

DIVISION III.

Decisions upon the act 5th Parliament 1696, declaring
Notour Bankrupts.

S E C T. I.

Circumstances which infer Notour Bankruptcy.

1698. February 15. CHARLES GRAY against HENRY BAIRD.

In a competition betwixt Charles Gray and Henry Baird, two creditors of Hary Mein's, this point came to be debated, That Baird's precept and assignation was null, though prior to Gray's arrestment, because, within 60 days after Mein's signing the precept, he fled, and took sanctuary in the Abbey, and became notourly insolvent; and so, by the 5th act of Parliament 1696, the voluntary deed within the said three score days must be repute an unlawful preference, and gratification of one creditor to another, and so is null.—*Answered*, Insolvency and flying are but two of the requisites by the act; the debtor must be also under horning and caption before the granting of the deed.—*Replied*, The act does indeed require, that diligence be done against the debtor, but mentions not that it should be before the deed quarrelled; for then it could be reduced on the act of Parliament 1621; and here it is offered to be proven, there was horning and caption against him before the 60 days, and particularly Hary Baird's own horning.—*Duplied*, His own diligence may be well beneficial to him, but can never be detorted to his prejudice.—*Triplied*, The act of Parliament does not distinguish whose horning it be, whether the receiver of the voluntary deed, or another's.—THE LORDS inclined to think the flying within the 60 days did not annul it, unless there was horning and caption against him before the voluntary deed. But the case being on a new act deserves to be considered.

Fol. Dic. v. 1. p. 81. Fountainball, v. 1. p. 824.

1702. July 24. JAMES MAN against WALES and his CREDITORS.

ANDREW WALES, merchant and shop-keeper in Dundee, did, upon the 14th of February 1700, grant several bonds to his creditors; and, of the same date, disposed his household plenishing, ware in his shop, debts, and whole moveables, for further security and payment of these bonds.

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No 167.

In a competition betwixt two creditors of a bankrupt, the Lords inclined to think, that the bankrupt's flying within 60 days, did not annul a voluntary right granted by him, unless there had been horning and caption previous to the deed.

No 168.

Horning and caption upon general letters, found sufficient to infer notour

No 168.
 bankruptcy,
 joined with
 the other cir-
 cumstances
 in the act.
 See No 113.
 p. 1006.

Of the same date, John Man draws a bill upon Wales, payable to James Man; and James Man draws a bill upon Wales, payable to John Man, both upon sight, and Wales accepts both, but without date, and they were protested upon the 15th and 17th days of the same month of February.

Wales' shop and plenishing are roused by the said creditors, and James and John Mans' wholly neglected; whereupon the said James, for himself, and as assignee by John Man, raises a declarator of bankrupt, upon the 5th act, Parliament 1696. And, after a mutual probation led upon the qualifications of the said act of Parliament, for proving Wales to have been bankrupt, and reducing his disposition, it was *alleged* for his creditors, *1mo*, The pursuer had no interest to insist upon the said act of Parliament; because he was no creditor at the time of the disposition quarrelled, which is dated the 14th of February 1700, in so far as the bills libelled on are not accepted of that date. *2do*, The act requires horning and caption at the instance of some creditor, before the disposition quarrelled, which must be understood upon some decret or special obligation; whereas, in this case, Wales was under no diligence preceeding the 14th, except by horning and caption upon general letters, which are not equivalent to diligence upon a decret for a special debt; because escheats fall not upon general letters; and therefore men of the best credit are not solicitous to avoid them; and consequently they can be no qualifications of bankrupt.

It was *answered*, *1mo*, The pursuer's bills are dated the 14th, and being accepted upon the same paper, the date upon the top of the bill must be presumed to be the date of the acceptance, the drawer and acceptor being in the same town, and the protest taken on the 15th and 17th; likeas in the case of Street and Mason, No 111. p. 1003. it was found, that a creditor to a merchant had interest to reduce a fraudulent right, though anterior to Street's debt. *2do*, The drawer of the bill was creditor at the time of the draught, which can be instructed. *3tio*, The act of Parliament requires only horning and caption; which is instructed in this case, and makes no distinction whether upon general or special letters; neither is there any deed to distinguish; because diligence is not the single qualification, but one of three; and conform to that act, insolvency and absconding are also proven.

'THE LORDS found, That the acceptance wanting date, was not presumed to be of the date of the bill, unless instructed; and that therefore the pursuer was not creditor at the time of the disposition quarrelled, and had no interest to reduce the same; but allowed him yet to prove, that the drawers of the bill were creditors; which they found relevant to sustain the pursuer's title; and repelled the objection against the horning and caption upon general letters.' See BILLS of EXCHANGE. See No 113. p. 1006.

Fol. Dic. v. 1. p. 81. Dalrymple, No 36. p. 45.