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The Lords adhered to the Lord Ordinary's interlocutor, preferring the truftees.

A fecond petition was refufed without anfwers.

For Petitioner, *Alex. Garden, William Grant.* For Refpondents, *Alex. Hay.*

Fol. Dic. v. 1. *p.* 85. *Session Papers in Advocates' Library.*

1734. *July* 12.

Snee and Co. Merchants in London, and John Bogle, their factor, *against* The Trustees for the Creditors of Michael Anderson, Merchant in Edinburgh.

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Found, that no difpofition by a bankrupt can difable creditors from doing diligence.

A bankrupt having granted a difpofition of his whole effects, to certain truftees, for the behoof of all his creditors; in a reduction of it, upon the act 1696, the reafons were, that a bankrupt was difabled from granting fuch a right, tho' not directly in preference of one creditor to another, yet indirectly, by putting all upon an equal footing, the moft remifs with the moft vigilant. *2do,* The truftees were of the bankrupt's own naming, and his neareft relations; and thefe truftees invefted with moft unreafonable powers, fuch as, to adopt creditors or not at their pleafure; to divide the price of the effects among the creditors, without being liable to any check; being impowered to do fo as arbiters, and in that capacity to determine alfo the expences of management: Alfo it was declared, that they fhould not be made liable for omiffions: And *lastly,* That there fhould be a forfeiture upon the creditor, who fhould quarrel or impugn the right granted to thefe truftees, or who fhould ufe feparate diligence.—The Lords found the reafons of reduction relevant, and, at the fame time, laid hold of this opportunity to declare their fentiments againft all fuch difpofitions in general, and, in that view, caufed infert the following claufe in their interlocutor: *And further find, That no disposition by a bankrupt debtor can disable creditors from doing diligence.*

Fol. Dic. v. 1. *p.* 85.

*** The opinion upon the general point, expreffed in the above interlocutor, renders it immaterial what were the particular circumftances of the cafe. There were, however, fome not mentioned in the above report.

Bogle, factor for Snee and Co. had obtained from Anderfon a bond of corroboration of the debt due to his conftituents, upon which, and upon two bills due to Jeremy Lupton and Samuel Dawfon, he charged Anderfon with horning. He was proceeding to poind, when he was ftopt by Anderfon's truftees, as having right, by the difpofition in their favour, which was dated the day pofterior to Bogle's charge.

Bogle inftituted a reduction upon the fecond branch of the act 1621. He prevailed in fo far as regarded Lupton and Dawfon's bills; but it was pleaded by the truftees, that at the time Anderfon granted the bond of corroboration of Snee and Co's debt, he was bankrupt in terms of the act 1696, confequently the

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bond upon which was founded the title to pursue the reduction, was itself reducible.——The Lords found accordingly, and the reduction was abandoned.

Bogle then obtained a decree of constitution of the original ground of debt, and arrested in the hands of the disponees. In the furthcoming, the question of the effect of the disposition *omnium bonorum*, was brought forward.

In addition to the specialities of the case enumerated in the above report, it was likewise *objected*, That the debts due to the bankrupt were not specially assigned in the disposition, so as to be traced, or capable of intimation, consequently the creditors had no check upon the trustees, and no security to prevent the bankrupt from privately taking up the money.

The answer of the creditors, upon the general question, was similar to that urged in former cases, (*supra*). As to the specialties, they argued, that no trust-deed could be perfectly simple; that objectionable conditions were not challengeable on the act of 1696, whatever they might be on that of 1621. The grounds of challenge of such deeds are either in respect of undue preference, proceeding upon the act 1696, or on account of the injustice of the conditions imposed, proceeding upon the act 1621. The circumstance merely, that there are conditions, is no objection. They must be unjust to be objectionable. It was necessary for the bankrupt to name the trustees, in order to give form and effect to the deed. The trustees are not impowered to assume what creditors they please; they are only entitled to communicate the benefit of the deed, to creditors appearing within a certain time, though not named in the deed. The forfeiture, upon using diligence, is not reducible on the statute 1696, as it is applicable to all the creditors. If it be not strictly legal, it ought to be held *pro non scripto. Utile per inutile non vitiatur.* The clause relative to freedom from the consequences of omission, was necessary to induce trustees to accept: But there have been no omissions. As to the circumstance that the assignation is general; it refers to an inventory. The trustees rendered the assignation special, by inventorying and rouping the effects at the sight of a magistrate. A disposition *omnium bonorum* in favour of one creditor, in exclusion of another, is challengeable. Such a disposition for behoof of all the creditors is not so. It cannot be pretended there was simulation. Possession was not retained a moment.

For Snee & Co. *Jas. Ferguson.* For Anderson's Creditors, *Ro. Craigie, Jas. Graham.*

Session Papers in Advocates' Library.

1735. *January* 28. Mansfield *against* Brown and Stobs.

No 243.

A bankrupt had disponed to trustees in favour of his whole creditors. A creditor had previously executed a charge of horning.—This found sufficient to render the trust-deed ineffectual. *See* The particulars *voce* Legal Diligence.
See No 241. p. 1205.

Fol. Dic. v. 1. *p.* 85.