1725. *November* 17.

Competition the CREDITORS ASSIGNEES of Mr DAVID WATSON, with DAVID MUIRHEAD of Linhouſe.

No 238.
A diſpoſition by a bankrupt to his whole creditors, equally and proportionally, where no partial favour is done, but each preferred according to his diligence, not reducible either upon the act of 1621, or that of 1696.

MR DAVID WATSON having contracted great debts, did upon 2d May 1723, convey his whole effects in favour of his creditors, 'to be diſpoſed of by them 'or their truſtees, and the price to be applied towards the payment of their 'debts, equally and proportionally according to their ſeveral rights and diligen-'ces:' And particularly, he aſſigns in favour of his creditors, the ſum of 8000 merks, due to him by Mr William Violand, profeſſor of humanity in St Andrew's; and this aſſignation was duly intimated to Mr Violand by one of the creditors, as procurator for the reſt, upon the 6th of the ſame month. Mr Muirhead, one of the creditors, thinking to provide better for himſelf than was done by the aſſignation, did thereafter arreſt in the hands of the ſaid Mr Violand, upon the 13th of the ſaid month.

The caſe coming to be tried in a multiple-poinding, it was argued for the aſſignees, That the aſſignation being duly intimated, did fully denude Mr Watſon of the ſums aſſigned, ſo that they could not be affected by diligence at the inſtance of his creditors.

It was *answered* for the arreſter, That the aſſignation was null in terms of the act 1696, being a voluntary right granted by a notour bankrupt; in which circumſtances, he could do no deed to invert, alter, or prevent the legal rule of preference amongſt his creditors, which is determined to be according to their diligence: It would, indeed, be giving a power no way agreeable to the ſtate of bankruptcy, to indulge one in that condition, by any voluntary deed of his, to diſappoint even the chance of his creditors their diligence, and to bring them in, though *pari paſſu*, contrary to the tenor of our law, which prefers the vigilant according to their diligence. 2*do*, Creditors being under no obligation to accept of any diſpoſition, but having by the law right to proſecute their diligence, no voluntary right made by the *dyvour*, unleſs they accept, can deprive them of their right to uſe, or the benefit of their diligence when uſed; and though all the reſt accept, it is in the power of any one that ſtands out, to follow forth his diligence; in which, the bankrupt's hands by the law being tied up, the creditor cannot be prejudged.

Replied for the creditors aſſignees: That allowing Mr Watſon was, at the date of this diſpoſition to his creditors, a notour bankrupt in terms of the act 1696; yet they apprehend this diſpoſition is neither null nor reducible. And for clearing this, it was offered to conſideration, 1*mo*, That though a notour bankrupt can do no *fraudulent* deed in *prejudice* of his lawful creditors, he ſtill remains proprietor; his bankruptcy does not denude him of his eſtate real or perſonal, nor of the power of conveying it by voluntary rights. 2*do*, That voluntary rights, even granted in favour of his creditors, are not ſimply *null*, but make a conveyance; though ſuch conveyance be reducible upon the ſtatute, if fraudulent. As to the

No 238. *first*, His diſpoſition for an onerous cauſe will effectually convey his property; the onerous purchaſer will be ſecure, and his right not ſubject to a reduction upon this ſtatute. This the aſſignees apprehend is a demonſtration, that bankruptcy does not diveſt the bankrupt, or incapacitate him to grant voluntary conveyances. As to the *ſecond*, Suppoſing a notour bankrupt diſpone his lands in favour of a creditor, and this creditor convey to an onerous purchaſer; it is thought it could not be a queſtion but the purchaſer would be ſecured, however the creditor his author be liable in repetition. In like manner, ſuppoſing the bankrupt grant a diſpoſition to his whole creditors, equally and proportionally, which they accept of, and take infeftment thereon; if the bankrupt afterwards contract debts, his other creditors cannot plead, that the diſpoſition was null, and the ſubjects diſponed affectable by their diligence. And, in the *laſt* place, If a bankrupt grant a voluntary conveyance of land or money, to one creditor in prejudice of the reſt, it is thought, that neither the ſuperior of the land ſo diſponed can object the nullity, nor the debtor whoſe debt was aſſigned, refuſe payment upon the head of bankruptcy. Theſe inſtances are ſufficient to make it evident, that voluntary conveyances granted by a bankrupt in favour of his creditors, are not ſimply null, but reducible; and that nothing more is introduced by the ſtatute 1696, or indeed intended, but to tie up the bankrupt's hands from doing fraudulent deeds in prejudice of his lawful creditors, and to give a right to his creditors to reduce ſuch deeds done to their prejudice.

This being eſtabliſhed, the aſſignees apprehend that their competitor, the arreſter, muſt ſubſume, and ſay, 'That this deed granted by Mr Watſon is a 'fraudulent deed done to the arreſter's prejudice.' As to which it is contended, There is not the leaſt pretence of fraud in the caſe. Suppoſe a man, owing 20,000 merks, has his ſtock reduced, by ſhipwreck, fire, or other misfortune, to 10,000; the debtor, willing to do all juſtice to his creditors, divides his money equally among them: Can this be called a fraudulent deed, when he, without any trouble or charge, gives them all the ſatisfaction they could poſſibly obtain after a courſe of expenſive diligence? And as this is the preſent caſe, it cannot in any view be fraudulent; on the contrary, it is the moſt honeſt and fair thing a bankrupt can do; a deed neither fraudulent, nor to the prejudice of one creditor in favour of another; they have his whole effects divided among them, according to their ſeveral rights and diligences: They are not obliged to diſcharge their debts upon drawing their proportion, which is the caſe of a ſtatute of bankrupt in England; their debts ſtill ſubſiſt againſt the debtor's perſon, and any future acquiſition. Neither is any ground of preference, competent to one creditor againſt another, cut off: The diſpoſition is expreſsly qualified 'to each ac-'cording to his rights and diligences;' and ſo if one creditor had an infeftment, and another a preferable arreſtment, they in conſequence of this diſpoſition would draw their whole ſum, leaving to the ſimple perſonal creditors, their proportion only of what remained: So that the ſole intention of ſuch a diſpoſition is, to denude the debtor of his funds by one ſingle deed, and to ſtate his right in his cre-

No 238.

ditors, without the expenſive circuit of legal conveyances by adjudications, poindings, and furthcomings; and, at the ſame time, to preſerve an equality amongſt them. This being the only poſſible deſign and conſequence of ſuch a diſpoſition, it is ſubmitted, if it can in any ſenſe be reckoned prejudicial to one or all of the creditors. It is true, ſuch a diſpoſition does prevent the benefit that might ariſe to one creditor, by outrunning another in the courſe of his diligence, and the *little arts* made uſe of for that purpoſe: But ſure, being deprived of this diſhoneſt advantage, this *turpe lucrum*, can never be conſtrued in law a damage, or ſuch a *prejudice* as to found an action of reduction.

As to the *ſecond* point in the arreſter's pleading, touching *the neceſſity of acceptance*: The aſſignees admit, that the objection would have its weight, if the caſe were to be determined by the Roman law, where a diſpoſition, till accepted by the diſponee, conveys no right. But we follow not the Romans in this matter: We hold, that a diſpoſition in any perſon's favour needs no acceptance, but that it directly eſtabliſhes the right in him, even in his abſence, and without his knowledge: Yea, ſo certain is this, that in a deed betwixt two, a right may be eſtabliſhed in favour of a third, without his knowledge or concurrence, which it ſhall not be in their joint powers thereafter to recal. Thus, in the preſent caſe, the aſſignation, when intimated in the creditor's name, fully transferred the debt in their favour; which could not be deſtroyed, but by their poſitive rejection of the right. The aſſignees need not go about to eſtabliſh this by authorities or deciſions; it is a principle in our law, and ſo laid down by Lord Stair in his Inſtitutions, L. 1. t. 10. § 4. & 5.

'THE LORDS found, That a diſpoſition ſimple, unqualified, and completed by a bankrupt in favour of his whole creditors, was not reducible upon the act 1696, at the inſtance of a poſterior arreſter.'

Fol. Dic. v. 1. p. 85. Rem. Dec. v. 1. No 61. p. 117.

*** The ſame was found in the caſe, 25th July 1726, Competition of Eymouth's Creditors, *voce* COMPETITION.

No 239.
Ad adjudication allowed to proceed, notwithſtanding of a diſpoſition *omnium bonorum*.

1727, *January*.

BELL of Craigfordy *againſt* The TRUSTEES for BARCLAY'S CREDITORS.

AN eſtate was diſponed to Barclay, under burden of the debts of the diſponer. Barclay having become bankrupt, conveyed this eſtate to truſtees for behoof of his creditors. In the truſt-deed, no proviſion was made for payment of the debts of the original diſponer. The deed contained a ſubmiſſion by the creditors to arbiters named by the bankrupt.

Bell, a creditor of Barclay's author, proceeded to adjudge.

Barclay's Truſtee oppoſed the adjudication; but the Lords decerned.

*** This caſe is mentioned in the ſeſſion-papers of the caſe Cheyne againſt Merchieſton's Creditors, No 240. p. 1204.; where it is ſaid in the petition for the