1696. *January* 9. SMART *against* DRYSDALE'S CREDITORS.

No 235.
Found that a disposition in favour of his creditors, by a bankrupt, was null, and could not defend against adjudgers,

RANKEILER reported the competition between the creditors-adjudgers of the estate of James Drysdale merchant, against the other creditors, who claimed his tenements by virtue of a disposition from the common debtor, whereon they stood infeft. Against this disposition the adjudgers repeated their reasons of reduction, viz. that Drysdale the granter, at that time was bankrupt, fled to the Abbey, and on death-bed; at which time a debtor is under an utter incapacity to convey any part of his estate, or rank his creditors, but ought to be left open to diligence, as creditors shall affect it.—*Answered*, The law only forbids in such cases fraudful alienations, whereby one creditor by an unlawful gratification is preferred to another; but here is no manner of fraud, but a very honest design of the debtor, in disponing his whole estate in favour of his haill creditors, so there are none postponed nor defrauded, but all brought in *pari passu;* whereby they had a clear benefit, that it prevented their depursing large expences, in leading adjudications and accumulating other diligences.—*Replied*, We are not here to consider a seeming equality introduced among the creditors, but the precise ground in law, is, that no deed of a bankrupt's *postquam cessit foro* and has fled, and creditors are *in cursu diligentiæ* against him, can subsist; but he must leave his estate to be affected by diligence, and creditors should not rely on such voluntary rights; and if they do, neglecting any farther diligence, and suffering others to anticipate them, *sibi imputent;* which has often been decided, Creditors of Tarpersie, No 29. p. 900.; 29th June 1678*, and 14th November 1679*; and lately in the case of Langton's Creditors, No 146. p. 1054.; where the Lords made a difference between one insolvent and a bankrupt. In the first case, though the debts exceed the estate, yet if diligences be not at least inchoate against him, he may validly dispone; but in the latter case of a notour bankrupt under diligence, he may not.——THE LORDS found Drysdale being a notour bankrupt, the time of his granting this disposition, (though it was in favour of his hail creditors) the same was null in law, being now quarrelled by the adjudgers, and could not defend against them.

Fol. Dic. v. 1. *p.* 84. *Fountainhall, v.* 1. *p.* 697.

1715. *July* 30.
The CREDITORS of THOMAS CALDERWOOD *against* BORTHWICK of CRUICKSTON.

No 236.
A person disponing his effects to his wife, for payment of her annuity, and of his debts.

THOMAS CALDERWOOD a little before his death, disponed to his spouse several sums, which is declared to be for the security and better payment of her liferent annuity, provided to her in her contract of marriage in the first place; and for payment of his just and lawful debts in the next place. Borthwick of Cruickston after Thomas's decease, pursues the relict upon the passive titles, and she

* The cases alluded to are, No 15. p. 889. and No 16. p. 890.

No 236.
Effect is given to this diſpoſition, ſo as to rank the creditors *pari paſſu*, in oppoſition to a creditor taking ſeparate meaſures.

is preferred in the firſt place by virtue of her ſaid diſpoſition, but declared accountable to Cruickſton for the reſidue of the ſubject. After this interlocutor, (upon which nothing was extracted) the other creditors applied, and

Alleged, 1*mo*, That Cruickſton and they were upon an equal footing as to the condition of their debts, all of them being only perſonal creditors to the defunct. 2*do*, There was as yet no legal diligence founded on, on either ſide.

Answered for Cruickſton, That he having raiſed the firſt proceſs, is preferable to all the reſt.

Replied for the creditors, That the raiſing of the firſt proceſs, never was in any ſuch competition, found to be a ground of preference; for ſuppoſing the creditors intereſts had not been produced till Cruickſton had extracted a decreet, and a multiple-poinding had brought all the reſt into the field, even in that caſe Cruickſton could not have been preferred to the other creditors, who were not obliged to have compeared in his decreet; much leſs therefore can he be preferred, when the matter ſtands yet only on the footing of an interlocutor. 2*do*, Since the relict's diſpoſition is in general, in favour of the defunct's creditors, they muſt therefore be all preferred *pari paſſu*, and the relict decerned to denude in favour of them all *pro rata*, and effeiring to their reſpective debts.

Duplied for Cruickſton, That he having purſued the relict to denude in his favour, and having obtained interlocutor, ordaining her to denude, the ſame ought to be conſidered as a ſtep of diligence on his ſide, which ought to afford him preference; and that he was in *pari casu* as if the relict had been confirmed executrix to her huſband, and that he had firſt cited her as executrix after ſix months from the defunct's deceaſe; whereupon he would have been preferable to the other creditors, who had been more remiſs in their diligence.

Triplied for the Creditors, 1*mo*, That Cruickſton's action was not a proceſs againſt the relict to denude, but a common action on the paſſive titles againſt her, as repreſenting her huſband; for though ſhe was ordained to denude in his favour, yet that was not in conſequence of any concluſion in his ſummons, he having ſimply purſued her for payment of his debt; ſo that the order to denude, was not the effect of any diligence at his inſtance. 2*do*, By the diſpoſition all the creditors have a *jus quæsitum* to the ſubject, and the relict burdened with the payment of their debts, as far as the effects would go, with a bare preference to herſelf for her liferent; therefore no creditor can obtain any ſpecial advantage to the prejudice of the reſt. And as to the ordinance to denude in Crickſton's favour, that interlocutor muſt neceſſarily be underſtood ſo, as the relict ſhould denude in his favour, in proportion to his debt. 3*tio*, Where the eſtabliſhed forms of diligence, known in law, are neglected, law makes no diſtinction, but brings in all creditors *pari paſſu*. Now an action of conſtitution againſt a repreſentative, is no ſtep of diligence, it only tending to conſtitute the debt, but produces no *jus in re*. 4*to*, Cruickſton's caſe differs from a creditor purſuing an executor within ſix months; for that is introduced by ſpecial ſtatute in the caſe where there is a confirmation, and cannot be extended beyond the caſe ſpecially contained in

No 236.

the ſtatute. And it is abſurd to ſay, that becauſe he was the firſt mover of an action againg the relict for conſtituting his debt, he ought to be preferred to the other creditors, ſeeing her right is founded upon a voluntary conveyance of the defunct, and not upon a confirmation.

THE LORDS found Cruickſton preferable for his expences, as the Ordinary ſhould modify the ſame, to be paid out of the firſt and readieſt of the ſubject, and found the whole creditors come in *pari passu*. *See* COMPETITION. *See* PROCESS.

For the Creditors, *Hay*. Alt. *Ipse*. Clerk, *Gibson*.

Bruce, *No* 134. *p.* 176.

1724. *July* 3.

Mr ALEXANDER SUTHERLAND, and Others, Arreſters, *againſt* The other CREDITORS of Mr DAVID WATSON.

No 237.
A bankrupt diſponed his ſubject, taking the bond for the price payable to his creditors, with the *proviso*, that they ſhould accept of certain funds, in full. Before the creditors had accepted, arreſtments were uſed in the hands of the debtor in the bond. In a competition, the arreſters were preferred. The Lords ſpecially mentioned their *ratio decidendi*, viz. that the bond was conditional, depending on the acceptance of the creditors. Had the bond been ſimple, and to the creditors equally, they would have been preferred.

MR WATSON having ſold his office in the Bill-Chamber to Mr Robertſon, upon the 27th of Auguſt 1723, he took a bond for the price thereof payable to his creditors, 'according to the reſpective ſums due to them, as in a former diſpoſition of his effects, 2d May 1723, or as they ſhould be ranked by the Lords of Seſſion.' And the bond contained a proviſion, That 'the creditors ſhould accept of the funds conveyed to them by the firſt diſpoſition, and what ſhould accrue to them by the bond, in full of all their debts; and alſo with this provion, That if any of the creditors ſhould uſe diligence for incarcerating Mr Watſon, or ſhould decline or neglect to teſtify in writing to Mr Robertſon or Mr Watſon, their agreeing to the above-mentioned condition betwixt and Candlemas then next, ſuch creditor ſhould loſe his ſhare of the ſum contained in the bond, and which ſhould accreſce to the creditors agreeing to the condition.'

The diſpoſition to which this bond referred, was to all his creditors thereinnamed, of his whole eſtate heritable and moveable, and of the half of the dues of the ſaid office, reſerving the other half for the ſubſiſtence of himſelf and family; but the diſpoſition was alſo clogged with a *proviso*, 'That if any creditors did diligence by arreſtment and adjudication or otherwiſe, (without the conſent of the other creditors, or major part of them) then the creditors ſo doing diligence ſhould forfeit their right in the ſubject diſponed, and the ſame ſhould accreſce to the other concurring creditors.'

Within ſixty days of the date of theſe deeds, Mr Watſon became notour bankrupt in the terms of the act 1696; and Mr Sutherland and others of the creditors did not accept of theſe conveyances, but arreſted the price of the office in Mr Robertſon's hand, and they craved to be preferred thereto as the firſt arreſters.

It was *argued* for the other creditors, That Mr Watſon having taken the bond in queſtion, payable directly to his creditors, equally among them, it was the