1736. *February* 3.

WILLIAM EARL of ABERDEEN *against* the TRUSTEES and CREDITORS of LOWIS of Merchiston and SCOT of Blair.

No 244.
Found in conformity with No 242. p. 1206.

LOWIS of Merchiston, Scot of Blair, and Menzies of Lethem, had been connected in joint securities for money; and all together became unexpectedly bankrupt.

Each executed a separate trust-deed for behoof of his creditors about the 1727. At that time such deeds were supposed to have the effect entirely to prevent subsequent diligence. But, in 1735, the affairs of these bankrupts not having yet been finally settled; and the effect of dispositions *omnium bonorum* having begun to be doubted; the Earl of Aberdeen and Master of Salton, creditors of both Merchiston and Blair, used arrestments in the hands of the tenants of Blair, holding leases from the trustees. A furthcoming was pursued at the instance of the Earl of Aberdeen, who likewise raised a reduction of the trust-deed. The arguments used against such deeds in general in the six preceding cases (*supra*) were repeated; and various specialties, extremely similar to those in the case of Snee and Company, No 242. p. 1206. were likewise objected.

The opposite general argument in the former cases was also repeated.

The answer with regard to the specialties was much the same as in the case of Snee.

The chief peculiarities of the present case were, the Earl's *mora* in not using his arrestments for so many years, which was alleged to import acquiescence, and an alleged personal exception, that he had explicitly acceded to the trust-disposition by Merchiston, as had been found in a separate process relative to it.

In opposition to these, it was *urged*, That silence here did not import acquiescence. The brocard, that silence imports consent, is inapplicable. It regards judicial procedure, in cases where one is called on to confess or deny a fact, and does neither: or it relates to cases where one is acting in dependence on another; as if a servant, in his master's presence, should receive his master's money from his debtor, without his contradiction, his consent would be presumed; but if one know any thing to be done, which, by consent, he could not hinder, his taciturnity will not imply a consent; January 8. 1663, Nicol *against* Sir Alexander Hope, Stair, v. 1. p. 155. *voce* HOMOLGATION; January 5. 1666, Lady Bute and her Husband against Sheriff of Bute, Stair, v. 1. p. 333. *voce* HUSBAND and WIFE. Thus then, as in the disposition in question, the pursuers are not named, their only hope of obtaining a share of the trust-fund, under the trust, must have been by virtue of a clause in it, obliging the trustees to assume, within 90 days after the date of the disposition, such persons as should appear to be true creditors. They therefore were really excluded, if not assumed within 90 days.

No 244.

It is against reason to presume from taciturnity, that they consented to be entirely excluded; but if they had consented at all, they behoved to have sought to be assumed. The Earl, however, expressly showed dissent, by executing a charge of horning, five days after the date of the disposition.

As to the personal objection, founded on proceedings in the separate process, relative to Merchiston's disposition; that was quite a distinct matter, nor did what past actually import voluntary acquiescence even in that case.

The Lords reduced, and preferred the Earl of Aberdeen.

For the Earl, *Cha. Areskine.* For the Trustees, *Ro. Dundas.*

Fol. Dic. v. 1. *p.* 85. *Session Papers in Advocates' Library.*

1744. *November* 13.
Snodgrass *against* The Trustees and Creditors of Beat.

No 245.
A person, bankrupt in terms of the statute of 1696, cannot, by a general disposition, tie up the hands of his creditors from subsequent diligence. But however insolvent, if not bankrupt, a disposition to all his creditors equally, if simple and unconditional, cannot be reduced.

The Lords have come and gone upon the question, How far, where one is bankrupt in terms of the statute, he can, by a general disposition to his creditors, tie them up from after-diligence? and by the latest decisions, it is found, that he cannot. But where there lies no ground of reduction on the statute, there appears no foundation in the common law, upon which a disposition by a man, however insolvent, to all his creditors equally among them, can be reduced.

And accordingly in this case, where David Beat, the debtor, though insolvent, was not bankrupt in terms of the statute, a disposition by him, in favour of trustees, for the behoof of his whole creditors, duly intimated, was preferred to posterior arrestments, and the allegeance repelled, That a person insolvent had it not in his power, by such disposition, to deprive his creditors of their right to obtain a preference to each other *vigilantia*.

But a few days thereafter, in the competition among the personal creditors of Sir Patrick Murray of Ouchertyre, creditors were found not bound to accept of such disposition, although they had done no diligence, in respect of a clause, declaring the trustees only liable for their intromissions, and not liable for omissions.

Ibid. The disposition by David Beat, to the trustees, was found not to fall under the act 1696, in respect he was not under caption at the granting thereof, although he was under an act of warding, the statute specially requiring caption. *See* No 174. p. 1095.

Kilkerran, (Bankrupt.) *No* 5. *p.* 51.