

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

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

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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.

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personally apprehended, and execute at the market cross of the shire where he lives, and registered in the general register, but not execute at the market cross of the shire where the lands lie, will not give the raiser of the inhibition the benefit of the act of Parliament 1621, as diligence to reduce voluntary rights of the lands made by the debtor in favour of another creditor, in respect of the informality, and that the diligence is not complete, not being execute at the market cross where the lands lie, as was lately decided in the case of Daniel Nicolson against Francis Kinloch *; so by that same reason the charge of horning, which is an incomplete diligence, should not give the raiser of the horning the benefit of the act of Parliament; and the clause in the act of Parliament 1621, by which it is provided, That a debtor cannot prefer a creditor to another, after diligence by horning, can only be understood of a complete diligence, when a debtor is legally charged, denounced, and registered to the horn: As also the clause in the act of Parliament, That the creditor after diligence of horning, arrestment, inhibition, or apprising, cannot prefer a creditor to another, can only be understood *in terminis juris*, and be applicable to the several subjects which these diligences do affect, so as that a diligence of inhibition or of apprising cannot be a ground to reduce a disposition of moveables, because such diligences do not properly affect moveables, but lands and heritable rights. Neither can a diligence of horning be a ground to reduce a disposition of moveables, which can only be properly affected by arrestment; so that the pursuers not having affected the goods disposed to the defenders by a proper diligence of arrestment, before the disposition, they cannot reduce it upon the account of diligence of horning; especially the horning not being completed by denunciation and registration before the disposition, which would have been a ground for the gift of escheat that might have affected the moveables: And as a horning doth not render a debtor incapable to dispone his lands, much less his moveables; for if it were allowed, then it would ruin and destroy all commerce: And the foresaid disposition was not *omnium bonorum*, but only of the merchant goods in the shop, and some debts that were owing to him; whereas Provost Drummond had a visible estate in land beside; and the defenders are content that the pursuers have the benefit of the disposition, as to the debts and sums of money, which they may affect and pursue for payment of, and the defenders shall not oppose the same; but the disposition cannot be reduced as to the merchant goods in the shop, the defenders having actually intromitted therewith, and disposed of the same for their own payment and relief; and as Provost Drummond might have sold these goods in his shop to any person he pleased notwithstanding, and the time of the granting of the disposition the Provost was in entire credit, and kept his shop, bought and sold as he had been in use to do, and did appear in public and sit in the Town Council of Edinburgh after the granting of the disposition; and was not *in meditatione fugæ*, nor did he withdraw to the abbey for some time thereafter; and it is clear by the common law upon which the act of Parliament 1621 is founded, that *actio pauliana*, which was introduced *ex Edictio* † *Edicto*, for reducing of deeds done by debtors in favour of

* Examine General List of Names.

† *Prætorio*.

some of these creditors in defraud of others, did not take place unless the creditor, in whose favour the rights were made, were *consciis et particeps fraudis*; but so it is, the defenders, in this case, were not *consciis et particeps fraudis*, seeing they did not so much as desire Provost Drummond to grant the foresaid disposition; nor did they know his condition, that he was in any considerable debt when he granted the same, so that the defenders cannot be understood to have had any design in procuring the foresaid disposition to defraud other creditors; and the act of Parliament being founded upon the common law, it ought to be ruled and interpreted according to the common law, by which it is clear, that when a right is granted for an onerous cause, it cannot be reduced unless there be fraud *ex concilio et ex eventu*; and fraud *ex concilio* ought not only by a fraudulent design of the granter, but likewise of the receiver, to prejudge other creditors, ‘Leg. 6. Par. 8. ‘D. Quæ in fraudem creditorum. Hoc edictum eum coercet, qui scieus eum in fraudem creditorum hoc facere, suscepit quod in fraudem creditorum fiebat. ‘Quare si quid in fraudem creditorum factum sit, si tamen is qui cepit, ignoravit, cessare videntur verba edicti.’ And, ‘Leg. 10. Par. 2. Quod ait Prætor *Sciente*, sic accipimus, te conscio et fraudem partecipante: non enim si simpliciter scio, illum creditores habere, hoc sufficit ad contendendum, teneri eum in factum actione; sed si particeps fraudis est.’ And Donellus, lib. 23. Coment.* Franciscus Stephanus, decisio: 31. Joannes Deckerus, lib. 1. Differ. 10. No 27.’ are positive of the opinion, ‘Quod ad actionem paulianam non sufficere fraudem debitoris et ejus qui cum debitore negotium gessit fraudisq. eventum fit, insuper requiri ut bona possessa sint.’ And which is likewise clear from the foresaid 6th law, Par. 7. Digest. ‘Quæ in fraud. creditorum. Sciendum; Julianum scribere, eoque jure nos uti, ut qui debitam pecuniam recepit, antequam bona debitoris possideantur, quamvis sciens prudensq. solvendo non esse recipiat, non timere hoc edictum; sibi enim vigilavit.’ So that by the common law, albeit there has been both *fraus debitoris et creditoris*; *actio pauliana*, did not take place, unless the other creditor, who was alleged to have been prejudged by the disposition, had by virtue of legal diligence, actually obtained possession of their goods; which cannot be alleged in this case; but, on the contrary, the defenders had obtained possession by virtue of their disposition: And albeit, Provost Drummond had been *in meditatione fugæ* when he granted the foresaid disposition, yet, by the common law, it is not reducible upon that ground, Leg. 6. Digest. eod. Par. 6. ‘Apud Labeonem scriptum est, eum qui suam recipiat, nullam videri fraudem facere, hoc est, eum qui quod sibi debetur receperat.’ And Leg. 10. Par. 16. ‘Si debitorem meum, et complurium creditorum consecutus essem fugientem, secum ferentem pecuniam, et abstulissem ei id, quod mihi debeatur; placet Juliani sententia dicentis, multum interesse, antequam in possessionem bonorum ejus creditores mittantur, hoc factum sit, an postea; si ante, cessare in factum actionem; si postea, huic locum fore.’ So that if a creditor may apprehend the debtor fleeing away with money, and may take the same for his own payment, by that same reason he may take a disposition of these moveables for payment of his just debts, albeit he was *in medi-*

No 158. *latibne fuga*, as is clear by several decisions, and particularly No 1. p. 879. where an assignation to a creditor was sustained, albeit made by a bankrupt of his goods, and that they were delivered in the night time, and that same night before the disponent fled, and it cannot be *alleged* the pursuer was in course of diligence, seeing the charge at the instance of Bateman, and of the pursuers, was two months before the disposition, and all that time they used no farther diligence. *Replied*, That there are two heads in the act of Parliament upon which rights made in defraud of creditors may be reduced. The one is of rights made by debtors in favour of conjunct persons without any onerous cause; the other is of the debtor preferring one creditor to another, in prejudice of the other creditors more timely diligence. And the disposition made in favour of the defender falls under the last head of the act of Parliament, by which a debtor cannot make any voluntary right in defraud of other creditors lawful and more timely diligence, by using of horning; so that a simple charge of horning being the using a horning; it must state the pursuers, in the terms of the act of Parliament, as being *in-cursu-diligentia*, albeit the debtor was not denounced and registered to the horn before the granting the disposition; and there is no necessity that the diligence should be complete, and should be such as may affect the subject, because, if the diligence were complete, and did affect the subject, as arrestment affects moveables and comprising lands, then the creditor, in respect of his diligence, would be preferred without making use of the act of Parliament; and the disposition was not only granted after the pursuer's diligence of horning, but when the debtor was in *meditatione fuga*, having immediately thereafter retired to the abbey; and albeit the disposition was not *omnium bonorum*, yet it was of all his moveable estate, and he had likewise disposed his lands to other creditors, and our law is founded upon and agreeable to the common law, as to the reducing such rights made by debtors by voluntary gratifications in favour of other creditors; for, by their *actio pauliana*, if a creditor had done diligence, and was in possession of the goods, he was preferable, and might reduce rights made by the debtor to other creditors in his prejudice, and diligence done by a creditor for affecting the goods is equivalent, by our law, to the attaining possession by the common law; and a horning, albeit it be not a title for present possession, yet it being a course of diligence upon which denunciation may follow, the debtors escheat will fall; and if either the creditor himself, at whose instance the diligence is used, or any other person, should get the gift of escheat, the creditor who used the diligence will get payment out of the first and readiest of the escheat goods. As also, it is clear by many decisions, That, after a charge of horning, a debtor cannot make any voluntary right in favours of a creditor, in prejudice of that creditor at whose instance the horning is used; and particularly in the case of Veitch against The Creditors of Ker and Pallat, No 159. p. 1073.; and Murray *contra* Drummond, No 139. p. 1048.; and Bathgate against Bowdoun, No 140. p. 1049.; and the case of an inhibition not duly execute at the market cross where the

lands lie, does not meet this case, because such an inhibition is null by the act of Parliament, and declared to have no effect in law; and if a horning were null, as not being stamped, and without witnesses, it could not have that effect; but a horning duly execute with all the solemnities requisite to a charge of horning, ought to give the user thereof the benefit of the act of Parliament; and if it were otherways sustained, it should be in the power of a debtor to prefer and pay a creditor, and defraud all the rest; and the defenders are not in the case as if they had been persons that bought the ware out of the shop, and paid the money, because that being only some particular goods, there could be no design of fraud either by the feller or buyer; and the money being actually paid, the law in favour of commerce could not have allowed the goods to be repeated; but in this case, where there is no money paid, but a disposition granted of all the goods in the shop, and other moveables, in favour of the defender, by a voluntary gratification, it ought not to be sustained in their prejudice, who have done lawful and timely diligence against the debtor before the granting thereof. And albeit, by the common law, 'qui suum recipit nullam videri fraudem facere,' and that it is very lawful to a creditor to apprehend his debtor fleeing away with money, and to take the same for his own payment, yet that was only in the case where there was no diligence done; but if any diligence was done by other creditors for affecting the goods, in that case one creditor could not take the money from a debtor that was flying, in prejudice of other creditors, as is clear from the foresaid 16th Par. Leg. 10. Digest. eod. by which it is provided that there be *possionem bonorum*; in which case *lex pauliana* takes place, and the money may be repeated; and legal diligence for attaining possession of the debtor's goods is equivalent to the being put in possession.—THE LORDS having advised the debate, Find that the pursuers having raised horning, and having given a charge thereupon, and the disposition in favour of the defenders being granted before elapsing of the days of the foresaid charge, that the same could not prejudge their diligence, albeit incomplete, they not being *in mora*, but prevented by the disposition foresaid; therefore reduced the disposition in favour of the defenders. See No 161. p. 1076.

1687. February.

SIR GEORGE DRUMMOND, late Provost of Edinburgh, having granted a disposition of all the merchant-ware in his shop to Bailie Hamilton, John Drummond, and others, for payment and relief of the sums of money due to them, and wherein they stood cautioners for him to several of his creditors; and Major Bateman another creditor having pursued a reduction of the disposition upon the act of Parliament 1621, the LORDS reduced the disposition in respect of Major Bateman's prior diligence, he having charged Provost Drummond with horning before the granting of the disposition; and Major Bateman having likewise arrested the goods in Bailie Hamilton's, and the other person's hands; and there being a conclusion to make furthcoming added to the summons of reduction; after the disposition.

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was reduced, he insisted in the conclusion to make arrested goods furthcoming. *Alleged* for the defender, That the conclusion to make furthcoming, libelled in the summons of reduction, is incongruous, and contrary to form; these being actions of a different nature, could not be accumulate; and therefore there could be no more decreet to make furthcoming upon the summons of reduction: And when the pursuer should raise an action to make furthcoming, he should have an answer. As also, the arrestment not being laid on until after the disposition made to the defenders; and they having deponed that they were not debtors to Provost Drummond, nor had any goods in their hand belonging to him the time of the arrestment, they could not be decerned to make the same furthcoming: And albeit, the pursuer could affect the goods disposed to them after the disposition was reduced; yet the goods cannot be made furthcoming to the pursuer for payment of his whole debt. But the effect of reduction can be only to bring in the pursuer *pari passu* with the defenders, effecting to the sum, as was decided 18th December 1673, The Creditors of Tarperfie, No 29. p. 900. where albeit the LORDS reduced the disposition, and found, that albeit a debtor cannot prefer a creditor to another; yet the LORDS declared the creditors should have access, according to their sums and diligence, as if the disposition had been granted by (to) them all. *Answered*, That a conclusion in the reduction for making furthcoming the goods, is formal and consistent with law, being a consequence of the reduction, and *frustra fit per plura quod potest fieri per pauciora*; and albeit there had been no arrestment, yet the pursuer might have added a conclusion to make the goods intromitted with and price of the same furthcoming to them, by virtue of the clause in the act of Parliament 1621, by which it is provided, that persons, receivers of fraudulent dispositions, shall make the subject disposed, or price thereof, furthcoming to the prior creditors who had used the first legal diligence; and the defenders acknowledge that they intromitted with the goods disposed to them conform to an inventory; and the disposition being reduced, and the goods roup'd by the Lords order, and the price thereof, as appears by the roup, being much more than the pursuer's debt, so much thereof ought to be made furthcoming to him as will pay his debt; and the defenders cannot come in *pari passu* with him, because it is expressly provided by the act of Parliament 1621, That if any dyvour, or interposed person, shall make any voluntary payment or right to any person, in defraud of the lawful or more timely diligence of any other creditor having served inhibition or used horning, arrestment, or other lawful diligence, duly to affect the debtor's lands or goods, in that case the person shall be holden to make the same furthcoming to the creditor that has used the first diligence, who shall likeways be preferred to the con-creditor, who being posterior in diligence, hath obtained payment by partial favour of the debtor, and shall have good action to recover from the creditor that which was voluntarily paid in defraud of the pursuer's diligence; and the decision of the creditors of Tarperfie does not meet this case, because it does not appear in that case, there

was a prior diligence used by any of the creditors, and therefore the creditors being all in a like case, they were brought in *pari passu* together, effecting to their fums.—THE LORDS preferred Major Bateman, and decerned so much of the prices of the goods arrested to be made furthcoming as would satisfy the pursuer's debt. See PROCESS.

Fol. Dic. v. 1. p. 79. Sir P. Home, MS. v. 2. No 760. & 888.

* * See Clerk against Ferguson (Kilkerran, p. 47.) *voce* COMPENSATION, RETENTION.

S E C T. VIII.

Effect of *Mora* in the conduct of the Creditor Reducer.

1675. February 12. VEITCH against EXECUTORS of KER and PALLAT.

THIS cause being debated the 9th of February instant, (Stair, v. 2. p. 318. *voce* COMPETITION,) and the assignee having obtained payment; Veitch the donatar further *alleged*, That he ought to be preferred as creditor, having assignation from Nairn, who in *anno* 1648 used horning against Sanderfon the common debtor, and thereby is a preferable creditor by the act of Parliament 1621 anent bankrupts, by the last part whereof it is declared, 'That where a creditor uses diligence by inhibition, horning, comprising, or otherwise, he shall be preferred to any other con-creditor obtaining a voluntary assignation or disposition from the common debtor, who shall refund what he recovered thereby;' so that the pursuer's cedent having used horning against Sanderfon the common debtor, long before the assignation made by him to Ker and Brown, of the Stewarts bonds, albeit the assignees had gotten actual payment, they must restore; much more when the fum is yet in the hands of Sir George Maxwell, who gave bonds for the Stewarts; especially, seeing that assignation was granted by Sanderfon, when he was a notour bankrupt, insolvent, and fled.—It was *answered*, That it were of dangerous consequence, if a horning used should incapacitate all creditors to obtain satisfaction by voluntary payment or assignations; for thereby creditors would be obliged to refund, albeit they had received their money *in specie*, or in moveable goods for satisfaction thereof. *2do*, If this be the effect of hornings, it will not only exclude creditors getting payment thereafter from notour bankrupts, but that clause of the act is general, as to all creditors and debtors. *3tio*, That clause can only be extended to creditors who have used horning or other legal diligence duly; to affect their debtors estate; but here there is no more done but the horning, and neither arrestment nor apprising hath followed. *4to*, All preferences are only competent to those who are not negligent, but do insist in their rights; but the pursuer's cedent never having further insisted, but only used horning, and being supinely negligent for more than 20 years,

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It was found, that after diligence by horning, the common debtor who was bankrupt, could not grant any voluntary right, in prejudice of the diligence, although the creditor had allowed it to ly over for 20 years. See No 127. p. 1029.