No 175.

only reduced to the effect of bringing in the injured creditors equally with the favoured ones. The case was lately determined, in the competition of Beat's Creditors, No 174. p. 1095. where it was also found, that no alternatives could supply the requisites in the statute 1696, so as to make a deed reducible in virtue thereof. The reservations were trifles, to wit, seven shillings Scots, to be paid quarterly by each member for their poor, and the upsets of new members, of whom, since the breaking out of the insolvency to 4th February 1745, the time of drawing the information, there had been but one. Nevertheless, though mention was made, in the preamble, of the creditors propositions, these articles were not reserved in the disposition; nor was it made a condition of any creditor's having the benefit of it, that he should renounce them; but whoever pleased was at full liberty to affect them, notwithstanding the doing so would soon put an end to the Incorporation altogether, as there would never be another member.

Observed on the Bench, It did not import that there was no reservation in the disposition; for the deacons and other disponers could only make it, in terms of the act of corporation their warrant; that if this had been a deed by a single person, the granting it under these exceptions would have made it reducible; for a man must struggle through life, and subsist while the course of nature lasts, and in that time may acquire; but it was necessary to make the reservations in the case of an Incorporation, which otherwise would have been speedily dissolved.

THE LORDS preferred the disponee. *See* SOCIETY.

Act. *Geddes.* Alt. *W. Grant.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. p. 239.

1750. *November* 9. and 22.

The EARL of HOPETON *against* NISBET of Dirleton, and INNES.

No 176.

A debtor was incarcerated, and afterwards liberated by consent of the creditor, to whom he granted an heritable bond of corroboration. After liberation, he continued to carry on business in his shop as before, but the bond reduced.

JAMES JOHNSTON, merchant in Edinburgh, being debtor to William Nisbet of Dirleton, was incarcerate at his instance, 16th August 1746; but being liberate by his consent, he, 21st August, granted an heritable bond of corroboration of the debt.

The Earl of Hopeton, another creditor, insisted in a reduction of this bond, as granted in security to one creditor in preference to others, by a notour bankrupt, in terms of the act 1696, after he was insolvent, under diligence, and in prison; and proved his insolvency.

Pleaded for the defender, The design of diligence is to compel payment or security; and if the obtaining this security has been the effect of his diligence, it would be a strange interpretation of the act of Parliament to render it null: When a person has been incarcerate, and craved to come out on the act of grace, it has been found, when only one creditor appeared, that the disposition ought to be him: And suspensions also have been past on assignations in security; and both these rights would have been reducible by what is here pleaded, if the person had proved insolvent, and other creditors appeared.

No 176.

2*dly*, In this case the three requisites do not concur: He was at the date, by supposal, insolvent; and under diligence, as the caption was not discharged; but not in prison; and so was found in the case of the Lady Rachan, No 173. p. 1092. who was imprisoned, but the debt and diligence discharged, and she let out; after which she disponed a house, with this provision, that the purchaser should retain part of the price for a debt due to him; the LORDS found the transaction fell not under the act 1696. And if deeds granted after having been in circumstances of bankruptcy, though the requisites did not continue, were annulled; then if a person insolvent recovered, and continued opulent for years, his bankruptcy happening afterwards, would annul all his deeds in the mean time.

3*dly*, The debtor on his coming out of prison continued to keep shop; it was not till February that he called a meeting of his creditors; no bond of his was registred till August; he in September disponed his effects to a trustee, who did not think it necessary to take possession till some time in 1748; so that he was so far from being bankrupt, or *foro cedens*, that no body suspected him.

Pleaded for the pursuer, The bond is null by the express words of the statute, which enacts, That deeds done by a bankrupt, preferring one creditor, within 60 days before, or at any time after his being so, by insolvency, diligence, or imprisonment, are void. It is not necessary that he be in prison at the time, it is sufficient if he shall be so within 60 days after; or has been before; provided he be insolvent at the date of the deed; for if he then be solvent, there cannot be a bankruptcy; and for that reason, the deeds of a debtor recovering, though he afterwards relapse, will not be reduced. The case of the Lady Rachan is different; for there the debt and diligence were taken away by discharge; and besides, the preference given was for a debt not her own, which the Lords found fell not under the act. This debtor, though he kept shop, continued insolvent.

THE LORDS, 11th July, repelled the reason of reduction; but on bill and answers, 9th November, Found the bond reducible; and this day refused a bill and adhered.

Act. *R. Craigie.* Alt. *H. Home.* Clerk, *Pringle.*

D. Falconer, v. 2. *p.* 196.

*** Lord Kames reports the same case:

INNES, after the utmost diligence by horning and caption, obtained from James Johnston his debtor an heritable bond of corroboration, 17th July 1746. Upon the 16th August following, James Johnston was incarcerate at the instance of Nisbet of Dirleton's factor *, with whom the bond was trusted to receive payment. The first notice Dirleton had of his debtor's imprisonment, was by a letter from the late Provost Coutts, bearing, that he himself was creditor to Johnston in a considerable sum; that he was in no pain for his debt, as he knew Johnston to be in good circumstances, and therefore begging that Dirleton would set him at liberty. Dirleton made no difficulty to comply with his request, blaming, at the same time, his factor for his rigorous dealing. Accordingly, upon the 21st of August 1746, Johnston was set at liberty; and, of that date, granted to Dirleton an heritable bond of corroboration, which he had offered to the factor before his imprisonment.

* It seems to be omitted, in this narrative, that Johnston granted to Nisbet another bond, different from that to Innes.

No 176.

This imprisonment must have given the alarm to the other creditors, had they entertained any suspicion of their debtor's solvency; but they entertained no more doubt of his solvency than Provost Coutts did. After this short interruption, he returned to his shop, and followed out his business as usual, for six months; during which period, he acted in every respect as a man of credit, carrying on his shop business to as great an extent as ever; and, during this period, there was not the smallest attack upon him, an inhibition excepted, used by a Glasgow company to whom he was indebted L. 74 Sterling. He himself first declared his insolvency, by calling a meeting of his creditors in January or February 1747, laying a scheme before them, in which his debts were stated at L. 1200, and his saleable funds at L. 1100, without including his houshold furniture. Even after this meeting, James Johnston was left in the management of his own affairs till September 1747, that he disponed his real and personal estate to George Boswell, writer in Edinburgh, for behoof of his creditors; who, in spring 1748, assumed the management by placing a factor. At last, in the beginning of the 1749, James Johnston's other creditors, finding a considerable shortcoming, brought a process of reduction, on the act 1696, against Innes and Dirleton, in order to cut down their preference. The libel was, 'That James Johnston, who would be 'found insolvent, ought to be held and repute a notour bankrupt from the time 'of his said imprisonment; and therefore, that the two heritable bonds granted 'by him, the one within threescore days of his bankruptcy, and the other after 'it, ought to be reduced.' The Court first assoilzied from the reduction; but they altered this interlocutor upon a review, and found the two bonds reducible upon the act 1696.

The defenders, in a reclaiming petition, set out with an analysis of the statute: and *first*, a dyvor or bankrupt is a man who gives over his business for want of credit or stock, *qui cessit foro*; consequently a man who has credit, and carries on business, cannot be a dyvor or bankrupt. But betwixt these extremes there being several circumstances, to make it doubtful whether a man be a bankrupt or not, such as lurking, forcibly defending, &c. it was partly the view of this statute to remove these doubts, and to ascertain the precise intermediate circumstances, that should give a man the character of a dyvor or bankrupt. Another view was to extend the remedy against fraudulent or partial alienations. By the law, as it formerly stood, such deeds could only be cut down that were granted after actual bankruptcy. The statute 1621 prevented partial preferences after diligence commenced: But this not being a perfect remedy, because debtors, finding themselves in a declining condition, do often lay hold of that opportunity to make up matters with their favourite creditors, the statute 1696 extended the remedy against all deeds granted 60 days before actual bankruptcy. These are clearly the views of the statute; and it is framed to answer these views. After ascertaining those circumstances which should infer notour bankruptcy, and which before were doubtful, it goes on to enact, That, after a man is a notour bankrupt, every deed done during his notour bankruptcy, and 60 days before, shall be void and null. But to cut down such deeds, the man must have the

No 176.

character of bankrupt, without interruption or discontinuance down to the process; the words of the statute holding and reputing the defender to be a notour bankrupt, 'from the time of his foresaid imprisonment, retiring, flying, &c.' plainly import a commencement of the present bankruptcy, which, from the very idea of commencing or beginning, must infer a continuance in the same state: and the same is implied in the subsequent words, 'declaring all and whatsoever voluntary 'dispositions, &c. made by the foresaid dyvor or bankrupt, either at his becoming bankrupt, or for 60 days before, in favours of creditors, to be void and null.'

And this construction arising both from the nature of the thing, and the words of the statute, was found by the Court to be the just construction, upon a hearing in presence, in the case of Agnes Hamilton, Lady Rachan, No 173. p. 1092. The Judges, before the hearing, settled the point in dispute, 'Whether a person 'being once notour bankrupt, in terms of the act 1696, still continues a notour 'bankrupt by the construction of the act, though the debt in the caption on which 'he was imprisoned be paid, the caption discharged, and he set at liberty? or whether it be necessary that he continue under diligence, as well as continue insolvent?' The result of the hearing was to find, 'That the debt and caption being 'discharged before the transaction challenged, it fell not under the act 1696.'

Found, that if the debt in the caption upon which a debtor has been imprisoned, be paid, the caption discharged, and he set at liberty; subsequent transactions cannot be affected by that diligence.

And indeed to judge otherwise, would be in effect to maintain, that, if a man have once the misfortune of being a notour bankrupt, no circumstances can ever relieve him from this character; a conclusion contrary both to common sense and to the statute. A trading man becomes bankrupt in the sense of the statute; but, by the assistance of friends, he compounds with his creditors at 10 or 15 shillings per pound, and, upon payment of the composition, obtains a full discharge from every one of them. Being thus a free man, he begins trade again, and perhaps makes some money, but at the distance of 10, 20, or 30 years, becomes bankrupt a second time. Now, if it would be sufficient to specify that this man was once bankrupt, without necessity of specifying the continuance of the bankruptcy down to the date of the process, the consequence would be, that every single voluntary deed, granted from the date of the former bankruptcy, in security or payment to a creditor, must be declared void and null, not only at the instance of prior creditors, but also of creditors whose debts were not existing at the date of the transaction.

'The Judges adhered. They considered, that as the common debtor was rendered bankrupt by incarceration in terms of the statute, the few months in which he was allowed his liberty, was no such interruption as to make the posterior surrender of his effects be considered as a second bankruptcy.'

Fol. Dic. v. 3. p. 54. Rem. Dec. v. 2. No 118. p. 241.

1751. *December* 3. DICKSON *against* REPRESENTATIVES of MITCHELL.

No 177.

To constitute a debtor bankrupt, from his betaking himself to the sanctuary, it is not necessary that the clerk of the Abbey should mark him in the books.

Fol. Dic. v. 3. p. 53.

*** *See* the particulars, No 6. p. 5. *voce* ABBEY of HOLYROODHOUSE.