

1673. December 18.

CREDITORS OF TARPERSIE *against* the LAIRD OF KINFARNS.

No 29.  
A disposition,  
by a person  
who had been  
denounced  
and in the  
sanctuary, of  
his estate to  
his uncle, re-  
duced, to the  
effect, that  
the creditors  
should be  
ranked pro-  
portionally  
on the price.

THE Laird of Tarperfie having disposed his estate to Kinfauns his mother's brother, some of his creditors coming short of payment, pursue a reduction of the disposition upon the act of Parliament against bankrupts, as being done by a bankrupt to his uncle, a confident and conjunct person, without an onerous, at least without a necessary cause, whereby the bankrupt and his uncle did prefer such creditors as they pleased, and excluded the rest. The defender *alleged*, That, by the act of Parliament, a bankrupt was not hindered to pay his lawful creditors by himself, or any confident interposed person; for, by the express words of the act, *all payment made to the bankrupt's creditors by the interposed person is allowed; and is only liable for the remainder*; and albeit creditors who have done diligence, cannot be postponed by voluntar dispositions after their diligence, yet these creditors had done no diligence before the disposition, or before the defender's undertaking of the other creditors debt, which he offers to depone were undertaken by him at the time of the disposition. *2dly*, The law doth not determine what a bankrupt is; and albeit there were several hornings against Tarperfie, that will not conclude him bankrupt, or else all dispositions, though for most onerous causes, may be reduced, most of the disponers being at the horn for the time; and all the hornings that were then due are now paid. It was *answered* for the pursuers, That their reason of reduction is most relevant, for there are two members in the act of Parliament, one is in favours of creditors that had done diligence, but the other is by the first part of the act in favours of all anterior creditors, whether doing diligence or not, that bankrupts could not, even for an onerous cause, prefer one creditor to another, but either dispone for all their uses proportionally, or leave them to their legal diligence; and therefore the act bears, *not only that the dispositions of bankrupts must not only be for an onerous cause, but for a necessary cause*, and there is no necessity for a bankrupt to prefer one creditor to another: And that Tarperfie was bankrupt, it is most evidently evinced, on these grounds, that he was many times denounced, and at the horn, and that he was fugitive in the Abbey, where his disposition is dated, that his debts exceeded his estate, and that his uncle accepted of a disposition of all his estate.

THE LORDS found that the qualifications were sufficient to instruct, that the disponent was a notour bankrupt, and that the disposition by him to his uncle could not prefer one anterior creditor, though he had done no diligence, to another, and therefore reduced the disposition *ad hunc effectum*, that their creditors might have access to the estate, not to affect it simply for their whole sums, but to put them in that case as if the disposition had been for payment of the price proportionally to all the creditors, conform to their sums and diligences.

*Stair, v. 2. p. 243.*

\*\*\* Lord Gosford reports the same case thus :

No 29.

IN the action of reduction at the instance of the creditors of Tarperfie, upon the act of Parliament 1621, anent bankrupts, the LORDS, by their interlocutor, having affoizied Kinfawns, notwithstanding he was uncle to Tarperfie, and that the time of the disposition he had only undertaken to pay debts to Tarperfie's creditors, to whom he was no ways bound before that time, which was then thought very hard; the interlocutor being qualified, that, if the creditors should condescend that Tarperfie was a notour bankrupt the time of the disposition they should be farther heard: They did, of new, insist upon that ground; and condescended that he was a bankrupt, in so far as he was denounced rebel at the instance of many creditors, and letters of caption being taken out against him, he had fled from his own house and family, and taken sanctuary in the Abbey to be free of captions, and during his abode there did dispone his estate to Kinfawns. It was *answered* for Kinfawns, that he had satisfied all creditors who had done diligence by horning except one Coupar; and that having paid to other creditors the full worth of the land, as he had undertaken when he got the right, the act of Parliament could be no ground to reduce his right, as to other creditors who had not done the like diligence, he not being obliged to know them; and the act of Parliament doth only militate where rights are made to confident persons without an onerous cause, in prejudice of lawful creditors who had done diligence. It was *replied*, that Tarperfie the common debtor being a notorious bankrupt, as said is, Kinfawns being then his uncle, was *in pessima fide* to take a disposition from him of his estate, for no other end but to prefer creditors as he pleased, which being a fraudulent deed, was a good ground to reduce the same, albeit it did not directly fall within the act of Parliament; and it is not enough to allege that he had paid the true creditors the adequate price of the lands.

THE LORDS did find, that, as to Coupar, who had done diligence by horning, he could not be prejudged by payment to other creditors, but Kinfawns ought to count to him and put him in the like condition, as those other creditors whom he had satisfied, who had done diligence; so that the price of the whole estate being considered, how far it would satisfy Coupar, as well as all the rest of the creditors, he might have a just proportion answerable to his debt; but yet, that whatever had been truly paid, Kinfawns could not repeat it from those creditors, seeing it was his own fault. And likewise found, that Kinfawns counting according to the value of the estate, he was not liable to creditors in so far as the debt did exceed the same. But did (not) fully decide as to other creditors who had done no diligence, or had only base rights never clad with possession, before Kinfawn's public right, which seems to have been decided in a late case betwixt the Creditors of Douglas of Tilliequhillie and John Graham of Craigie.

Gosford, MS. p. 381.