

At advising, the quality relating to the terms and condition of the bargain, was found to be intrinsic; but the pursuer having repeated a declarator of bankrupt upon the 5th act, Parliament 1696, 'THE LORDS sustained the declarator.'

No 193.

The defenders reclaimed by a bill, representing, that the said act 1696 did indeed annul voluntary dispositions, assignations, and other deeds made and granted by bankrupts at or after their becoming bankrupt, or 60 days before; in favour of creditors, either for satisfaction or security in preference to other creditors; but that act did not concern the defender's case, who had received goods or merchandice *de manu in manum* in the way of commerce; and that the word *deed*, in the act of Parliament, was only to be understood of writings, in the common meaning and acceptation of the word; otherwise the words of the act of Parliament would not be congruous, which bears dispositions, assignations, or other deeds made and granted, which words, *deeds made and granted*, can only be interpreted *writings*.

It was *answered*: Clauses in an act of Parliament are to be interpreted according to the reason and meaning thereof, and not captiously by the words. The reason is, that frauds are still frequent, notwithstanding of former laws against fraudulent alienations; and therefore there is by that law very great extension made; and former laws, especially the act of Parliament 1621, expelled all alienations against the same to be null; and albeit *deeds* be frequently understood of *writs*, yet alienation of moveables and merchandice, by delivering *de manu in manum*, are also *deeds* of the bankrupt, and falling under the reason of the law; for in this case the common debtor *in meditatione fugæ* disposes of merchandice to a great value, for satisfying such creditors as he favoured, to the manifest defraud of others; and in the preceding act, regulating deeds on death-bed, there is no question that alienation of heirship, as jewels, or other valuable moveables on death-bed, are regulated by that act, though no writ be interposed.

'THE LORDS adhered to their former interlocutor.'

*Fol. Dic. v. 1. p. 83. Dalrymple, No 132. p. 184.*

1717. January 1. BRUGH of Tinnmouth against ALEXANDER GRAY.

SIR DAVID THOIRS having disposed some lands in Leith in trust to Sir Robert Forbes; and he, with consent of Sir David, having sold to Alexander Gray part of the said lands, Mr Burgh, one of Sir David's creditors, denounces and registers him at the horn; and after his decease in the Abbey, constitutes the debt against his heirs, and thereupon leads adjudication of the said lands, and of Sir Robert's back-bond, and charges the superior: But, coming to insist for mails and duties, Gray compares, and craves preference upon his said disposition, which was granted, after Burgh's diligence by horning; but, prior to his adjudication; the question was, Whether a voluntary disposition for a price paid, and not an anterior debt, fell under the acts 1621 and 1696?

No 194.

A voluntary disposition for a price paid, and not for anterior debts, falls under neither of the acts of Parliament 1621 or 1696.

No 194.

It was *alleged* for David Burgh, *imo*, As to the act 1621, that that law, in the latter clause thereof founded on, seemed to have a particular regard to the diligence of creditors, deeming all alienations made in prejudice thereof fraudulent, without distinction; and therefore reducible only to the extent of the debts, for which the creditor's prior diligence was deduced; and that there was a great difference betwixt that clause and the former one of the same; for by the former, deeds are only to be reduced, where the fraud of the receiver concurs; whereas, in the latter, all deeds, without distinction, are declared reducible upon the single ground of their being prejudicial to prior lawful diligence.

*2do*, Though the first clause of that law provides in favour of *bona fide* purchasers from the interposed person, yet, in the latter clause, no such provision is repeated; and therefore conveyances made by dyvors in prejudice of creditors, are affectable with the dyvor's debts, though passing *bona fide* through many hands; which is the opinion of Sir George Mackenzie in his treatise on the said clause: But this clause, says he, annuls not these deeds upon any personal account, but because they are contrary to diligence done by a lawful creditor; besides, that if a purchaser *bona fide* from a co-creditor, preferred contrary to the meaning of the act, should be burdened with the prior diligence of another creditor; it were ridiculous to suppose, that a purchaser from the dyvor himself, should not be liable to the prior diligence of a creditor, merely because that purchaser was not a creditor.

*3tio*, Though it is true that the law, in this clause, had more particularly in its view, alienations made in favours of co-creditors, as being the most common case; yet it has left the dispositive words general and comprehensive touching 'all rights made to any person,' which are the very words made use of; and the fraud would be much greater if the dyvor were allowed to sell lands in prejudice of creditors diligence, than if he were allowed only to prefer one creditor to another; since, in the last case, the extinguishing one creditor's debt would leave the remaining subject affectable by others.

*Answered* for Gray, *imo*, That the act 1621 plainly concerned either gratuitous deeds in favour of conjunct persons, or rights granted in security or payment of prior creditors, in prejudice of the inchoate diligence of competing co-creditors; but there is nothing in that law which precludes purchasing for a price paid, even from debtors under diligence by horning, which the purchaser is not concerned to notice or enquire after. *2do*, The law is thus clearly explained by Lord Stair, Inst. tit. Repar. § 15. when speaking of the last clause of the act 1621: Neither, says he, will this clause of the statute annul dispositions made to buyers for a just price paid, where the price was not an anterior debt due to the buyer; and so also was expressly decided, Nielson against Ross, No 134. p. 1045.; and also inferred from the decision, Bathgate against Bowden, No 140. p. 1049. where the interlocutor is, The Lords found the reason of reduction relevant, that after horning used by Bathgate against the common debtor, the disposition was made by him to Bowden, not for a price paid by way of commerce, but for satisfying a

prior debt due to Bowden; *ergo*, if it had been for a price paid by way of commerce, it would not have been reduced; neither, in the present case, does the homing used signify any thing; that being no proper diligence to interrupt disposal by sale, which only can be done by inhibition. *Lastly*, As the above decisions are *in terminis*, so has it never as yet been otherways found.

*Replied* for Brugh: That the reason why no decisions have occurred in the matter may be, that purchasers have been cautious how they bought from bankrupts, seeing the law is so clear against them; yet one there is, 23d February 1709, Hamilton against Sir James Campbell, where the voluntary assignation of this same Sir David Thoires is reduced upon the act 1621, (No 150. p. 1059.)

*Duplied* for Gray: That the decision did not meet; for there both parties were creditors to Sir David, and the assignation was for no price instantly paid by Hamilton, but for payment of a prior debt, and so fell under the last clause of the act of Parliament.

As to the act 1696, it was *alleged* for Gray, That it was plain, by the terms thereof, that it only concerned creditors.

*Answered* for Brugh: That he did not concern himself with the import of that particular clause in the act 1696, touching deeds done sixty days before bankruptcy, but that he founded on the general scope of the act to prevent such fraudulent alienations, and especially on the first clause thereof; which provides, that an insolvent debtor absconding, imprisoned, &c. shall be reputed notour bankrupt from the time of his imprisonment, &c.; and therefore no deed done by him can subsist in prejudice of his creditors; and this conclusion is more founded on the common principles of law and reason, than on this act, which seems to have taken that point for granted.

'THE LORDS preferred Alexander Gray, as having purchased *bona fide* for a just price, and not for satisfaction or security of former debts.'

Act. Boswell.

Alt. Dun. Forbes.

Clerk, M. Kenzie.

Fol. Dic. v. 1. p. 83. Bruce, No 45. p. 60.

1728. February. CREDITORS of GRATNEY, Competing.

AN apparent heir having granted infeftments of annualrent, thereafter granted a procuratory to serve himself heir, that his infeftment might accrefce to the annualrent rights. In a competition betwixt these annualrents, and posterior adjudgers, it was *objected* against the procuratory, That it was granted while the common debtor was a notour bankrupt, and therefore null by the act 1696; the design of which act is to annul every partial preference granted by a bankrupt, *directly* or *indirectly*, in favour of creditors.—It was *answered*, That the act mentions only *alienations* made by the bankrupt, and reaches not every deed, which

No 195.

Whether deeds are challengeable where nothing is given away, but yet a partial preference effectuated.