

Creditors, that ‘ the Lords were unanimously of opinion in Barclay’s case, upon
 ‘ the general point, that it being an useleſs diligence ought to be ſtopped ; and
 ‘ that though adjudication paſſed, it was purely upon account of this ſpecialty :
 ‘ That Bell was a creditor of Robert M’Lellan’s, who had diſponed his eſtate to
 ‘ Samuel (Barclay) with the burden of his debts ; and Samuel being bankrupt,
 ‘ diſponed that eſtate to his creditors, without ſaving the preference of Robert’s
 ‘ creditors, and brought them in only with his own, and obliged them all to ſub-
 ‘ mit to arbiters of his chuſing. Mr Bell being a creditor of Robert’s, and hav-
 ‘ ing uſed inhibition, was preferable to the creditors of Samuel, whoſe very right
 ‘ was burdened with Robert’s debts. It was purely on that account that the ad-
 ‘ judication was allowed to paſs. The diſpoſition by Samuel was reducible, at
 ‘ Bell’s inſtance, as cutting off his certain preference. Had it not been for this
 ‘ *ſpecialty*, the Lords were unanimously inclined to reſuſe the adjudication.’

In the answers for Cheyne, it is ſaid, ‘ The ſpecialties mentioned in the peti-
 ‘ tion are nothing to the purpoſe ; for albeit Bell, who craved the adjudication,
 ‘ was a creditor of Robert M’Clellan’s, who had diſponed his eſtate to Samuel
 ‘ (Barclay) with the burden of his debts ; and that Samuel being bankrupt, con-
 ‘ veyed the eſtate to his creditors, without giving a particular preference to Ro-
 ‘ bert’s creditors ; yet ſtill it was open to Robert’s creditors, in the ranking be-
 ‘ fore the arbiters, to claim their preference upon their rights, as much as it was
 ‘ competent, to any other creditor, to claim his preference according to the na-
 ‘ ture of his right and diligence ; ſo that here there was no iniquitous condition
 ‘ impoſed upon the creditors of Robert, more than what aroſe from the general
 ‘ nature of the thing, and the law of the land, in denying a perſon acceſs to a
 ‘ diligence authoriſed by public law, in which he confided more than in the deed
 ‘ of a bankrupt, which may be ſubject to many objections, beſides that found
 ‘ on the act 1696.’

See *The Session Papers for 1729, in the caſe of Cheyne againſt
 Creditors of Merchieſton, in Advocates’ Library.*

1729. *January.*

MR JAMES CHEYNE *againſt* The TRUSTEES of MERCHIESTON’S CREDITORS.

A BANKRUPT having granted a diſpoſition *omnium bonorum* to his creditors, for
 their ſecurity and payment, one of them not ſatiſfied with the common fate, in-
 ſiſted in an adjudication againſt the bankrupt ; which was ſtrenuouſly oppoſed by
 the others, foreſeeing this adjudication would be uſed as a foundation for puſhing
 on a ſale of the debtor’s eſtate, which would heap a multitude of expences upon
 them, and tend, in general, to render of no effect, the method that has been of
 late fallen upon of granting diſpoſitions *omnium bonorum* : They *pleaded*, that this
 was an invidious diligence, and, in all events, their diſpoſition muſt be preferable ;
 whereby it will be impoſſible for him to make more by the adjudication than he

No 240.

The Lords reſuſed to ſtop an adjudication, purſued by a creditor chuſing to take ſeparate meaſures, in oppoſition to a diſpoſition *omnium bonorum*, to truſtees for the whole creditors.

has already by his right in the disposition; and, therefore, there was the same reason for stopping this diligence, that there is for stopping arrestments and inhibitions, which is done every day upon equitable considerations.—THE LORDS refused to stop the adjudication.

No 240.

Fol. Dic v. 1. p. 85. Session Papers in Advocate's Library.

1729. July.

FARQUHARSON against CREDITORS of CUMMING.

MR ALEXANDER FARQUHARSON, writer to the signet, held in trust, for others, various debts due by George Cumming, Vintner in Edinburgh. He executed a horning against Cumming, and thereupon used arrestments in the hands of Douglas.

Douglas pursued a multiple-poining, and *condescended*, that he held the price of goods which had belonged to Cumming, and had been sold by public roup, by trustees to whom Cumming had disposed his whole effects for behoof of his creditors.

The disposition to the trustees was intimated before Farquharson's arrestment; but his horning was executed a day before the date of the disposition.

THE LORD ORDINARY had 'preferred the trustees.'

Pleaded for Farquharson, in a reclaiming petition:—The disposition in favour of trustees was fraudulent, as being obtained without an onerous cause, and granted in security of antecedent debts, in prejudice of prior diligence. It tended to give a partial preference. If such dispositions were allowed, diligence would no longer be of any avail. The recent decisions tending to support dispositions *omnium bonorum*, had respect to the act 1696, which annulled only dispositions granted by one creditor in *preference* of other creditors: But this case depended on the act 1621, which provides, That the creditor using the first lawful diligence by horning, shall be preferred to voluntary rights granted by the bankrupt.

Answered for the trustees:—The scope of the statute 1621, and that of 1696, was the same. No more was intended than to disappoint partial preferences, by voluntary deeds, to some creditors in prejudice of others. But rights, equal and impartial, in favour of all the creditors, were not meant to be prevented. The petitioner can have no benefit from his diligence, as a charge of horning can, of itself, attach no particular subject. There is no iniquity in a debtor doing what is to benefit, and save expence to his whole creditors. Diligence ought never to be used, but as an extraordinary remedy: Here it is unnecessary, and would be vexatious. The debtor has voluntarily done what diligence would have effected.

An arrestment, prior to the disposition, might perhaps have frustrated it as to moveables, or an inhibition as to real rights; but a simple charge of horning can have no such strong effect.

No 241.

A disposition by a bankrupt to trustees for his whole creditors, was sustained, notwithstanding of a prior charge of horning, and the trustees preferred to the charger.