1779. *January* 22. CREDITORS of MESSRS COLVILLS *against* the TRUSTEE.

No 255.

THE LORDS again found, as in many former inſtances, (*ſupra*) that it was no ſufficient objection againſt the proceeding of an adjudication againſt a debtor's eſtate, that he had previouſly granted a diſpoſition *omnium bonorum*, in favour of a truſtee for his whole creditors. *Fol. Dic. v.* 3. *p.* 67.

*** The particulars of this caſe have not yet been reported. *See* APPENDIX to this Title. *See* General Liſt of Names.

1791. *December* 8.
ANDREW HUTCHISON, *againſt* The CREDITORS of JAMES GIBSON.

No 256.
A diſpoſition *omnium bonorum* by a perſon inſolvent, but not under the deſcription of the act 1696, to a truſtee for behoof of his creditors, named by a majority of themſelves, found to be valid and effectual.

GIBSON, who had become inſolvent, but was not bankrupt according to the terms of the ſtatute of 1696, offered to make over his funds to his creditors in a body. This offer they having accepted at a regular meeting, he granted to two of their number, named by them as truſtees for the whole, a diſpoſition of all his effects, which were chiefly houſehold-furniture, and in value much inferior to the amount of the debts.

The truſtees received the poſſeſſion of the goods, and had juſt completed a ſale of them by public auction, when Hutchiſon, a creditor who diſſented from the reſt, uſed arreſtment in the hands of the purchaſers at the roup, and of the auctioneer. In a competition which afterwards took place between him and the truſtees, he diſputed the validity of this truſt-deed, as being a diſpoſition *omnium bonorum* by an inſolvent debtor. In ſupport of the objection, it was

Pleaded: No man is entitled to uſurp a power over another's rights. Hence, whenever a man knows himſelf to be irretrievably inſolvent, it becomes unlawful for him to exerciſe a ſingle act of property, by which the ſituation of any one of his creditors may be altered in the leaſt; becauſe, by ſo doing, he neceſſarily infringes rights with which he ought not to interfere. Among theſe, one is the right of any creditor to obtain a preference, by a vigilant uſe of the legal means; and therefore a debtor, in ſuch a ſituation, cannot lawfully, by a diſpoſition *omnium bonorum*, or any other act, deprive the creditor of this advantage; which, it may be remarked, is ſignified by the appropriate expreſſion, *vigilantibus jura subveniunt*.

This principle is evinced by the ſtatute of 1696, which defines the circumſtances of that inſolvency, which juſtice muſt ever render a bar to the diſpoſal of property. But it does not itſelf create that bar; otherwiſe it would enact that which is poſitively unjuſt.

Nor can the concurrence of any majority of creditors give validity to an act of the inſolvent debtor, tending to alter the relative ſituation of any individual without his conſent; for creditors are regarded as independent of each other, and not as a collective body or ſociety.

No 256. It follows then, from the general principles of law, that the diſpoſition in queſtion was *ultra vires* of the granter, and conſequently null and void.

In the caſe of Snee and Company *contra* Truſtees of Anderſon, 12th July 1734, No 242. p. 1206. the Court found, 'that no diſpoſition by a bankrupt 'debtor could diſable creditors from doing diligence.' The terms *bankrupt debtor* ſeem here to be ſynonymous with thoſe of *inſolvent debtor*, though the debtor was likewiſe bankrupt according to the ſtatute of 1696.

Similar judgments were pronounced in the caſes of Mansfield *contra* Brown and Stobo, 28th January 1735, No 243. p. 1207.; of Earl of Aberdeen *contra* Creditors of Blair, 3d Feb. 1736, No 244. p. 1208.; of Forbes-Leith *contra* Livingſtone, 25th July 1759, No 249. p. 1212.; of Mudie *contra* Dickſon, 14th November 1764, No 252. p. 1217.; of Peters *contra* Dunlop's Truſtee, 27th January 1767, No 253 p. 1218.; of Johnſton *contra* Fairholm's Truſtees in 1770*; of Scott *contra* Truſtee of Hogg and Son in 1770†; of Fraſer *contra* Monro, 5th July 1774, No 183. p. 1109.; of Walpole and Elliſon *contra* Alexander's Truſtee, in 1778, Fac. Col. No 104. p. 198. *voce* TACK.; and in various later inſtances.

A diſtinction has been ſometimes ſuppoſed, as to the effect of truſt-deeds, between thoſe bankrupts who had fallen under the ſtatutory deſcription and thoſe who had not. But it is plainly ill-founded; for the ſtatute being directed againſt 'fraudful alienations' creating preferences, cannot refer to a general truſt for behoof of creditors, which is not a fraudful alienation.

Answered: By that argument it is plain, all bankrupt laws muſt be accounted unjuſt. But the reaſoning is fallacious.

If the law will not permit one perſon to uſurp the rights of another, it is becauſe it holds ſacred thoſe of every man. The right of property being one of the moſt ſacred, is even protected in an uſe that is immoral and unjuſtifiable; ſince an inſolvent debtor, when not precluded by diligence under the ſtatute of 1621, or placed within the deſcription of that of 1696, is entitled in law to convey his effects for the payment of any particular creditor, to the prejudice of the reſt, though equally onerous; Erſkine, b. 4. tit. 1. § 41.

Thus it appears how very far mere inſolvency is, from inferring any forfeiture of the right of property. For it would be extraordinary indeed, were the law to ſanction it in its unjuſt exerciſe alone, with-holding all countenance from that equitable and rateable diſtribution which is ſo obviouſly the demand of juſtice. No ſuch doctrine, it is certain, can be learned from any of the deciſions of the Court; with regard to which, however, two diſtinctions are to be received.

In the *firſt* place, from the way in which the ſtatute of 1696 is expreſſed, its terms, in their literal import, ſeem to comprehend every deed of the debtor, by which even the power of obtaining, by the diligence of the law, a partial preference, is precluded; and thus affords to creditors an obvious plea, however ungracious, againſt the moſt equitable conveyances by the bankrupt debtor. The

*† Not yet reported. *See* Appendix. *See* General Liſt of Names.

phraſe "vigilantibus," &c. is really not ſo much an expreſſion of approbation, as a ſort of notice of a degree of evil that is unavoidable, for the ſake of a more extenſive benefit. No 256.

In the *ſecond* place, When truſt-rights are granted for behoof of creditors, it is to be conſidered, whether it be to the truſtee of the creditors, or of the debtor; for it is only in the former caſe that the debtor can be diveſted of the property, and while it remains with him, it muſt neceſſarily be ſubject to the diligence of any of his creditors.

Now, in all caſes, without any exception, where the granter had not fallen under the preciſe ſtatutory deſcription of bankruptcy, ſo as to authoriſe a challenge on that ground, and where the grantee was not the truſtee of the debtor himſelf, general conveyances for the behoof of creditors have been uniformly ſuſtained.

Thus, 13th November 1744, Snodgraſs *contra* Creditors of Beat, No 245. p. 1209; 5th June 1747, Grant *contra* Cuningham, No 246. p. 1210.; 23d January 1756, Souper *contra* Creditors of Smith, No 76. p. 744.; 30th July 1766, Mackell *contra* Truſtees of Maclurg, No 21. p. 894.; 24th February 1769, Watſon *contra* Orr, No 254. p. 1220.; 15th June 1773, Ramſay *contra* Creditors of Ramſay*.

Even where the challenge has been laid on the ſtatute, ſuch diſpoſitions have been often ſupported; for example, 3d July 1724, Creditors of Watſon, No 237. p. 1199.; 16th November 1757, Sym *contra* Simſon, No 248. p. 1212.; 18th February 1762, Baillie *contra* Macvicar, No 250. p. 1214.

Of the caſes quoted on the other ſide, there is not one which did not relate to bankruptcies, according to the terms of the ſtatute, excepting that of Walpole and Elliſon alone; in which not only was the truſt-deed granted to the private mandatary of the party, but it was beſides of an actually fraudulent nature. As to the caſe of Snee, it ſeems incongruous to admit, that it related to the ſtatutory bankruptcy, and yet, without any authority, to deny the influence of this circumſtance.

Two other topics were introduced by the truſtees: 1*mo*, That at any rate they were entitled to retention of the proceeds of the roup; and 2*do*, That the arreſter, after availing himſelf by his diligence of proceedings founded on the conveyance, was *perſonali exceptione* barred from objecting to it.

The queſtion at firſt came before the Court in a reclaiming petition and anſwers. But conſidering the point to be of importance as a precedent, their Lordſhips ordered memorials, for the purpoſe of preſenting a full view of former deciſions.

On adviſing theſe, ſome of the Judges paid attention to the conſiderations laſt mentioned. But the Court were unanimouſly of opinion, that the conveyance in queſtion was valid and effectual; and therefore

* Not reported. *See* General Liſt of Names.

No. 256. THE LORDS dismissed the claim of the arresting creditor, and found him liable in expences.

Lord Ordinary, *Hailes.* For Hutchison, *Maconochie, Wauchope.* Clerk, *Colquhoun.* Alt. *Steuart.*

Fol. Dic. v. 3. *p.* 66. *Fac. Col. No* 193. *p.* 401.

Stewart.

1798. *March* 10.

JAMES THOMSON, Common Agent for the Creditors of NEIL CAMPBELL, *against* HENRY BUTTER and Others.

No 257.
A revocable trust-settlement, by which a person conveyed his whole property, at his death, to certain confidential friends, for payment of debts, and other refiduary purposes, found insufficient to prevent his creditors from obtaining preferences by legal diligence.

By 33d Geo. III. c. 74. § 3. an arrestment may be used upon an unexecuted sommons, although the debtor be not bankrupt, in terms of the act 1696, c. 5.

CAPTAIN NEIL CAMPBELL executed a revocable trust-deed, by which, in the event of his going abroad with his regiment, he conveyed his whole property to his wife, and certain confidential friends, for payment of his debts, and other purposes, the trust to subsist after his death, if the objects of it were not previously accomplished.

He afterwards executed a second deed, likewise containing a power of revocation, conveying his whole property, at his death, to the same and additional trustees, whom he named his executors. The purposes of this deed were declared to be, to enable them to pay, 1*mo*, His deathbed and funeral charges, and the expences of management; 2*do*, His other debts, and those due by open account, without decree, if the trustees were satisfied of their justice; 3*tio*, The provisions to his wife; 4*to*, The legacies and donations which should be left by him; and, *lastly*, The reversion to his heir.

Captain Campbell died insolvent, but not bankrupt, in terms of the act 1696, c. 5.

After the trustees had sold his estate, several creditors used arrestments in the hands of the purchaser. A multiplepoinding was raised, and a common agent appointed, who stated, as a general objection to the preferences claimed by all the arresting creditors, that, by the trust-deeds, in which the whole creditors had acquiesced till the lands were sold, each creditor was entitled to a rateable proportion of the funds *in medio*, and no one could obtain a preference by arrestment; 13th November 1744, Snodgrass, No 245. p. 1209.; 23d January 1756, Souper against the Creditors of Smith, No 76. p. 744.; 30th July 1766, Mackell against the Trustees of Maclurg, No 21. p. 894.; 24th February 1769, Watson against the Trustees of Tod, No 254. p. 1220.; 8th December 1791, Hutchison against the Creditors of Gibson, No 256. p. 1221.

THE LORD ORDINARY "Found, that the trust-deeds executed by Mr Campbell, were not granted by him at the desire of his creditors, or for the behoof of his creditors: Found, that by these trust-deeds, Mr Campbell of Inverliver appointed his wife Mrs Campbell, and Mr George Andrew, his cousin and man of bu-