

No 228.

*Replied*, In our law, *facts* and *deeds* are reciprocal terms: The transference here objected to is an alienation, and a fact or deed, whether reduced to writing or not. No injury can happen to commerce; a fair purchaser, for a price, cannot be affected by the statute. Indorsements to bills are most of all favoured by commerce; yet they fall under the law, when granted for a prior debt. A sale, such as figured, intended to pay the creditor's debt, would be reducible as simulate. If the partial deed of the bankrupt be set aside, there is no foundation upon which the receiver of the goods can stand, in opposition to the pursuer, who has done legal diligence. The goods must be understood to remain *in bonis* of the bankrupt, subject to such diligence as has been led against them.

See Session-papers in Advocates' Library.

No 229.

1743. February 9.

CREDITORS OF HAMILTON against HENRY.

THIS act respects only preferences granted to *creditors of the bankrupt*.

See The particulars No 173. p. 1092.

1750. November 9.

THE EARL OF HOPETOUN, and other Creditors of JOHNSTON, against NISBET of Dirleton, and INNES.

No 230.

A case, in which is admirably stated, the construction of the act 1696, in general; and in particular with regard to the *criteria* of bankruptcy.

ALEXANDER INNES being creditor to James Johnston in L. 159 Sterling by bill, used diligence against him by horning and caption in June 1746; and Johnston being unable to pay, gave an heritable bond of corroboration, on the 17th July 1746, upon his houses in Edinburgh, upon which infestment was taken, 4th December 1746.

William Nisbet of Dirleton, being creditor to the said Johnston in L. 163 Sterling by bill, used horning and caption thereon, and imprisoned Johnston in the tolbooth of Edinburgh upon the 16th August 1746; but he having agreed to grant heritable bond to Dirleton on the said houses in Edinburgh, he was liberated upon the 20th or 21st of August, and immediately thereafter granted the heritable bond, whereupon infestment was taken on the said 4th December 1746. This heritable bond bore to be in corroboration of the debt and diligence, and by it Johnston became bound to pay the debt against the 20th September 1746. And it further bore this special *proviso*, That the granting the said security should not hinder Dirleton from using the foresaid diligence by horning and caption against Johnston, between and the said 20th of September, or at any time thereafter.

These securities remained a secret to the Earl of Hopetoun, who was a considerable creditor, till the infestments were taken; at which he being alarmed, certain treaties ensued; which proving ineffectual, the Earl, for himself, and others

who had conveyed their debts to him, brought a reduction in November 1748 of the said heritable bonds, upon the statute 1696.

And as the diligence by horning and caption, and the imprisonment, were instructed, the Ordinary, to whom it was remitted to discuss the reasons of reduction, 'Allowed the pursuers to prove the insolvency;' and accordingly Johnston's debts were proved to amount to about L. 1300 Sterling, and his only visible estate, the said houses in Edinburgh, to be worth between L. 700 or L. 800 Sterling, and no more.

When this proof came to be advised, the cause was put off for some days, that the lawyers might inquire, How the fact stood in the Lady Rachan's case, determined 9th February 1743, No. 173. p. 1092, when it appeared, that, in that case, the reason of reduction had been repelled on this ground, 'that the debt, upon which the imprisonment had proceeded, being paid and discharged, and so the person not under caption at the time the deed quarrelled was granted, the case did not fall under the act of Parliament; the Court being then of opinion, that, in order to found the reduction upon the statute, the three requisites of bankruptcy, diligence by horning and caption, insolvency and imprisonment, must all concur at the time of granting the deed.'

And, upon the same principle, as these requisites did not concur in the present case when the deeds quarrelled were granted, the Lords, upon the 10th July 1750, by plurality of voices, 'Repelled the reasons of reduction, and found that 'the writs called for were not reducible upon the act 1696,' notwithstanding of its having been observed by the minority, that, even according to the reasoning in the case of Lady Rachan, Innes's security in this case fell under the act of Parliament, as having been granted within 60 days before the bankruptcy, whatever might be said as to Dirleton, whose security was granted after the debtor was liberated.

Against this interlocutor the pursuers reclaimed; and, in their petition, informed the Court, for the first time, of the above recited *proviso* in Dirleton's heritable bond, whereby, notwithstanding of the bond of corroboration, liberty was reserved to use the diligence of horning and caption, which distinguished the case from that of the Lady Rachan, where the debt had been paid and discharged when the deed quarrelled was granted.

The Lords altered their former interlocutor, and found, 'That both the heritable bonds were reducible upon the act 1696, and reduced the same accordingly;' the effect of which was no other than to bring in the pursuers and defenders *parsi passu*; as the pursuers were no otherways prejudiced, than by the preference of the defenders.

The Lady Rachan's case had too much regard paid to it at pronouncing the former interlocutor. As it was but a single decision, or rather a single interlocutor, never brought under review, so the point thereby determined was not necessary to the decision of the cause, as the security which the lady had granted was given by her as cautioner for a third party, which, at the same time, was found not to fall under the statute.

No 230.

But what is more material, the plurality came now to think it a wrong judgment: For, in the first place, however the doctrine supposed in that judgment, that all the three requisites must concur at the time when the deed quarrelled is granted, may be at least intelligible in the case of actual imprisonment, it is really not intelligible in other cases, particularly in the transient act of forcibly defending. But the substantial argument against that judgment was this, That the act of Parliament was intended to fix the bankruptcy at a precise period, namely, the imprisonment. A man may for many years be under horning and caption, and he may, during the same period, be also insolvent, but the statute does not proceed upon these to declare him notour bankrupt. But when to these any of the other alternatives are superadded; which are imprisonment, without distinction whether it last for an hour or an year; retiring to a sanctuary, also without distinction how long he continues in it; forcibly defending, suppose it to be but one act; this fixes the party to be a notour bankrupt from that moment. Nor can the statute otherways admit of a sound meaning, when it is not conceivable how otherways the sixty days before or after the bankruptcy can be computed, than by supposing the bankruptcy fixed to a precise point: The three requisites must once concur; but, if they once concur, he must for ever be held bankrupt, *quoad* all and each of his creditors, who were such at the period fixed by the statute for his bankruptcy; and no after incident, by the creditors, at whose instance he was imprisoned, liberating him from prison, or even discharging the debt, can deprive them of the right of reduction competent to them by the statute: And were not the statute to be so understood, the creditor using diligence would have the sole power over the bankrupt; and by consenting to his liberation, or discharging his diligence, could put an end to the right of other creditors, contrary to the very intention of the statute.

And whereas it had been argued in the case of Lady Rachan, that it were absurd to suppose, that one who had been once bankrupt, and had thereafter acquired an opulent estate, should nevertheless be supposed to continue all the while bankrupt; and that all rights in that time granted by him should be reducible as granted by a bankrupt; it was answered, that there was no absurdity in it; for the statute makes no provision for creditors that become such after the bankruptcy; and if they neglect to obtain payment of their debts while their debtor continues to be in good circumstances, they have themselves to blame.

It has only been omitted to observe, that, in the present case, some of the Lords were moved, with the hardship it would be, to make a creditor's own diligence defeat the security he had obtained by it, which was Dirleton's case, who, by his imprisoning the debtor, procured the heritable bond. But however such reasoning might be proper for the legislature, it was improper for a court of law: The law hath said, that if an insolvent debtor, under horning and caption, shall be imprisoned, all securities granted by him to his creditors shall be void, whether to the creditor at whose suit he is imprisoned, or to another; and the law must take its course. See No 176. p. 1098.