioners for him: But for theſe their debts, no diligence ſave regiſtrations of their bonds was uſed, and the common debtor ſtill continued to trade in buying and ſelling ſheep, &c.

Tweedie now inſiſting upon the latter clauſe of the act of Parliament 1621, and *alleging*, That he was in the preciſe words thereof; becauſe he had uſed diligence to affect his debtor's goods, by a regiſtrate horning againſt a bankrupt and dyvour; and that the other creditors had obtained payment (by the partial favour of the debtor) though poſterior to him in diligence; and therefore he had good action to recover what was thus voluntarily paid.

And the co-creditors defenders, having *alleged*, 1*mo*, That there was a difference betwixt bankrupt and inſolvent, and that the law was only to be underſtood of the firſt; and here the common debtor was not bankrupt. 2*do*, Betwixt creditors partakers of the fraud, and thoſe who are not. 3*tio*, Betwixt thoſe who had got payment, and ſuch who only were competing for preference, on a ſubject yet outſtanding.

Answered for the purſuer, 1*mo*, That there is a difference betwixt bankrupt by the act 1696, ſo to operate the effect of that law, and bankrupt by the act 1621, to afford the benefit of that act: That leſs is requiſite to make one bankrupt by the latter than the former; becauſe the effect of the act 1621, is nothing ſo general as of the act 1696. So that with reſpect to the benefit of the act 1621, it was ſufficient that a horning was regiſtrate againſt the common debtor. And this was ſo found 11th December 1691, the Creditors of Langtoun competing, *voce* COMPE-

No 129. TITION, obſerved by the Lord Stair, Inſt. tit. Reparation, § 15. For there, though ſingle inſolvency was not ſuſtained, yet joined with legal diligences, beginning to be raiſed and execute, was found ſufficient. As to the ſecond point, *answered*, That it makes no difference as to this clauſe of the act, whether the receiver was *particeps fraudis* or not; for the former clauſe of the act does indeed make that diſtinction and repeats it twice: But the latter clauſe hath no ſuch quality burdening the prejudged creditor with proving the participation; but all that therein is required, is a prior diligence, and a partial preference; ſo that the clauſe being here omitted, it is *de industria* done; and therefore the addition of it, is againſt the mind of the law. As to the third, *answered*, That there is no ſuch diſtinction to be made, as is plain from the law, for the preference and repetition are joined in one clauſe, without any difference made; and therefore as the co-creditor would be preferred, ſo alſo has he action for repetition; as was found 12th February 1675, Veitch *contra* Ker, *infra h. t.*

Replied for the defenders, That the import of the act 1621, is very plain, eſpecially if traced up to the common law, from whence (as appears by the expreſs words of the act) it is derived, where there is a manifeſt diſtinction made betwixt lucrative deeds in prejudice of creditors, and onerous: In the firſt, *non est quærendum an sciente eo cui donatum, gestum sit, sed hoc tantum an fraudentur creditores. L.* 6. § 11. *D. quæ in fraud. cred.* But where the right is onerous, ſuch as where a true creditor receives his payment, *non sufficit si simpliciter sciat illum creditores habere, sed si particeps fraudis sit, L.* 10. § 2. *D. eod.* And conſequentially our act of Parliament is divided in two branches, the one with reſpect to lucrative conveyances, ſuch as the law preſumes all thoſe in favours of conjunct and confident perſons; and ſuch again as are onerous; and there the act denotes the perſon, whoſe deeds are to be reduced by the name of dyvour or interpoſed perſons partakers of the fraud; which neceſſarily implies, that there ought ſuch circumſtances of bankruptcy to appear, as might interpell the party who is oneroufly contracting, from dealing with the dyvour. As to the deciſion in the caſe of Langtoun's Creditors, *1mo*, The rights there reduced were rights in ſecurity granted after diligence. *2do*, There was ſuch a crowd of diligence againſt the common debtor, that it amounted to a notoriety of his bad circumſtances. *3tio*, Theſe diligences were ſo far proſecute, that *ex continenti*, the common debtor retired to the abbey: All which make that caſe widely differ from the preſent. And the deciſion, Veitch *contra* Ker proceeds exactly upon the ſame principle. All which is diſtinctly cleared by a late deciſion, Lady Riccarton *contra* Thomas Gibſon, No 128. p. 1035.; the words of the interlocutor are, 'THE LORDS found, That in caſe of a 'maſter's obtaining a diſpoſition from his tenant, though in a competition ano-'ther creditor doing diligence might be preferred, yet the maſter having obtain-'ed payment *bona fide* by virtue of the diſpoſition, is not liable to repeat what 'he received.' As to the act 1696, it is obvious from the tract of our deciſions, that before that act, the difference betwixt a debtor inſolvent (but ſtill keeping his trade and credit) and a bankrupt debtor, was well eſtabliſhed; and that act

did not ſo much introduce the qualifications making notour bankrupt, as the privilege of reducing deeds done 66 days before the period of bankrupt. *Lastly*, If it were otherways, there would be a door opened to unſpeakable confuſion; and a ſtop put to all commerce, ſince thus no man could be ſure of what he may call juſtly his own. No 129.

The Lords found inſolvency of the common debtor, with horning and denunciation againſt him, not relevant *per se*, to give the purſuer the benefit of the laſt clauſe of the act of Parliament 1621, anent bankrupts, without participation of the fraud, by the creditors receiving payment by goods from the common debtor.

Act. *Boswell.* Alt. *Graham.* Clerk, *Sir James Justice.*

Fol. Dic. v. 1. p. 77. Brute, No 92. p. 109.

*** Dalrymple reports the ſame caſe;

Alexander Tweedie, being a creditor to John Din, arreſts in the hands of James Din and others, who depoſed in the furthcoming that they received certain ſheep or cattle at the prices mentioned in their depoſitions; and that the ſame were imputed in ſatisfaction of certain debts due by John Din to ſome of them, or wherein others ſtood engaged for him as cautioners, and were ready to inſtruct the debts due to them, or their engagements as cautioners and payment conform.

It was alleged for the purſuer; That the prices of the ſheep or cattle ought to be made furthcoming to him; becauſe he had uſed horning, and denounced the common debtor, before he delivered the ſaid ſheep or cattle to the defenders; and the true cauſe of the debt due to the purſuer was theſe very ſheep which he had delivered, in defraud of the purſuer's diligence, and at the time when he was ready to have poinded; and inſiſted upon ſome other qualifications of the defender's concurring with the common debtor to elude the effect of the purſuer's diligence; and founded upon the laſt clauſe of the act of Parliament 1621, which doth provide, That if any dyvor, or interpoſed partakers of their fraud, ſhall make voluntary payment or right to any perſon, in defraud of the lawful and more timely diligence of any other creditor having uſed inhibition or horning, &c. in that caſe, &c. the ſaid dyvor, or interpoſed perſon, ſhall be holden to make the ſame furthcoming to the creditor having firſt uſed lawful diligence, who ſhall be preferred to the co-creditor, who being poſterior in diligence, hath obtained payment by the partial favour of the debtor, and ſhall have good acceſs to recover what was voluntarily paid in defraud of the purſuer's diligence.

It was *answered*, The purſuer cannot qualify any fraud on the part of the defenders, but in as far as he doth inſiſt upon the ſaid clauſe of the act of Parliament 1621. The defenders anſwer ſhortly, that they received payment *bona fide* by the price of the goods they received, or the ſaid price was received for relieving themſelves of cautionry; and it would be of dangerous conſequence, to the

No 129. hindering of all commerce, if creditors might not receive voluntary payment from their debtors by money or effects, notwithſtanding they might be at the horn; for it was not uſual, nor conſiſtent with the freedom of commerce, to ſearch regiſters before accepting of payment of juſt debts; nor was that the meaning of the act of Parliament, which makes mention only of dyvors or their interpoſed perſons. And *esto* that probation did inſtruct the common debtor to have been inſolvent, yet he was not dyvor or notourly bankrupt, which is neceſſarily required by the act of Parliament; for a perſon inſolvent is not reckoned a dyvor, unleſs his inſolvency were notour, or that *cessit foro*; for a dyvor is called a bare man, and muſt be in ſuch a condition as no perſon can be preſumed to be ignorant of his inſolvency; whereas men that are in uſe to buy and ſell, and have poſſeſſions, though really inſolvent, may lawfully pay their debt, and their creditors accept payment *bona fide*.

It was *replied:* That *bankrupt* and *insolvent* were promiſcuouſly uſed in the ſaid act of Parliament, and by lawyers generally; and the diligence uſed by the purſuer by denunciation, which doth affect the ſubject acknowledged to be intromitted with by the defender, in as far as the eſcheat goods are by law burdened with the debt in the horning, the purſuer is in the preciſe terms of the act of Parliament; and an inſolvent debtor is held to be bankrupt as to creditors uſing diligence, though he may freely contract or pay debt in prejudice of other creditors. And it is no new thing that payments made to true creditors are repeated at the inſtance of the uſers of more timely diligence; as was found the 11th of February 1675, Veitch againſt Pallet, No 127. p. 1029. where a true creditor, being preferred to the more timely diligence of another who had uſed horning, and got the gift of the debtor's eſcheat, was found liable in repetition, although the creditor receiving payment had alſo uſed horning, and the debt aſſigned to him was innovate, and a new bond granted; yet the creditor uſing more timely diligence, was preferred to that new bond. In which caſe it was particularly marked, that nothing in that deciſion did hinder commerce by buying from bankrupts or rebels goods, for preſent money: But the caſe was different, where there was no preſent money or permutation, but goods ſold on truſt; for in that caſe, the act of Parliament was to take place.

It was *duplied:* That, in the foreſaid caſe of Veitch and Pallet, Sanderſon the common debtor was not only inſolvent, but bankrupt, and his eſcheat gifted and declared; and likewiſe the ſubject of competition was truly *in medio:* For tho' the bond aſſigned was renewed, yet the debt was not received by the aſſignee made by the bankrupt, nor was he found liable in repetition of any ſum received; whereas here goods are not *in medio*, but received in payment, or for juſt and onerous cauſes, by a perſon, though inſolvent at the time, yet he was in the poſſeſſion of two ſeveral rooms, and ſo continued for ſome conſiderable time thereafter. And it was never found, that even the donatar of eſcheat, could diſquiet juſt creditors receiving payment by the price of goods before declarator, much

leſs can the uſer of a horning pretend to have affected the moveables without a gift, or render creditors *in mala fide* to take payment. No 129.

'THE LORDS found, That denunciation with inſolvency was not ſufficient to give the purſuer the benefit of the act of Parliament 1621, unleſs the common debtor had been commonly reputed bankrupt, or that the purſuer can qualify, that the defenders were ſome way partakers of the fraud.'

1716. *December* 7.—TWEEDIE, as a creditor to John Din, arreſts in the hands of James Din and others, and purſues a furthcoming, in which the defenders, being five in number, deponed they were noways debtor to John Din; but that each of them had received a certain number of ſheep from him, in payment of juſt and lawful debts. And the purſuer having *alleged*, That the pretended payment was poſterior to his diligence by horning and caption; and that his debtor was inſolvent and bankrupt, which he alleged afforded preference to him upon the penult clauſe of the act of Parliament 1621.——'THE LORDS found the defenders might lawfully take payment of their juſt debts, unleſs it could be inſtructed, that they were partakers of the common debtor's fraud in conveying away his goods from being affected by the purſuer's diligence.'

The purſuer inſiſted on certain qualifications of the defenders being *participes fraudis*; whereupon, a probation being allowed, it was proven, that the common debtor, being poſſeſſor of a graſs-room, the purſuer had, in the night time, ſent a meſſenger with a caption to apprehend him; that the meſſenger miſſing his perſon, did ſearch the room of his poſſeſſion for moveables, where he did find nothing but three ſtirks, all the other cattle and flocks being driven off his ground; and that the very ſame morning the five defenders were convened at a place diſtant from his poſſeſſion, where they met with the common debtor, and had a notary and witneſſes preſent, to take inſtruments upon the diviſion of the common debtor's ſheep among the five defenders; and all this about the riſing of the ſun the ſame morning that the common debtor's poſſeſſion was ſearched; and the morning after the common debtor's houſe had been ſearched for apprehending his perſon.——'Which qualifications the LORDS found ſufficient to elide the allegeance of *bona fide* payment, and preſumed them to be partakers of the common debtor's fraud.'

Dalrymple, No 142. 163. *p.* 196. 228.

1724. *February* 19.

GEORGE GORDON, Writer in Edinburgh, *againſt* JOHN BOGLE, Writer to the Signet.

No 130.
A debtor apprehended by caption, delivered to his creditor

JAMES TWEEDIE, merchant in Edinburgh, being debtor to William Brook and Company, merchants in London, and likewiſe to Samuel Dawſon and Jeremiah Lupton, diligence by horning and caption was uſed againſt him by Mr Gordon;