

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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No 140.

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.

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real rights; as apprising, or inhibition could not prefer the creditor thereof, as to moveable rights. *2do*, If all these inchoate diligences should be equal diligences, it would invert that excellent design in securing purchasers *bona fide*; for then arretments which could not be known, or apprisings, though not registrate, might exclude them, which would marr commerce. It was *replied*, That if the clause imported no more, but that complete diligences should prefer creditors, *quoad* the proper effect, as to these diligences, it would then signify nothing; for without that, statute law did secure such diligences; but the true intent must be, that after such diligence inchoate, though not complete, the common debtor cannot, by gratification prefer another creditor, having done less diligence, by a voluntary disposition, which doth not concern purchasers, by way of commerce, who buy and pay a price; and therefore though Bowdoun's disposition bears a price paid, yet the true cause was for satisfying a debt due to Bowdoun before the disposition; and therefore the act doth not bear, That the creditor having used diligence, affecting any subject of his creditors, but bears, diligence lawfully to affect, which imports, that the diligence was but inchoate, and designing to affect; and therefore, horning being a diligence affecting both the moveables by single escheat, and lands and heritable rights, by liferent escheat, the common debtor cannot gratify another creditor, and prefer him to the user of the horning.

THE LORDS found the reason of reduction relevant, That after horning used by Bathgate against Coufston the common debtor, the disposition made by him to Bowdoun thereafter, not being for a price paid by way of commerce, but for satisfying a prior debt due to Bowdoun, that the same was reducible at the instance of Bathgate.

Fol. Dic. v. 1. p. 78. Stair, v. 2. p. 841.

* * * Fountainhall thus reports the same case :

A REDUCTION of a posterior disposition on the act of Parliament 1621, because she had charged him with horning upon her disposition before he made the second, and duly registrate it : *Answered*, Horning is not the habile and legal diligence to hinder a man to dispone lands, but only an inhibition, and the words of the act of Parliament must be understood *singula singulis*, according to their proper subjects and effects, though an arretment might be extended to secure lands, the contrary whereof was decided in Durie, March 1623,* and who ever searched the register of hornings, but only to secure against escheats? yet the LORDS found the reason of reduction relevant, and repelled the answer; but the LORDS were divided, and were not unanimous; for some thought horning not such a diligence as could secure against alienation of lands: All of them were of opinion it would not prejudge a posterior bargain, where the price was truly paid, but only that it secured where the disposition was voluntarily made to another creditor in satisfaction of an anterior debt, which was the case in hand. See M'Kenzie's Observations on the said act of Parliament 1621, page 154. *et seq.*

Fountainhall, MS.

* The case alluded to seems to be BRACO against OGILVIE, Durie, p. 61. 22d March 1623.

1685. November.

SHAW against M'MILLANS.

A DISPOSITION *omnium bonorum* being quarrelled by the disponent's creditors, that had done no diligence, upon this reason, That he was notoriously bankrupt, and so could not prefer one creditor to another, as was found in Farperfie's case, No 28. p. 899.

THE LORDS sustained the reason thus qualified, viz. That the disponent was under several hornings, and his debt exceeded his free gear before the disposition, and the disposition was of all his estate, real and personal; and resolved to determine so in other cases: But found, That the raising of horning was not sufficient, unless the party were denounced, and [the horning] registrate; and it would appear that one horning would not be found sufficient.

Harcarse, (ALIENATION.) No 138. p. 29.

1686. February.

SIR JAMES COCKBURN against Provost MILN and Others.

IN a competition of the creditors of Grange, it was alleged for Sir James Cockburn, That the common debtor being denounced at his instance, could not prefer and gratify another creditor, who had done no diligence.

Answered, 1mo, The denunciation being only at the market-cross of Edinburgh, where the party did not live, it could only be the foundation of a caption, and could not affect any part of the debtor's estate, seeing the contempt did not infer rebellion; and so cannot be reputed such a diligence as the act of Parliament requires. *2do,* The debtor was not bankrupt by that horning, for he was then in a reponsal condition.

THE LORDS sustained both the answers.

February 1686.—FOUND, That a denunciation to the horn at the market-cross of Edinburgh, where the party did not live, was not a sufficient diligence to hinder gratification, since his escheat did not fall thereby; and it was not a diligence *ordinata* to affect the goods, as other hornings are.

Harcarse, (ALIENATION.) No 140. 143. p. 29. 30.

1686. March 16.

BAILIE GARTSHORE against SIR JAMES COCKBURN.

A CREDITOR having executed an inhibition against Sir Walter Seaton his debtor, personally, upon the first of February, and published it at the market-cross of Linlithgow upon the 4th, registrate the same upon the 6th day: The debtor,

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No 141.

One horning, particularly when not followed by denunciation and registration, held not sufficient to found reduction.

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Denunciation at the market-cross of Edinburgh, (where the debtor did not reside,) found not sufficient diligence.

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An inhibition not yet registered, but *in cursu*, sufficient to