No 173.

And as to the other point, however ſtrange it may at firſt view appear, that one ſhould have power to prefer the creditor of another, who could not prefer his own, yet ſuch is the very letter of the ſtatute, that deeds are only reducible which are granted in favour of the granter's creditors. (Referred to in Section 8th of this Diviſion.

Fol. Dic. v. 3. *p.* 54. *Kilkerran,* (BANKRUPT.) *No* 3. *p.* 49.

1744. *November* 13.

SNODGRASS and HALDANE *againſt* The TRUSTEES of BEAT's CREDITORS.

No 174.
Found, that a bankrupt who was under act of warding, might effectually diſpone, in truſt for behoof of his whole creditors; altho' it was contended, that an inſolvent perſon had no title to deprive creditors of their right of obtaining preference by diligence. The act ſpecially requires, that the debtor be under *caption.* An act of warding is not equivalent.

DAVID BEAT, merchant in Edinburgh, being under diligence, diſponed all his effects to truſtees, for the uſe of his creditors, referring to a ſigned liſt of them, of the ſame date: And this diſpoſition was intimate to his principal debtors.

A full year after the date of the diſpoſition, John Snodgraſs and John Haldane, two of the creditors, arreſted; and a competition thereupon ariſing, the LORD ORDINARY, 27th July 1743, 'Repelled the objections to the diſpoſition in favours 'of the truſtees, that the perſons, ſums and ſubjects, were not ſpecially therein 'enumerated: And found that the hornings, act of warding, and other circum-'ſtances condeſcended on, did not bring the foreſaid diſpoſition under the de-'ſcription of the acts of Parliament 1621 and 1696: And therefore, and in re-'ſpect the intimations of the ſaid diſpoſition to the debtors of the ſaid David 'Beat, were prior to the arreſtments uſed by the ſaid John Snodgraſs and John 'Haldane, preferred the ſaid truſtees to the arreſters.'

Pleaded in a reclaiming bill for the arreſters: Notwithſtanding the ſpecious pretences, which frequently do not hold true in fact, of ſaving money to the creditors by diſpoſitions to truſtees, it would be very odd, if it were in the power of a bankrupt to diſappoint a vigilant creditor of all the methods the law has provided for his indemnity, and put him upon an equal footing with the moſt indolent. This would be more unjuſt, when one creditor has *parata executio,* which another has not; and therefore the firſt ought to be left to make out his own preference.

The objections to the diſpoſition, are, 1*mo,* It is no more than a factory; the goods are not diſponed *in ſolutum* of the creditors debts, but are to be levied by the truſtees, who are each to be liable only for their own intromiſſions: So that, according to what is pleaded, the diligence of the law is ſtopt, by the bankrupt's naming a factor on his own ſtate.

2*do,* In ſo far as it is ſaid to give a *jus pignoris* to the creditors, it is null for uncertainty; they being only mentioned generally; and though it refers to a liſt of the ſame date, the liſt produced might have been made up by the debtor at any time afterwards, having no witneſſes authenticating the ſubſcription.

Suppoſe him at the time to have been under no diligence, he was inſolvent, and could not give a partial preference to any, by equalling thoſe who had no *parata executio,* to thoſe who had it, and ſo fruſtrate the effect of the law.

No 174.

Answered for the truſtees: When a debtor becomes bankrupt, it is certainly better his effects be divided proportionally amongſt his creditors, than carried off by one or two. The whole intention of the law, and the very objection made by the arreſters, in ſo far as it is good, is directed againſt ſuch partial preference; for though an inſolvent debtor cannot eſtabliſh this in favours of one creditor, he can equally prefer them all; and even partial diſpoſitions have been ſet aſide only in ſo far as they were ſo, and the other creditors brought in *pari passu* with the diſponees; December 18. 1673, Creditors of Tarperſie againſt Kinfawns, No 29. p. 900.; January 18. 1678, Kinloch againſt Blair, No 14. p. 889.; and lately, February 25. 1737, Crammond againſt Bruce and Henry, No 20. p. 893. The diſpoſition cannot be looked upon as a factory; for the granter is thereby diveſted, and the property of his effects conveyed to the truſtees. And the other objection of uncertainty is no ſtronger; for ſuppoſing the liſt to have been made up *ex post facto*, of which there is no preſumption, a diſpoſition to truſtees for the behoof of creditors in general, would be an effectual deed, and the effects veſted in the truſtees. If there had been a preference given to ſuch as had *parata executio*, it would have been a much ſtronger objection; and no doubt others of the creditors had as ready execution as the complainers. *Lastly*, The diſpoſition is not *omnium bonorum;* for though it contains debts and ſums of money, it wants the clauſe, *Of all goods and gear whatsoever;* and for want of this clauſe, a partial diſpoſition was not reduced; — December 1728, Ducheſs of Buccleugh againſt Sir James Sinclair and Patrick Doull, No 19. p. 893. and much leſs ought this fair and equal one.

Pleaded, in the *second* place, for the arreſters:—The diſpoſition is reducible by the act 1696, as the granter had acts of warding taken out againſt him, which ought to be ſuſtained equivalent to caption, that being pitched on by the act of Parliament as ultimate diligence, and ſhewing why the debtor abſconds, the goal-mouth being then open for him. A town-officer can ſeize a man as effectually as a meſſenger; and it makes no difference, that a caption cannot be procured without a regiſtered denunciation; for the notoriety required by law is the debtor's declaring himſelf a bankrupt, by flying, &c. and the mentioning caption, does not exclude other ultimate diligences: However, if the Lords think caption abſolutely neceſſary to bring this diſpoſition under the ſtatute; yet, as the fraud is as notorious in the one caſe as the other; the circumſtance of the diligence that is here, ought to be of force to annul this diſpoſition, granted of purpoſe to enervate the effect of the law, and containing in reality no more than a factory; whatever might be the fate of a diſpoſition of a particular ſubject made to a particular perſon.

Answered: The act 1696 requires caption; and there is a great difference betwixt that and an act of warding, both as to the notoriety and effects thereof: And beſides, ſuch a diſpoſition as this made by a bankrupt, in terms of the ſtatute, was found not reducible; Competition of the Creditors of Mr David Watſon, Rem. Dec. v. 1. No 61. (*infra h. t.*) And though the contrary was found in the year 1724. John Snee againſt the Truſtees of Anderſon's Creditors, (*infra*

h. t.); yet as there were ſeveral partialities in that diſpoſition, though it is owned the general point was determined, the queſtion might deſerve to be reconſidered in a caſe free of theſe ſpecialties. No 174.

THE LORDS adhered.

Act *Ch. Areskine.* Alt. *Ferguson.* Clerk, *Gibson.*

Fol. Dic. v. 3. p. 53. *D. Falconer, v. 1. p. 4.*

1747. *June* 5.

THOMAS GRANT *againſt* NINIAN CUNINGHAM, Truſtee for the Incorporation of Cordiners in the Canongate.

No 175.
What circumſtances infer the bankruptcy of an Incorporation.

THE Incorporation of Cordiners in the Canongate having failed, a diſpoſition of their effects was by them made, referring, in the recital, to an act of the Incorporation, wherein was narrated certain propoſals of their creditors to them, by which they agreed, 'to renounce all claims to the quarterly payments or upſets 'of new members, or any action competent to them againſt the Incorporation 'in all time coming:' Upon the terms wherein ſet down, the Incorporation was willing to grant the diſpoſition underwritten; wherefore they diſponed their ſaid effects in truſt to Ninian Cuningham, clerk of the Canongate, and failing him, to certain other perſons in a ſucceſſive order, providing that the major part of their creditors were to have it in their power to oblige him to denude after two years, to any other perſon choſen by them; and he himſelf, after three years, was to have an option of continuing the execution of the truſt, or of denuding to the truſtee named next in ſucceſſion.

Thomas Grant, merchant in Edinburgh, one of their creditors, arreſted, ſubſequent to the diſpoſition, in the hands of their debtors, and purſued a reduction of the deed as fraudulent, being granted by a bankrupt, who could not in theſe circumſtances diſpoſe of his effects, to the excluſion of the diligence of creditors, 9th January 1696, John Smart againſt the Creditors of James Dryſdale, (*infra h. t.*) eſpecially as in this caſe the diſpoſition was partial, being only in favour of ſuch creditors as ſhould renounce all intereſt in the after-acquiſitions of the Incorporation, which no one was obliged to do; and whoever did not, was not entitled to the benefit thereof.

The managers of the Incorporation had been guilty of notorious fraud, in borrowing money, when they had long known their utter incapacity to pay; wherefore, upon the firſt breaking out of the bankruptcy they had abſconded, and ſome of them left the country out of apprehenſion of puniſhment, until ſuch as could be found were brought to examination by warrant of the Lords of Seſſion, which brought their caſe to a near reſemblance with that of a perſon who abſconded from a caption, and ſubjected the deed to a reduction by the ſanction of the ſtatute 1696.

Anſwered, The bankruptcy of the Incorporation was not owing to the preſent managers, but was old; and the diſpoſition fair, and to the benefit of the whole creditors; the like whereof had been frequently ſuſtained, and even partial ones