

No 160.

were suppressed.—It was *replied*, That it was offered to be proven, that inhibitions used to be even then executed at the head burgh of the regality.

THE LORDS sustained the inhibition, albeit some persons, for the more security, inhibited at the head burgh of the regality, during the time of the usurpation. See INHIBITION. *Stair, v. 2. p. 762.*

1686. *January 27.*BATEMAN and CHAPLANE *against* HAMILTON, &c.

No 161.

A disposition *omnium bonorum*, by a person *obscutus*, reduced, in so far as to the prejudice of creditors who had charged him with horning; although there was no denunciation nor registration at the time; and some of the creditors seemed in *mora*, by not denouncing for a month after.

See No 158. p. 1067.

ALEXANDER CHAPLANE, writer to the signet, having raised a reduction of a disposition *omnium bonorum*, granted by Sir George Drummond, late Provost of Edinburgh, in favours of Bailie Thomas Hamilton, and two or three more of his creditors, in prejudice of all the rest, and especially of the pursuer, who had charged him with horning prior thereto, on the act of Parliament 1621, and that he was then *in meditatione fugæ*, and could not prefer one creditor before another. The Lord Cattlehill, who heard the cause, reduced the said disposition.

But, on a bill, this being heard in presence on the 9th of February, it was then *alleged* for the defenders, that the first branch of the act of Parliament does not reach them; because it only concerns dispositions made by bankrupts, to conjunct or confident persons without onerous causes; but *ita est* this disposition was for most onerous causes of debt and cautionry, and they were neither conjunct nor confident to the Provost. *2do*, It was not *dispositio omnium bonorum*, but he had a real estate behind. *3tio*, His shop being *in commercio*, they might bargain for the same, even as they might have bought 100 ells of cloth from him after these hornings, and paid for it, and it could not have been evicted, nor quarrelled, on this act. *4to*, *Non cessit foro*, for some time after this disposition; and a naked charge of horning, without being denounced or registered, did not incapacitate him. See Durie, 31st *January* 1627, Scougal, No 1. p. 879.; Paterfon against Edwards, Durie, p. 471. *voce* FRAUD; and 2d *February* 1632, Jack, No 25. p. 897.; *Stair*, 8th *January* 1669, Preston, No 26. p. 897.; and 3d *February* 1672, Home, No 4. p. 881.; and the decision, *January* 1682, Cunningham, &c. against Hamilton, No 30. p. 902.; where dispositions made by bankrupts, even that same day they fled, were sustained, where no previous diligence was done against them. *5to*, The *actio revocatoria pauliana* cannot be founded on, unless it were subsumed that the receivers of the disposition were *conscii* as well as the granter; but so it is they were not *participes fraudis*; and that the Roman law *in edicto fraudatorio* made two distinctions; *1mo*, Between him who had got a right from a bankrupt *ex titulo oneroso*, whose right was valid even against other creditors, unless he was *particeps fraudis*; and him who had only right *ex causa lucrativa*, as by donation; and there *fraus in concilio* of the granter, and *in eventu*, (though the receiver was ignorant of his condition,) was sufficient to annul it. *2do*, *Vel bona erant possessa ex praetoris edicto*, (which answered to our diligences,) *vel non*. In the first case, the debtor could not any

more gratify one creditor before another: In the second, he might prefer him *qui vigilavit sibi*; and if he found his debtor flying and abtracting money, *poterat eum retrahere*, l. 6. § 7. l. 10. § 16. D. *Qua in fraud. creditor*. No 161.

The President inclined much to bring in all the personal creditors *pari passu* with this disposition; for it was answered for the pursuer, that though it was not *dispositio omnium bonorum*, yet the rest was alienated before, and he had nothing remaining; and this was a selling *per aversionem*, and so not allowable in a bankrupt; and that a charge of horning was sufficient, they being *in cursu diligentia*, and before the days of the charge were expired, he in defraud had disposed; and they were not *in mora*, but denounced him after the six days; and if it had been a compleat diligence by a registrated horning, then it would have been preferred of itself, and needed not the help of this statute; and the words of the act of Parliament are, that he shall not gratify nor prefer to the prejudice of those who have used horning; now a naked charge is to use it.

This debate being advised on the 17th of February, the LORDS reduced Provost Drummond's disposition in so far as it prejudged Chaplane and Bateman, the two creditors who had charged him with horning before the date of it, albeit he was neither denounced nor registrated then; though Bateman seemed *in mora* in forbearing to denounce for a month thereafter, and though the receivers were not *conscious fraudis*. But they did not determine if this would bring in all the rest of the personal creditors, who had done no diligence, *pari passu*. See No 158. p. 1067.

*Fol. Dic. v. 1. p. 80. Fountainball, v. 1. p. 396.*

\* \* Harcarfe reports the same case:

ALEXANDER CHAPLANE having charged Provost Drummond with horning upon the 24th August; upon the 26th, the Provost made a disposition of the merchant goods in his shop to four of his creditors *primo loco*, and some other creditors *2do et 3tio loco*; and, upon the 31st day of the said month, immediately after expiring of the six days of the charge, he was denounced and registrated by Chaplane. The provost was charged also upon the 15th of August by Major Bateman, and denounced and registrated the 8th September thereafter; a reduction of the fore-said disposition being raised by Chaplane and Bateman, as made in prejudice of their diligences;

It was *alleged* for supporting thereof, That the Provost was not looked upon as a bankrupt, but of good reputation and credit at the date on't; nor was it a gratuitous disposition *omnium bonorum*, but of a part of the granter's goods for cautionry; and the pursuer's diligences were not complete before the disposition, as the act of Parliament requires.

*Answered*: Not only by the act of Parliament 1621, but by the civil law, the diligences of creditors cannot be anticipated or prevented *in cursu*; and, if it were otherwise, all diligence might be disappointed by provoked debtors, seeing

No 161. it requires a tract of time to complete it; and, though the disposition quarrelled was not *omnium bonorum*, yet the Provost, about the same time, made two other dispositions of his whole estate, and was thereby in the case of a bankrupt.

*Replied*:—Bateman's diligence was not sufficient, in respect of his negligence to denounce after the days of the charge, which he might have done before the date of the disposition.

*Duplied*: Creditors cannot be obliged to so exact diligence; and it is ordinary to wait some time after the elapsing of the days of the charge, to see if the debtor will pay before he be denounced.

THE LORDS sustained the reason of reduction, in so far as it prejudged the fore-said diligences of Chaplane and Bateman.

*Harcarse, (ALIENATION.) No 141. p. 30.*

No 162.

1688. November.

YOUNG against KIRK.

ONE having charged his debtor without denouncing for four months after, and taken a disposition after the charge; before which disposition, but after the charge, another creditor having charged and denounced, and quarrelled the disposition;

THE LORDS reduced the disposition as a voluntary gratification, the first charger having been negligent in delaying so long to denounce.

*Fol. Dic. v. 1. p. 80. Harcarse, (ALIENATION.) No 156. p. 35.*

1707.

JAMES GORDON of Davach, against WILLIAM DUFF of Dipple.

No 163.

Reduction upon the act 1621 refused, of a disposition made in prejudice of anterior diligence by horning, used at Edinburgh, not at the head burgh of the shire where the debtor lived, no other diligence to affect either the debtor's heritage or moveables having been done for several years after.

IN the reduction upon the act of Parliament 1621, anent bankrupts, at the instance of James Gordon against William Duff, for reducing a disposition granted to the defender by Andrew Geddes of Afile, the pursuer's debtor, after he had been charged with horning, denounced and registered by the pursuer:

*Answered* for the defender:—The act of Parliament 1621, relates only to dispositions granted to one creditor in prejudice of the more timely diligence used by another. Whereas Dipple, at the granting of the disposition made to him, paid a full and adequate price for the same, and got only allowance therein of a small debt that was secured, and preferable by the first investment affecting the subject disposed. *2do*, Albeit the defender had got the disposition quarrelled in satisfaction of bygone debt, the pursuer could not impugn the same upon the act 1621; seeing he did not complete his horning by denouncing the debtor at the market-crofs of the shire where he lived, to make his single escheat fall, and affect the price in the defender's hands; or, by using any other diligence of adjudication, inhibition, &c. to affect either moveables or heritage for several years: But had only denounced at the market-crofs of Edinburgh, in order to caption.