

1747. *June 5.*GRANT *against* CUNNINGHAME, Trustee for the CREDITORS of the Incorporation of Shoemakers in Canongate.

No 246.

The Incorporation of shoemakers of Canongate having become insolvent, granted a general disposition in favour of their creditors. A creditor dissatisfied, attempted to reduce it on the act 1696. Found, that as a body corporate was incapable of personal diligence, and equivalents were inadmissible, the act was inapplicable; therefore the disposition was good at common law; although some small dues of entries were reserved; this being necessary for the future existence of the society.

It being discovered in 1743, that the Incorporation of Shoemakers in Canongate was utterly insolvent, it was proposed by the Incorporation, and agreed to by the generality of the creditors, for saving the expence of diligence, that the Incorporation should dispose the whole effects they were then possessed of, to their creditors, equally among them, to be accepted in full satisfaction of their debts. And accordingly, on 14th May 1743, a disposition, proceeding on the narrative of the said proposals being accepted of, was granted by the Incorporation to Ninian Cunninghame, as trustee for the whole creditors, all particularly named, of all and sundry their effects, heritable and moveable, to be disposed of by the trustee, and applied for payment and satisfaction of the creditors, according to their respective interests, but declaring the trustee to be liable for his intromissions only, and not for omissions; and this disposition was of the same date intimated to the tenants of the tenements.

On the 16th May 1743, Thomas Grant, one of the creditors, repudiating the disposition, used arrestment in the hands of the said tenants, and pursued a forthcoming before the Sheriff; which being brought by advocacy before the Lords, he repeated a reduction of the disposition on the following grounds: *1mo*, As fraudulent on the act 1696; and certain circumstances were insisted on as equivalent to the particular requisites in that statute for inferring bankruptcy. At least *2do*, As fraudulent upon the common law; and *separatim*, as containing special clauses with which no creditor was obliged to comply, *viz.* The creditors being obliged to accept of their dividend in satisfaction, and the trustees being declared free of omissions.

Upon the first, the Lords were clear, that no reduction could lie upon the act 1696, as the Incorporation, a body politic, was not capable of the personal diligence requisite by that statute, and that no equivalent circumstances are ever admitted to bring a debtor under the description of it: And were no less clear, that as a reduction at common law had no other effect than to bring in all the creditors equally, there could lie no reduction, at common law, of a disposition which gave the creditors the very same thing which they could obtain by the reduction; and so the Lords have uniformly found, and lately in the case between Snodgrafs and the other Creditors of Beat, No. 245. p. 1209.

Upon the other points, had the case been of a disposition by a man to his creditors, the objection would have been good, that a creditor could not be bound to accept of his dividend in satisfaction. But, as in the case of an Incorporation, there could be no other future acquisition, but what might arise from the trifling upsets of new intrants, which was said to be no more than sevenpence from each intrant, as it was too inconsiderable to be thought of, so no such upset-money

was ever to be expected, and consequently the Incorporation would in effect end or die out with the present members, if these small contributions, for the use of their poor, were to be for ever mortgaged for the use of the creditors. And as to trustees being declared free of commissions, the Lords seemed not to approve of their former decision, in the case of the Creditors of Ouchtertyre, mentioned in No 245. p. 1209. where it was found, on that very ground, that the trustee was declared free of commissions, that the creditors were not bound to accept. They now considered such clauses to be common and ordinary in trust-rights, and that no trustee will be found who will accept on other terms; and that the trust may be transferred to another where he is observed not to act carefully.

No 246.

And, on these considerations, the LORDS sustained the disposition, and preferred the trustee to the arrester. See SOCIETY.

Fol. Dic. v. 3. p. 66. Kirkerran, (BANKRUPT.) No 6. p. 52.

1749. February 22.

The CREDITORS of BALMAGHIE against WILLIAM M'GHIE.

ALEXANDER M'GHIE of Balmaghie disposed his estate to trustees, providing that they should be obliged to hold compt for their intromissions to his creditors, so often as they should be desired; and to him for the superplus of what money should arise from the sale of the foresaid lands, if any were, after payment of the debts. And they disposed it to William M'Ghie merchant in Edinburgh, in the same terms.

No 247.
An estate adjudged, without regard to a previous disposition to a trustee for behoof of the creditors at large.

Robert Garment merchant in Kirkcudbright, in right of several debts contracted since the disposition, obtained an interlocutor of an Ordinary, adjudging the estate,

Pleaded in a reclaiming bill for William M'Ghie. The debtor was divested of the estate, before contracting the debts, for which the adjudication is craved; and his creditors cannot affect any thing which does not belong to him: He has only a right to have the superplus of the value accounted for; and this they may affect. An adjudication of the estate is not competent, as it is not now in the debtor's power to offer a part equal to the sum; and yet this is a right competent to him, wherever there is room for an adjudication.

THE LORDS adhered.

Petit. H. Home.

Fol. Dic. v. 3. p. 63. D. Falconer, v. 2. No 60. p. 64.