

No 26.

** Sir P. Home also reports this case :

March 1685.—MR JOHN BELSHES of Tofts having pursued a declarator against the Earl of Loudon and his Trustees, for an extinction of an apprizing deduced at the instance of Mr Livingston, of the estate of Loudon, whereunto the Trustees had right ; *alleged* for the defenders, that there could be no process upon the summons, because the same was continued these several years after the days of the first summons were elapsed, but after year and day the instance perished, and the summons could not be continued, and that the style of all summonses was, to compear the day of next to come, which imported the day of compearance should be within the year, and consequently the continuation. *Answered*, That albeit the day of compearance behoved to be-filled up in the summons within year and day, yet the summons was to be called and continued at any time thereafter; and anent citation being given upon the letters, it proceeded upon the act of continuation, which was equivalent to a wakening. THE LORDS found no process upon the summons, in respect the same was not continued within year and day after the day of compearance, in which case, they found the instance perished, and so the summons could not be wakened.

Sir P. Home, MS. v. 2. No 717.

1687. *February 2.*

CHAPLAIN and BEATMAN *against* HAMILTON and Others.

No 27.
In a reduction
on the act
1621, a con-
clusion of
forthcoming
was sustained
in the same
libel.

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 wife, for payment and relief of the sums of money due to him and, wherein they stood engaged for him to several of his creditors; and Major Beatman and other creditors having pursued a reduction of the disposition, upon the act of Parliament 1621, the LORDS reduced the disposition, in respect of Major Beatman's prior diligence, he having charged Provost Drummond with horning, before the granting of the disposition; and Major Beatman having likewise arrested the goods in Bailie Hamilton, and the other person's hands; and there being a conclusion to make furthcoming, added to the summons of reduction; and after the disposition was produced, he insisted in the conclusion, to make arrested goods furthcoming; *alleged* for the defender, that the conclusion is 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 accumulated, and therefore there could be no decret to make furthcoming upon the summons of reduction; and when the pursuer should raise an action to make furthcoming, he shall have an answer. As, also, the arrestment not being laid

on until after the disposition made to the defender ; 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 him, 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 defender, affeiring to the sum, as was decided, 18th December 1673, the Creditors of Tarsapie *against* the Lady Tarsapie, No 29. p. 900. who, albeit the Lords reduced the disposition, and found, that albeit a debtor cannot prefer one creditor to another, yet the Lords declared the creditor should have access, according to the sum and diligence, as if the disposition had been granted 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 sit 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 paid of the same furthcoming to them, by virtue of the clause in that act of Parliament 1621, by which it is provided that persons . . . of fraudulent dispositions shall make the subject disposed, or price thereof furthcoming to the prior creditor, who had used the first legal diligence ; and the defenders acknowledged that they intromitted with the goods disposed to them, conform to an inventory ; and the dispositions being reduced, and the goods roused, by the Lords' order, and the price thereof, as appears by the roup, being much more than the pursuers' debt ; so much thereof ought to be made furthcoming to him as will pay his debt ; and the defender 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 arrest the debtor's lands or goods, in that case the persons shall be holden to make the same furthcoming to the creditor that has used the first diligence, who shall be likewise 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 pursuers' diligence ; and the decision of the creditors of Tarsapie does not meet that case, because it does not appear in that case there was a prior diligence used to any of the creditors ; and therefore the creditors being all in a like case, they were brought in *pari passu* together, effeiring to their sums.

THE LORDS preferred Major Beatman, and decerned so much of the prices of the goods arrested, to be made furthcoming, as would satisfy the pursuers' debt.

Fol. Dic. v. 2. p. 180. Sir P. Home, v. 2. No 888.