

1763. November 16.

ROBERT JAMIESON, Trustee for the Creditors of WEST DIGGES Comedian, against
COUTTS, BROTHERS, and COMPANY, and Others.

No 251.

A concert among the creditors at large of a comedian, who assigned a proportion of his emoluments, supported by the Court, in opposition to the separate measures of particular creditors.

WEST DIGGES comedian having contracted many debts, found himself under the necessity of leaving this country, in order to shun the diligence of his creditors.

By this retreat, the creditors were deprived of every prospect of recovering payment of their debts; and, being sensible that it was their interest to allure him back again, some of them resolved to offer him a *supersedere*, on the condition of his returning to this country, and conveying to a trustee, for the behoof of all his creditors, equally, a certain proportion of the weekly allowance he should receive from the managers of the theatre.

Mr Digges embraced this offer; and Robert Jamieson, writer to the signet, being pitched upon as trustee, the whole of the creditors whom Mr Digges was able to recollect were immediately informed of the intended measure, and approved of it; particularly, Mr David Beatt, who wrote a letter to Mr Jamieson from Newcastle, upon the 6th of October 1759, agreeing, that it was the only way left for the creditors to get payment of their debts.

In pursuance of this scheme, Mr Digges, upon the 2d of November 1759, executed a trust-deed, in which he made over to Mr Jamieson, as trustee for his creditors therein named, four guineas, weekly, out of his salary, and the whole profits of his second benefit, each winter-season, until his creditors should be completely paid; and lest any of them should have been omitted in the narrative of this assignment, it was declared, that it should be lawful to the trustee, with consent of the major part of the creditors, or any committee to be named by them, to assume any person not therein contained, to the benefit of the trust, who should afterwards appear to be entitled to the same.

A *supersedere* was, at the same time, made out, upon the narrative of the trust-right, superseding all diligence against Mr Digges's person and effects, so long as he should continue employed at the theatre of Edinburgh, and the sums assigned by him should be regularly paid to the trustee. This *supersedere* was signed, at different times, by many of the creditors; but Mr Beatt, notwithstanding the letter he had written to Mr Jamieson, approving of the measure, declined to put his name to it.

In January 1760, Mr Jamieson brought an action before the Sheriff against Messrs Beatt and Love, the managers of the theatre, for payment of the sums already due to Mr Digges, and which should thereafter fall due to him, at the rate of four guineas per week, and obtained a decret accordingly.

It happened, however, that Mr Digges, in the list he gave in of his creditors, had forgot four, to whom he was owing very trifling sums; and these four creditors having thought proper to strike out against the general measure, used arrests in the hands of the managers; and Mr Beatt having joined with them,

he assigned over his debt to a trustee, who thereupon used an arrestment in his, Mr Beatt's, own hands.

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In consequence of these arrestments, a multiple-poining was brought by Messrs Beatt and Love, which was conjoined with Mr Jamieson's process before the Sheriff.

In this process, Mr Jamieson *contended*, That the whole creditors ought to be ranked *pari passu*, in terms of the trust-right: The arresting creditors, on the other hand, *maintained*, That the trust-right was void or reducible upon the act 1696; and the Sheriff pronounced an interlocutor, finding it proved, that Mr Digges was bankrupt at the time of granting the trust-deed, and therefore preferring the arresting creditors, according to the priority of their diligence.

Mr Jamieson obtained an advocacy; and, besides *insisting* upon the common topics in favour of trust-deeds executed for the behoof of creditors in general, he further *pleaded*, as a circumstance of considerable weight, That the sum in dispute did not exist at the date of the trust-deed, and therefore was not subject to the diligence of creditors, and that it was created by means of the trust-deed and *supersedere*, and owed its being and existence thereto.

The Lord Auchinleck, Ordinary, after pronouncing some interlocutors, took the cause to report, and the following judgment was pronounced:

THE LORDS having considered the terms of the trust-disposition; the particular state of the funds assigned depending entirely on the creditors acting in concert; and David Beatt's letter; they prefer Mr Jamieson on the trust-right, he being accountable to the whole creditors of Digges, *pari passu*; and decern in the preference, and against the raisers of the multiple-poining accordingly.

For the trustee, *Walter Stewart*. For the arresting creditors, *David Rae* Clerk, *Honle*.

Fol. Dic. v. 3. p. 65. Fac. Col. No 120. p. 280.

A. Wight.

1764. November 14. MUDIE against DICKSON and MITCHELL.

STRAHAN failing in his circumstances, executed a trust-disposition to some of his creditors of all his subjects, for behoof of his whole creditors. The trustees took possession, and sold the subjects; but before proceeding to a division of the value, they were stopped by Elisabeth Mudie, the sole non-acceding creditor; who had charged Strahan with horning three days before the date of the trust-disposition, raised caption, and obtained several executions of search against him, all within 60 days of the date of the disposition; upon which, this creditor now pursued a reduction of that deed, and a furthcoming upon arrestments which she had used against the trustees, and fundry debtors of the common debtor.—It was chiefly *insisted* for the trustees, in bar of these actions, That the act 1696 was intended solely to prevent partial preferences, and not to invalidate general dispositions for

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A disposition *omnium bonorum*, found ineffectual to prevent diligence.