

No 139.

A man sold his lands to two different purchasers. Having become insolvent by the two sales, it was found that after horning against him by the first purchaser, he was not entitled to extend the second minute of sale, and grant infestment to the second purchaser. The horning was found to have a general effect both as to lands and moveables.

1677. July 18.

MURRAY against DRUMMOND.

MURRAY of Keillor having bought certain lands by a minute of contract subscribed thereupon, the feller did by another minute sell the same lands to Drummond of Machinie for a less price; after both minutes, Keillor charged the disponent upon his minute to dispoise in ample form, after which charge the common author did extend a disposition in ample form to Machinie who thereupon was infest. Keillor raises reduction of Machinie's disposition and infestment, upon these reasons: *1mo*, That by the act of Parliament 1621, All dispositions, without an adequate price are declared null, in favours of anterior creditors; and Machinie's disposition was for 1000 merks less than Keillors, which was the 6th or 7th part of the price. *2do*, By the last article of the same act, it is declared, That after legal diligence used by lawful creditors, no bankrupt or insolvent person can make any voluntary disposition or payment to a creditor, to prefer that creditor to the other, having done more timely diligence by horning, arrestment, inhibition, or apprising; which voluntary deeds by gratification are declared null. *Ita est*, Keillor by the minute obliging the common author to dispoise, is a lawful creditor; and having used horning upon the minute against the common author, he ought not to have extended and perfected the posterior minute by gratification and voluntary preference, without compulsion of law, and therefore the disposition and infestment following thereupon are null and void. It was answered for the defender Machinie, *1mo*, Absolvitor, because beside the disposition and infestment upon the posterior minute, he hath an infestment upon an expired apprising, which doth totally exclude the pursuer's interest. *2do*, The first reason of reduction is not relevant, for suppose the posterior disposition were for a less price than the former, yet that was never sustained as a ground to annul a disposition, but only to affect for the excrecence, in so far as the disposition was without an equivalent cause onerous. *3tio*, A competent price hath a considerable latitude, and the offer by another of 1000 merks more, cannot infer the incompetency of the price, for upon that ground the most of the bargains in Scotland may be called in question, because another in emulation would offer a greater price; and whatever was the fault of the feller, this defender knew nothing of it, but bought for satisfaction of a debt owing to him before, and at a reasonable price. And as to the second reason of reduction, it is not relevant; for, *first*, the act of Parliament requires that the disponent must be dyvor. *2dly*, By creditor cannot be meant a purchaser by disposition, who hath given out no price, but a creditor who hath lent money. *3dly*, The act of Parliament bears, That the diligence must be such as can truly affect the subject; and therefore horning and arrestment can have no effect as to lands, but as to the moveables, and lands only by inhibition or apprising. It was answered for the pursuer, That defence upon the defenders other rights cannot hinder him to reduce this right, neither will this reduction prejudice his other rights: And as to the second reason of reduction, the pursuers condescended, that the common author had no more estate, and so by

the posterior disposition he became insolvent. Like as the pursuer's horning was the first and necessary step of his diligence, to complete his minute, and hath not only a personal, but a real effect even against land; for thereupon adjudication would proceed, which could only take place after horning; the liferent escheat might be recovered, and caption used against the seller to compel him by incarceration to dispoise; neither is there any exception in the act of Parliament of creditors for fairs only; but on the contrary, an obligation to dispoise and infest, is a more special debt, and makes a more special creditor; and the defender will be at no loss, for the pursuer hath in his hand the price, which will be furthcoming to pay the debt due to the defender.

THE LORDS found, that it was *in arbitrio judicis*, to put the parties to dispute their whole rights, or any one right quarrelled; and that they used not to follow that form and course, but when the parties were poor, to prevent further process, and therefore they repelled the defence, but prejudice to defend upon the apprising as accords; and they found not the first reason of the reduction relevant upon that difference of the two prices, but found the third reason of reduction relevant, that the common author becoming insolvent by these dispositions, after horning against him at the pursuer's instance, he could not by gratification extend the second minute, whereby he had attained infestment in prejudice of the prior minute, and horning thereupon, which they found to have a general effect, both as to lands and moveables.

*Fol. Dic. v. 1. p. 78. Stair, v. 2. p. 543.*

1681. January 25.

BATHGATE against BOWDOUN.

JAMES COUSTOUN having first disposed a tenement in Leith to Helen Bathgate for a full price, she was infest, but upon mistake, as if the tenement had been within a burgh-royal, she neglected to registrate her sasine. Thereafter Coustoun disposed the same tenement to James Bowdoun, who was infest and registrate. In a competition betwixt them, Bowdoun craved preference by this last infestment, because Bathgate's infestment was null, not being registrate: Bathgate repeated a reduction upon this reason, that she being a lawful creditor to Coustoun had used horning, against him, whereupon he had disposed to her the tenement, and therefore Coustoun could not, by gratification, prefer Bowdoun another creditor, who had done less diligence by the act of Parliament 1621, anent fraudulent alienations, and the last clause thereof, by which it is declared, That after diligence done by any creditor lawfully to affect his debtor's estate, by horning, apprising, arrestment, or inhibition, that the debtor could not, by gratification, prefer another creditor, having done less diligence. It was *answered*, That that clause bears diligence lawfully to affect the debtor's estate, and cannot be extended to horning, which does not affect the estate, at least could only extend to the liferent; as arrestment could only affect moveables; and could not prefer the arrester, as to

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After horning against a common debtor, a disposition made by him not being for a price paid, by way of commerce, but for a prior debt, was found reducible at the instance of the creditor who had done the prior diligence.