

1757. *November 16.*ROBERT SYM, Trustee for JACKSON'S CREDITORS, *against* ALEXANDER SIMSON.

No 248.

Creditors having carried away by diligence great part of a bankrupt's effects; at a meeting of them all but one, he executed a disposition of the remainder to a trustee for their behoof, according to their diligence. The single creditor took separate measures; found ineffectual.

PATRICK and JAMES JACKSONS having become bankrupt, and their creditors having, upon different diligences, carried off the greatest part of their effects, the JACKSONS, at a general meeting of almost all their creditors, except Alexander SIMSON, executed a disposition of the remainder of their effects to Robert Sym, as trustee for all their creditors. The disposition was simple, and unqualified; reserved the several rights and preferences of the creditors; enumerated them all; referred to a signed inventory of the debtor's effects; and contained none but the most common and ordinary clauses necessary for its receiving execution.

In consequence of this disposition, the creditors stopped their diligences.

Two months after, Alexander SIMSON, who had not used any diligence before, arrested in the hands of Robert Sym, for a debt due to him by the JACKSONS. The Sheriff decerned in the furthcoming; Robert Sym advocated the cause.

SIMSON *pleaded*, in the advocacy, That a disposition *omnium bonorum* by a bankrupt, could not stop the diligence of creditors.

Sym made *answer* upon the common argument made use of in support of such dispositions. And, *2do*, That the case in hand was more favourable than the common case of such general dispositions; for that it was only a conveyance of the remaining part of the bankrupt's estate, after the greatest part of it had been torn away by diligence; and that, even of it, the division had, before the meeting of the creditors, been already fixed by the diligences which the creditors had by that time used, in which those only who had diligences had an interest, and in which SIMSON had no interest, it not being denied, that if the other creditors had gone on in their diligences, without using the trust-disposition, there would not have been left any thing for him to have drawn.

'THE LORDS affoizied Robert Sym.'

For Sym, *J. Dalrymple, Geo. Brown.*

For SIMSON, *Arch. Murray, Lockhart.*

J. Dalrymple.

Fol. Dic. v. 3. p. 64. Fac. Col. No 59. p. 97.

1759. *July 25.*

JOHN FORBES-LEITH, and Others, CREDITORS of WILLIAM MOWAT and COMPANY, *against* ALEXANDER LIVINGSTON, and Others, TRUSTEES for the CREDITORS of the said WILLIAM MOWAT and COMPANY.

No 249.

Found to be no sufficient objection, to the proceeding of an adjudication against a debtor's e-

WILLIAM MOWAT and COMPANY became bankrupt. In December 1756 they called a meeting of their creditors, at which John Forbes-Leith was present; at this meeting they made a full discovery of the whole state of their affairs and funds; and agreed, at the desire of the creditors, to make a general surrender of

their whole effects to certain trustees named and chosen by the creditors themselves.

In consequence of this agreement, proper deeds of conveyance were executed by the Company; and infestment was taken in name of the trustees, for completing their right to such of the Company's subjects as were heritable. A backbond or declaration of trust was executed by the trustees, and recorded at Aberdeen, declaring, That the produce of the funds was to be divided among the whole creditors proportionally.

John Forbes-Leith, and some others of the creditors, brought actions of adjudication for attaching the heritable subjects of the bankrupts.

The trustees named by the creditors opposed these adjudications; for that, *imo*, These diligences were intended to create an unequal preference in favour of particular creditors, contrary to the equitable intention of the trust-right; and that, besides, the adjudgers could not even attain their own end; for that all the other creditors, by adjudging within year and day, would be entitled to an equal preference with them; so that the only effect of carrying on this sort of diligence would be, to involve every creditor in a great unnecessary expence, so as to increase the loss by this bankruptcy.

2do, That, in point of law, the subjects could not be adjudged as the property of Mowat and Company, after the Company was divested of them by the deed in favour of the trustees, completed by infestment: That these deeds being granted for a fair and equitable purpose, and for the behoof of the whole creditors, equally and proportionally, could not be set aside by any particular creditor, but must effectually put a stop to the attachment intended by the processes of adjudication. At any rate, the right of the trustees must be effectual till set aside by a proper process of reduction.

Answered, imo, By the law of Scotland, a certain form of legal execution is established, by which a creditor can attach the effects of his debtor. This form he is entitled to follow, and cannot be obstructed, either by the debtor himself, or by other creditors, unless payment be offered. He is not obliged to explain his motives for following such a course; nor ought the courts of law to listen to averments, that he is acting against his real interest; for he is entitled to judge for himself. In this case, the creditors who have brought actions of adjudication, think they have good reasons for disapproving of the execution of the trust-right in question; and they have therefore chosen to follow the legal method of attaching their debtor's effects.

2do, A bankrupt cannot, by the law of this country, execute any deed after his insolvency, by which the rights of his creditors can be affected, or any restraint put upon them as to the form of attaching his effects. Dispositions by bankrupts in favour of their whole creditors are authorized by no statute; and if they were to be supported by the courts of law, it would give a power to bankrupts which might be attended with very bad consequences: For these trustees might connive with the bankrupt, and spin out the execution of the trust for

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state, that he had previously granted a disposition *omnium bonorum*, in favour of a trustee, for his whole creditors.

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ages. Nor is any form of process to be found in our law-books, for compelling such trustees to an immediate execution, or for removing them if they act improperly. Nor is the legal method of attaching the heritable subjects of a bankrupt either unequal or grievous: The law has taken sufficient care, that no creditor can obtain a partial preference by adjudication, since all who adjudge within year and day of the first effectual adjudication have an equal right. The expence of carrying on such judicial proceedings against the estate of a bankrupt, is no doubt considerable; but the execution of a trust-right is also very expensive; and if there be a difference of expence, which often is not the case, that difference is fully compensated by the advantage of having every thing conducted under the immediate inspection of the supreme court; and by the advantage which the creditors have, of bringing matters, if they incline, to a more certain, immediate, and fair execution. The right in question, in favour of the trustees, is void and null, and may be set aside by exception of reply, without the necessity of a reduction.

'THE LORDS decerned in the adjudication; and remitted to the several Lord Ordinaries before whom other adjudications against the same defenders were depending, to decern therein.' See No 12. p. 92.

A.G. Rae, Miller.

Alt. Lockhart.

Clerk, Justice.

Fol. Dic. v. 3. p. 64. Fac. Col. 193. p. 345.

W. Johnston.

1762. February 18.

WILLIAM WILSON and The CREDITORS of ROBERT BAILLIE, *against*,
NEIL M'VICAR.

No 250.

A disposition, although containing extraordinary powers and conditions, sustained to the effect of giving the creditors at large right to the funds, and preventing the separate diligence of an individual creditor. See the note.

ROBERT BAILLIE merchant in Edinburgh having become bankrupt, a very numerous meeting of his creditors was held, who resolved to concur in joint measures.

At another general meeting of his creditors, Robert Baillie executed a general disposition of all his effects, heritable and moveable, containing a special assignation of all the different debts due to him, in favour of a trustee, for behoof of all his creditors. In consequence of which, William Wilson, who was the trustee named, entered to the possession of the subject.

After this, Neil M'Vicar, one of Robert Baillie's creditors, who had not acceded to joint measures, nor to the trust-disposition, laid on an arrestment in the hands of the trustee; upon which a competition ensued betwixt him and the acceding creditors.

Objected for Neil M'Vicar: The trust-disposition contains sundry extraordinary powers: The Court have often found dispositions by a bankrupt to a trustee, for behoof of all his creditors, insufficient to interpel the diligence of dissenting creditors.