

b. 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.

A& 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.

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 disposed 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.

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

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 b. 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

No 175.

only reduced to the effect of bringing in the injured creditors equally with the favoured ones. The case was lately determined, in the competition of Beat's Creditors, No 174. p. 1095. where it was also found, that no alternatives could supply the requisites in the statute 1696, so as to make a deed reducible in virtue thereof. The reservations were trifles, to wit, seven shillings Scots, to be paid quarterly by each member for their poor, and the upsets of new members, of whom, since the breaking out of the insolvency to 4th February 1745, the time of drawing the information, there had been but one. Nevertheless, though mention was made, in the preamble, of the creditors propositions, these articles were not reserved in the disposition; nor was it made a condition of any creditor's having the benefit of it, that he should renounce them; but whoever pleased was at full liberty to affect them, notwithstanding the doing so would soon put an end to the Incorporation altogether, as there would never be another member.

Observed on the Bench, It did not import that there was no reservation in the disposition; for the deacons and other disponers could only make it, in terms of the act of corporation their warrant; that if this had been a deed by a single person, the granting it under these exceptions would have made it reducible; for a man must struggle through life, and subsist while the course of nature lasts, and in that time may acquire; but it was necessary to make the reservations in the case of an Incorporation, which otherwise would have been speedily dissolved.

THE LORDS preferred the disponee. See SOCIETY.

Act. Geddes.

Alt. W. Grant.

Clerk, Kirkpatrick.

D. Falconer, v. I. p. 239.

1750. November 9. and 22.

The EARL of HOPETON *against* NISBET of Dirleton, and INNES.

No 176.

A debtor was incarcerated, and afterwards liberated by consent of the creditor, to whom he granted an heritable bond of corroboration. After liberation, he continued to carry on business in his shop as before, but the bond reduced.

JAMES JOHNSTON, merchant in Edinburgh, being debtor to William Nisbet of Dirleton, was incarcerated at his instance, 16th August 1746; but being liberated by his consent, he, 21st August, granted an heritable bond of corroboration of the debt.

The Earl of Hopeton, another creditor, insisted in a reduction of this bond, as granted in security to one creditor in preference to others, by a notour bankrupt, in terms of the act 1696, after he was insolvent, under diligence, and in prison; and proved his insolvency.

Pleaded for the defender, The design of diligence is to compel payment or security; and if the obtaining this security has been the effect of his diligence, it would be a strange interpretation of the act of Parliament to render it null: When a person has been incarcerated, and craved to come out on the act of grace, it has been found, when only one creditor appeared, that the disposition ought to be him: And suspensions also have been past on assignations in security; and both these rights would have been reducible by what is here pleaded, if the person had proved insolvent, and other creditors appeared.