

No. 249.

ages. Nor is any form of process to be found in our law-books, for compelling such trustees to an immediate execution, or for removing them if they act improperly. Nor is the legal method of attaching the heritable subjects of a bankrupt either unequal or grievous: The law has taken sufficient care, that no creditor can obtain a partial preference by adjudication, since all who adjudge within year and day of the first effectual adjudication have an equal right. The expence of carrying on such judicial proceedings against the estate of a bankrupt, is no doubt considerable; but the execution of a trust-right is also very expensive; and if there be a difference of expence, which often is not the case, that difference is fully compensated by the advantage of having every thing conducted under the immediate inspection of the supreme court; and by the advantage which the creditors have, of bringing matters, if they incline, to a more certain, immediate, and fair execution. The right in question, in favour of the trustees, is void and null, and may be set aside by exception of reply, without the necessity of a reduction.

'THE LORDS decerned in the adjudication; and remitted to the several Lord Ordinaries before whom other adjudications against the same defenders were depending, to decern therein.' See No 12. p. 92.

A.G. Rae, Miller.

Alt. Lockhart.

Clerk, Justice.

Fol. Dic. v. 3. p. 64. Fac. Col. 193. p. 345.

W. Johnston.

1762. February 18.

WILLIAM WILSON and The CREDITORS of ROBERT BAILLIE, *against*,
NEIL M'VICAR.

No 250.

A disposition, although containing extraordinary powers and conditions, sustained to the effect of giving the creditors at large right to the funds, and preventing the separate diligence of an individual creditor. See the note.

ROBERT BAILLIE merchant in Edinburgh having become bankrupt, a very numerous meeting of his creditors was held, who resolved to concur in joint measures.

At another general meeting of his creditors, Robert Baillie executed a general disposition of all his effects, heritable and moveable, containing a special assignation of all the different debts due to him, in favour of a trustee, for behoof of all his creditors. In consequence of which, William Wilson, who was the trustee named, entered to the possession of the subject.

After this, Neil M'Vicar, one of Robert Baillie's creditors, who had not acceded to joint measures, nor to the trust-disposition, laid on an arrestment in the hands of the trustee; upon which a competition ensued betwixt him and the acceding creditors.

Objected for Neil M'Vicar: The trust-disposition contains fundry extraordinary powers: The Court have often found dispositions by a bankrupt to a trustee, for behoof of all his creditors, insufficient to interpel the diligence of dissenting creditors.

Answered for the creditors: Supposing the present disposition not to be good as a disposition to a trustee, and containing extraordinary powers; yet still it may stand good as a disposition to all the creditors; the effect of which will be, that the trustee's right will fall; but the disposition itself will stand good, so as to bring in all the creditors equally, according to the preference of their several rights and diligences, and so as to interpel particular creditors from taking separate diligences for the future.

Justice and equity demand, that the disposition should be sustained to this effect; for, in the nature of things, it is fair and just, that, if a man has not funds to pay all his creditors, he should surrender all the property he has, to be divided in proportion to their several rights. And, on the other hand, nothing can be more unreasonable, or inconsistent with the principles of justice, than an unequal and unproportioned division of a bankrupt's funds; that after a debtor is reduced to the state of bankruptcy, his creditors should strive to get the start of one another by a sort of legal scramble for his effects, and that the diligences of the law should be used as engines for an advantage plainly unequal and unjust.

Though the right of the trustee shall fall, the execution of such a disposition so sustained will be easy. As no creditor will be allowed to do diligence for his separate behoof, contention, confusion, and expence will be avoided. On the other hand, any one creditor wanting to have the bankrupt's subjects turned into money for the common behoof, may bring a multiple-poining in the name of the trustee, and, upon the dependence, can in course obtain a sequestration, and get a factor appointed by the Lords, who is bound to do diligence; and administrate according to many wise and useful rules established by authority of the Court. And, in the same manner, in order that the heritable subject may be turned into money, any one creditor may, on a disposition completed by infeftment, bring a ranking and sale; or he may adjudge, and, on that adjudication, a sale may proceed.

'THE LORDS found, That Neil M'Vicar is not entitled to be preferred upon his arrestment.'

Act. Burnet, Lockhart.

Alt. Garden, Jo. Dalrymple.

Fol. Dic. v. 3. p. 64. Fac. Col. No 80. p. 177.

* * * There was a peculiarity in this case not noticed in the report. The son of the arresting creditor had attended at a full meeting, previous to the execution of the trust-disposition, and tacitly acquiesced in a resolution then taken, to follow common measures.