1737. *June* 29. YAXLY DAVIDSON *against* ANNA BROWN.

No 172.
The act 1696 reaches cases where the bankrupt flies before the days of the charge are elapsed.

IN the reduction betwixt these parties, of an heritable bond on the act 1696, as having been granted by Andrew Brown within the sixty days of his bankruptcy, it was *objected*, That, from the proof which had been adduced, it appeared that the granter, who was a sailor and merchant, had gone abroad, in the way of his business, before the caption was taken out, so that he could not be said to fly or abscond, in terms of the act, from diligence which was not taken out until after he had left the kingdom. If indeed he had retired into the Abbey before the caption, it might have implied a confession of bankruptcy; but the following out the course of one's trade cannot admit of such a construction.

Answered, Diligence by horning and caption are named in the act before the alternatives of flying, absconding, &c. because that is the case which most commonly happens. But it does not follow, That one, who goes off upon the horning, without waiting till the caption can be got, which might perhaps be a hindrance to his design, can never be constitute a bankrupt, so as to have his unjust preferences reduced; and with what view Andrew Brown went off, is not easy to determine, that being *actus animi:* but, from the several circumstances of this case, it is presumeable, the fear of being thrown into prison was the reason why he fled, which is the more probable, as he has continued for two years out of the country, longer than his ordinary business as a merchant can be supposed to detain him; and, if the act shall be otherwise interpreted, it will open a door to many frauds.

THE LORDS sustained the reason of reduction on the act 1696.

C. Home, No 64. *p.* 112.

1743. *February* 9.

CREDITORS of AGNES HAMILTON, Relict of Campbell of Rachan, *against* The REPRESENTATIVES of JAMES HENRY.

No 173.
Found, that a minute of sale, executed by a person, who had, six months before, been in jail, but then liberated, and the debt paid and discharged, did not fall under the act 1696.

THE said James Henry entered into a minute of sale with the said Agnes Hamilton and two others, whereby they disponed to him a house in Edinburgh; and one of the articles was, That Henry should be allowed to retain as much of the price as should pay him two debts due by one of the disponers. Agnes Hamilton's creditors brought a reduction of the minute, upon the act 1696, *alleging*, That she was bankrupt at the date thereof; and, for verifying their allegeance, condescended on this fact, *scil.* that she had been incarcerate about six months before the minute of sale, in the tolbooth of Edinburgh, in virtue of a caption, at the instance of John Miln.

Answered: That the debt due by Agnes to John Miln was paid and discharged, and she liberated six months before the deed under challenge was granted: This being the case, she cannot be reputed a notour bankrupt, unless she shall be held to be such upon one of the three joint grounds, which the law requires,

without the concurrence of either of the other two. The ſtatute ſuppoſes, That, at the time of granting the deed, the granter is a dyvour, or bankrupt, in terms of the deſcription therein laid down. This muſt be admitted with reſpect to one of the requiſites in the act, viz. inſolvency; that muſt come down to the date of the deed under challenge, as it would be abſurd to ſuppoſe, that a reduction could proceed on this ſtatute, of a deed granted by a perſon ſolvent; or that an anterior inſolvency, which may have happened twenty or thirty years before, ſhould have any influence to ſet aſide a deed granted by a man who is at the time in good circumſtances. No 173.

In the *ſecond* place, There was no partial preference granted by Agnes to her anterior creditors, which can fall under the law, the debts for which retention of the price is allowed being due not by her, but by one of the other diſponers.

Replied for Agnes Hamilton's Creditors: That the payment of the debt in the caption cannot influence the caſe, if the bankrupt was once impriſoned thereon, or eluded the diligence by any other of the qualifications in the ſtatute; for ſure the payment of the debt cannot hinder the fact to be true, that ſhe was impriſoned thereon, or fell under any other of the qualifications reſpecting the diligence. And it is a miſtake to ſuppoſe, That the remedy introduced by the ſtatute was only intended for the behoof of the party at whoſe ſuit the diligence proceeds; as every creditor whatever may take the benefit thereof, in order to reduce the deeds granted thereafter; and if the defender's gloſs on the act were to hold, it might be cancelled, as the party who gets a voluntary right from a bankrupt would have no more to do, in order to ſecure that right, but to take off the creditor who uſed ſuch diligence, by payment of his debt, perhaps a mere trifle, a few days before taking the deed. With reſpect to the *ſecond* point, it was *anſwered*, That it would be abſurd, if a deed in ſatisfaction, or ſecurity of any debt of the bankrupt's ſhould be voided, and yet a gratuitous deed, in favours of the creditor of another ſhould ſubſiſt: Beſides, when the bankrupt aliens any of his effects to a creditor of his own, that debt is thereby ſatisfied, and his remaining effects left open to the reſt of his creditors; whereas, when he does the like to a creditor of another, it is downright profuſion, and his own creditors altogether thereby prejudged.

The Lords found the act of Parliament did not take place.

C. Home, No 227. p. 375.

*** Kilkerran reports the ſame caſe:

In Auguſt 1728, William Henry purchaſed a houſe in Edinburgh from Agnes Hamilton; and, by the bargain, Henry was to have retention out of the firſt end of the price of a debt of L. 50 or 60 Sterling, owing to him by William Hamilton of Little Earnock, her brother.

In the ranking of the creditors of the ſaid Agnes Hamilton, it was *objected* to this retention, That ſhe was, in terms of the act 1696, bankrupt at the date of

No 173. the minute of ſale, and therefore could not conſent to ſuch retention, which was to give a partial preference to Henry in prejudice of her creditors; and for inſtructing the bankruptcy, the fact condeſcended on was, that upon the 17th February 1728, being about ſix months before the minute of ſale, ſhe had been impriſoned in the tolbooth of Edinburgh, in virtue of a caption, and was at the date of the minute inſolvent.

It was *answered*, 1*mo*, That the objection was not competent upon the act 1696, in ſo far as the debt, to the preference whereof the alleged bankrupt had conſented, was not her own debt. 2*do*, Not relevant, in reſpect it was not alleged that ſhe was in priſon at the date of the minute; and it was averred and not contradicted, that the debt was paid and diſcharged a few days after the impriſonment.

The Court being of different ſentiments upon the conſtruction of the act of Parliament, ſome, that although it might not be enough in this caſe to allege inſolvency at the date of the minute, yet that it was relevant to infer bankruptcy, that the perſon was inſolvent at the date of the impriſonment, and continued to be inſolvent at the date of the minute, although the debt had been paid before the minute; and others, that in order to infer bankruptcy in terms of the ſtatute, it was neceſſary to allege that the impriſonment had alſo continued at the date of the minute; they, after the caſe had been heard in preſence, 'Found, that the debt upon which the impriſonment proceeded being paid, and 'ſo the perſon not under caption at the time the deed quarrelled was granted, 'the caſe did not fall within the act of Parliament 1696;' and *separatim*, 'Found 'that the deed not being in favour of any of the granter's creditors, the ſame 'falls not under the act 1696; reſerving to parties to be heard with reſpect to 'the act 1621.'

It was thought by a great majority of the Court, that the three requiſites of bankruptcy, diligence by horning and caption, inſolvency, impriſonment or abſconding, &c. muſt all concur at the time of granting the deed; and that to find otherways were to put an abſurd conſtruction upon the ſtatute: For that by the ſame rule that a deed granted after one had been impriſoned and inſolvent, ſhould not be exempted from falling under the ſtatute by the ſuperveening payment and liberation before granting of the deed, neither ſhould it be exempted from falling under the ſtatute by ſolvency ſuperveening before the granting of it; and that it could not be ſuppoſed that the legiſlature could have intended that any execution whatever, that may have followed upon a debt which may have been twenty years ago diſcharged, ſhould be a ground of reducing a deed granted of yeſterday.

Nor was it thought any good anſwer to this, that where the deed quarrelled is granted within 60 days before the bankruptcy, it is reducible, though all the requiſites do not concur at the date of the deed: For *ita jus ſcriptum eſt*, although none of them ſhould have occurred at the date of the deed; whereas a deed granted after the debt on which the diligence proceeded is diſcharged, is not, in terms of the ſtatute, granted by a bankrupt.

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.