APPENDIX.

PART I.

BANKRUPT.

1770. *July* 27.

MESSRS PETERS, BOGLE, and MARSHALL, arresting Creditors of JAMES DUNLOP, late Merchant in Glasgow, *against* MESSRS. SPEIRS, BLACKBURN, and SYME, Trustees of said JAMES DUNLOP.

No. 1.
The enactment of the statute 1696, *c.* 5. not effectual *extra territorium*. A trust-deed by a bankrupt for behoof of his creditors, though reduced at home as falling under the statute 1696, found to be effectual, and a valid title in favour of the trustees, to apprehend the possession of the effects of the bankrupt situate in a foreign country—and in a competition between the said trustees and certain non-acceding

JAMES DUNLOP having got into involved circumstances, upon the 17th November 1763 executed a trust-deed in common form, conveying his whole effects to Messrs. Speirs, Blackburn, and Syme, as trustees for behoof of himself and his creditors. Very soon after executing this deed, and within 60 days of its date, Dunlop was rendered bankrupt in terms of the act 1696, in consequence of diligence raised by some of the acceding creditors to the trust, and which was put in execution against him by the direction of the trustees.

The validity of the trust-deed was called in question by Thomas and Alexander Peters, non-acceding creditors of Dunlop, who had arrested some debenture duties in the hands of the collector. In an action of reduction, accordingly, founded upon the acts 1621 and 1696, the following judgment was given: "In respect it is not denied that the conveyance to the trustees was "granted after James Dunlop became bankrupt, for the behoof of his creditors, "and that Messrs. Peters are neither parties nor have acceded to it, they are "not thereby barred from the benefit of their diligence, therefore prefers the "Messrs. Peters upon their arrestment."

This judgment was affirmed by the House of Lords.

Some time after executing the trust, Dunlop had gone to Virginia, where the greatest part of his effects were situate; and as he collected these, he from time to time made remittances to his trustees in Scotland.

Messrs. Peters, Bogle, and Marshall, were creditors to Dunlop in upwards of £2000 Sterling; but they never acceded to the trust, being resolved to operate their payment by the diligence of the law. Having got information therefore

No. 1. creditors who had arrested the effects of the bankrupt sent home from the foreign country, both in the hands of the trustees and the master o the ship, the trustees preferred.

of Dunlop's having shipped 40 hogsheads of tobacco and some staves on board the *Grizie*, *Crawford* master, they raised diligence on their ground of debt; and on the 1st October 1768, the vessel having arrived at Port Glasgow, and the cargo on board, they used arrestments in the hands of Captain Crawford, of all goods, gear, &c. in his custody belonging to James Dunlop; and, upon the 7th of October, they used the like arrestments in the hands of the trustees.

The pursuers followed out their diligence by a process before the Admiral; and after a good deal of procedure, in which they were opposed by the trustees, the Admiral decerned in their favour; but the trustees having advocated, the cause was argued before the Court, first in informations, thereafter in a hearing and memorials.

Pleaded for the pursuers:

1*mo*, It must be acknowledged to be the established law of this country, that a trust-deed, such as the present, fell within the meaning of the statute 1696: this had been found, by repeated decisions, and had been recently decided in regard to the very trust-deed in question. Holding this deed therefore void, in a competition at least with non-acceding creditors, the question came to be, Whether it could be understood to have greater validity elsewhere, or could be held an effectual conveyance to the trustees of effects in Virginia or any other foreign country?

The only footing upon which the least effect would have been given to this deed, was the general rule established in almost all nations, that a deed, though null by the law of the country where it was put in suit, shall be deemed effectual, provided it was agreeable to the law of the country where it was executed. Upon this principle accordingly, if execution was sought upon this deed in Virginia, the question would have been, Whether it was an effectual deed by the law of Scotland where it was executed? And as the answer to that must have been, that it was not, being executed in direct contravention of a positive statute, it was clear that the courts there could not give it any support.

According to the *comitas* observed by the courts of one country to the laws of another, the whole law of that country, as it affected the particular case, must be taken into consideration. Thus, though it had been the practice of this Court to sustain an English assignment as a good conveyance, yet if that deed was liable to any valid objection by the law of England, or had been set aside by the judgment of a court, neither would it here receive any support. And whenever a foreign deed was founded on as agreeable to the *lex loci contractus*, any defence and exception established by the law of that country must also be received against it. Dirleton, *voce* PROCESS *contra* STRANGERS, Stewart's Ans. Bankton, B. 1. T. 1. § 78. Upon these principles the Court decided in the case, 6th July 1758, Sym, trustee for Jackson's creditors, *contra* Thomson, No. 201. p. 1137. See also Burrow Reports, 13th Nov. 1760, Robertson *contra* Bland.

As the trust-deed therefore could be of no avail in America as to effects in that country, it was clear, that as the trustees could have no legal right to possess themselves of Dunlop's effects, they could have as little to maintain that possession after the effects had been legally attached by non-acceding creditors. And as, by the same rule, and according to the statute 1696, the trustees could acquire no legal title to possess the effects in this country, they were therefore, when competing with non-acceding creditors, to be considered in no other light than as extraneous persons, into whose hands the bankrupt had committed a part of his effects, and who were under an obligation to make them forthcoming to those creditors who had first affected them by legal diligence. No. 1.

2do, The plea of retention maintained by the trustees had no legal foundation. For in what way was the possession, the ground of that plea, obtained? It was not pretended that the trustees had taken any steps towards attaching Dunlop's effects, or transferring the property to themselves by legal execution in Virginia; on the contrary, the only possession they had obtained was in consequence of and under the authority of the trust-right; and as that deed fell under the act 1696, and was thereby rendered null and void, it followed as a necessary consequence, that every thing that had proceeded thereon fell, in like manner, to be set aside or rendered of no avail. If this plea of retention were listened to, there would be an end to the enactment of the statute. An assignment might be granted to a favourite, who would then plead retention; but the Court had uniformly reprobated that idea, and had always obliged the favourite creditor to make the whole forthcoming without being allowed to retain any thing for his own debt. 2d Dec. 1704, Mann *contra* Reid, No. 226. p. 1183. 19th July 1728, Smith *contra* Taylor, No. 228. p. 1189. 27th Jan. 1715, Forbes of Ballogy, No. 193. p. 1124.

3tio, It was a mistake to say that the trustees had created the effects in question, and that they were on that account entitled to a preference. These effects were admitted to be part of Dunlop's funds recovered in Virginia; they were not created by the trust-right, for they existed before the trust-right had a being; and they did not depend upon that deed, as the fund would not have been reduced one farthing though that deed had never existed. If the trustees had not interfered, the pursuers might have attached these effects in Virginia by the proper writs of execution; but as, instead of allowing that course to be followed, they had brought the funds to this country, which was all they had done, the necessary consequence must be to render them attachable by the law of Scotland instead of that of Virginia.

Pleaded for the defenders:

Although they were not now to controvert the general question respecting trust-rights, as determined by recent decisions, they notwithstanding denied the proposition maintained by the pursuers, that trust-dispositions by a bankrupt, in favour of his creditors, were null, void, or unlawful deeds. It had indeed been found that they were liable to exception at the instance of creditors com-

No. 1. peting upon diligence; but it had never been doubted that they were deeds of a fair nature, upon which action would be sustained in courts of law, and which would afford a legal title to trustees to pursue for and apprehend the effects of a bankrupt. This was all the defenders had occasion to ask in the present case; and taking the proposition for granted, they maintained their right to the effects in question upon the following grounds.

1*mo*, It was a general principle of law, that in judging of the effects of foreign deeds, there was no inconsistency betwixt shewing a *comitas* to a foreign deed, so far as concerned the *solemnia* and formalities of execution, and yet paying no regard to what would have been the legal effects of that deed in the country where it was executed. Taking this distinction into consideration, it was unquestionable that this trust-deed, even according to the law of Scotland, was in point of form unexceptionable; and that it could not fail to be received as an effectual conveyance in Virginia. So far as to the *comitas* parties were at one; and the only point where they differed was, when it was maintained that the same *comitas* was to sustain the exceptions competent against the deed by the law of Scotland. This was the radical proposition; and upon the established principle of law, that effects must be disposed of according to the law of the country where they were locally placed, it followed, that if the present question had occurred betwixt the parties in Virginia, no regard could have been paid to the enactments of the statute 1696, but the competition would have been determined according to the law of that country.

The prohibitions of the statute 1696 were altogether the enactment of the Scots legislature; they could not operate *extra territoriam statuentis*, and could therefore have no effect in regulating the distribution of American funds. These effects had been recovered by the trustees under a right which must have been acknowledged by the laws of Virginia; and hence it was contradictory and absurd to say that these effects, when brought into this country, in consequence of these foreign proceedings, could be subjected to the enactments of the Scots Legislature, which had no hold over them, either at the time of the bankruptcy, the execution of the trust, or at the period when they were recovered, 28th June 1666, Macmorland *contra* Melvine, No. 14. p. 4447. 27th Jan. 1710, Savage *contra* Craig, No. 76. p. 4530. 12th July 1739, Kinloch *contra* Fullerton, No. 22. p. 4456, 22d June 1708, Earl of Selkirk *contra* Gray, No. 19. p. 4453; 1st Feb. 1611, Purves *contra* Chisholm, No. 46. p. 4494; 19th Jan. 1665, Shaw *contra* Lewis, No. 47. p. 4494. As to the case, 6th July 1758, Jackson's trustees *contra* Thomson, No. 201. p. 1137; it was a collusive and clandestine transaction betwixt the bankrupt and a favourite creditor, and was liable to reduction upon fraud at common law.

2*do*, It was an undisputed fact that the pursuers had done no diligence in Virginia; and it was equally certain that the diligence now founded on had been used only in consequence of the effects having been brought to this country by the trustees under the trust-right. Now as it could not be said that

there was any other objection to the trust, but that it deprived creditors of their legal right of using diligence, it was impossible to apply that objection in the present instance, when the opportunity of using the diligence upon which the competition was maintained was the very-trust right the pursuers now reprobated. This was an invincible objection to the diligence the pursuers founded on; and examples had occurred, where the right of creditors to use diligence had, when pushed too far, and adverse to justice, been controlled by the Court. No. 4.

3tio, By the trust-conveyance, the trustees were invested with a right not only *qua* trustees but as *creditors*; so that they were entitled to act either in the one capacity or the other. Whenever therefore they had recovered their debtor's effects in virtue of a legal and valid title of possession, they were entitled as creditors to *retain* those effects for payment of their debts, in a competition at all events with other creditors, neither more just nor more onerous, attempting to wrest them out of their hands. If they had made a dividend in America of the funds recovered there, their right of *retention* could not have been challenged; and it did not occur that the principle could be altered, when the effects, instead of being brought home by the respective creditors as their own, were brought home *in cumulo* by the trustees.

The Judges were all of opinion that the enactments of the statute 1696 could have no regard paid to them in a foreign country: That the trust disposition was therefore effectual in Virginia, and was a sufficient legal title for the trustees to apprehend the possession of the funds; and as they had thus got possession upon a fair and legal title, they were authorised to hold them in property for payment of their own debts, or for the purposes of the trust. The Court was much moved by the favourable circumstances in the situation and conduct of the trustees, and by the ungracious nature of the pursuers diligence.

The following judgment was pronounced: "Having advised the memorials "for the parties, and whole procedure, prefer the trustees of James Dunlop, "and remit accordingly."

Lord Ordinary, *Auchinleck.* For the Pursuers, *Lockhart, Macqueen, Blair.*
Clerk, *Kirkpatrick.* For the Defenders, *Adv. Montgomery, Sol. Dundas, Wight.*

R. H. *Fac. Coll. No. 37. p. 101.*

1770. *December* 18.

ANDREW JOHNSTON and BEATRIX COLQUHOUN, *against* The TRUSTEES for the Creditors of MESSRS. FAIRHOLMS, Bankers in Edinburgh.

No. 5.
Trust-disposition by bankrupts to certain trustees for behoof of their

UPON the 26th of March and 3d April 1764, Adam and Thomas Fairholm granted a disposition of their whole estate, heritable and moveable, in favour of certain persons in trust for behoof of their creditors, with power to sell their whole subjects, recover the debts, and to divide the proceeds from time to time