

No 156.

tors at whose instance the horning, or other diligence, was used; and therefore reduced the disposition as being simulate; *ad hunc effectum*, to bring in all the creditors *pari passu* together, that had used horning or other diligence against the debtor, before the granting of the disposition: But found that the diligence used by these creditors did not accrefce to the other creditors that had done no diligence, so as to give them likewise the benefit of the act of Parliament, and to bring them in *pari passu* with those creditors at whose instance diligence was used, and others in whose favours the disposition was granted, seeing he was not latent nor fugitive, but continued to keep shop and use merchandise, after the granting of the disposition.

Sir Patrick Home, MS. v. 1. No 248.

* * * President Falconer reports the same case:

In an action of reduction, pursued at the instance of Robert Hamilton, merchant, his creditors, for reducing a disposition granted by him, in favours of his sister and brother-in-law, of his house and shop, upon this reason, that the same was simulate, seeing it was made *retenta possessione*, he having continued in the possession of the house and shop by the space of two years; and having sold and disposed of the goods as formerly: THE LORDS found, in respect that the fine upon the tenement was not taken for a year and a half after the date of the disposition, and that the common debtor continued in possession of the house, shop, and goods, as formerly, and kept an open shop; and the same being all the estate he had till he broke, they reduced the disposition as being simulate, *ad hunc effectum*, to bring in all the creditors *pari passu*, according to their diligence. But the LORDS did not incline to sustain the reason of reduction following, viz. That by the act of Parliament 1621, he was bankrupt, and at the horn, and so could not dispoise to this defender, albeit a creditor, to prefer him to other creditors, the disposition being *omnium bonorum*, seeing that the horning was not used at the instance of the pursuer, and the common debtor used trading and merchandizing, and kept a public shop long after granting the disposition, and that the defender did offer to condescend upon and to prove the onerous cause, by producing and instructing by bond, that he was creditor *ab ante* to the common debtor. See PRESUMPTION.

Fol. Dic. v. 1. p. 79. Pres. Falconer, No 17. p. 9.

1683. November.

DEMPSTER of Pitliver against MORRISON.

No 157.

This act found to extend to *acquirenda*, and that a debtor cannot dispoise heritable rights ac-

JOHN MORRISON of Daerfie having dispoised to Mr Hary Morrison an heritable right of 17,000 merks, due to the Earl of Southesk; and Mr John Dempster of Pitliver, having thereafter apprised that sum, and pursued a reduction of Mr Hary's disposition, upon the act of Parliament 1621, as being granted after the said John Morrison was bankrupt and at the horn; after which he could make

any voluntary right in prejudice of the creditors that had done legal diligence against him.—*Answered*, That John Morrison, the defender's author, had no right to the sum at that time when diligence was done against him: But thereafter having acquired the right, he might dispose of the sum as he pleased, seeing the diligence against the said John Morrison could affect no estate but that which belonged to him the time of using the diligence.—*Replied*, That the act of Parliament is express; that after legal diligence is done against a person by horning, inhibition, arrestment, and apprising, he cannot make any disposition in prejudice of his other lawful creditors, their more timely diligence, and makes no distinction as to lands and rights acquired before or after the diligence. And if a party inhibited acquire lands, or other heritable right, after the inhibition, as he cannot dispose of the same, in prejudice of the inhibition; so neither can a person that is bankrupt and at the horn, dispone lands that he has thereafter acquired in prejudice of the creditors diligence.—THE LORDS found that the act of Parliament against dispositions, made by bankrupts, extends as well to *acquirenda* as to *acquisita*; and that the debtor must not dispone upon lands, or heritable rights, acquired after the creditors diligence by inhibition or horning, in prejudice of the creditor's debt and diligence; and therefore reduced the disposition and assignation made by John Morrison to the defender.

Fol. Dic. v. 1. p. 80. Sir P. Home, MS. v. 1. No 484.

1686. *January.* BATEMAN and CHAPLANE against HAMILTON, &c.

SIR GEORGE DRUMMOND, Provost of Edinburgh, having granted a disposition to Thomas Hamilton, John Drummond, and two or three more of his creditors, of the merchant-ware that was in his shop, and some debts, for payment and relief of several debts and sums of money due to them by bond, and wherein they stood engaged as cautioners, particularly condescended upon in the disposition; and Major Bateman and Alexander Chaplane, other two of the Provost's creditors, having raised a reduction of the disposition upon the act of Parliament 1621, it being granted in defraud of them who were lawful creditors, after they had done diligence against the Provost by a charge of horning, after which he could not by any voluntary deed prefer one creditor to another: *Answered* for the defenders, That they were not in the terms of the act of Parliament 1621, because they were not conjunct persons, they having no relation to Provost Drummond; and the disposition was granted to them for onerous causes; and a charge of horning being only an inchoate diligence, cannot give the pursuer the benefit of the act of Parliament 1621, unless the horning had been completed by denunciation, and registered before the granting of the disposition; for a charge of horning, which is but a private latent deed, as it did not hinder Provost Drummond to dispone, so neither could it hinder the defenders to accept of a disposition of these goods for payment of their just debts; and as an inhibition albeit execute against the party

No 157.

quired after diligence, by horning or inhibition, to the prejudice of the creditor using it.

No 158.

In a reduction of a disposition of goods upon the act 1621, at the instance of a creditor who had done diligence, the Lords preferred the pursuer, and refused to allow a signees, who were also creditors, to come in *pari passu* with him. See No 161. p. 1076.