SECT. IV.

Reduction not Sustained, even after Diligence, if the Debtor be not Insolvent, nor rendered so by the Alienation.

1686. *February* 12.

SIR JAMES COCKBURN of that Ilk, *against* LORD ROSS, ALEXANDER MILN of Carridden, and other Creditors of Hamilton of Grange.

No 135.
A disposition granted after horning is challenged. Found that one horning is not sufficient; and that it must be otherwise shown, that the party was *obæratus* and bankrupt.

SIR JAMES COCKBURN of that ilk, his reduction *contra* the Lord Ross, Alexander Miln of Carridden, and other Creditors of Hamilton of Grange, being heard *in præsentia*, and he founding on an old disposition of relief, given in 1641 by Sir James Hamilton of Grange to the Lord Forrester; the LORDS found the posterior disposition given by John the son, with infeftment following thereon, preferable to this old relief; unless Sir James Cockburn would subsume, that it was made real by an infeftment, and so not merely a personal right. Then Cockburn repeated a second reason of reduction, that Grange was standing registrated at the horn before this disposition.—*Answered*, This horning could never hinder him to dispone, because he was only denounced at Edinburgh, and not at Linlithgow, where the lands lie, and he dwelt, and so no escheat, but only caption, could follow.—*Replied*, It was enough to produce the effect of the act of Parliament 1621, against bankrupts.——THE LORDS found this not sufficient, unless they would conjoin with it, that he was then *obæratus* and bankrupt, one horning not being sufficient for that.

Fol. Dic. v. 1. *p.* 77. *Fountainhall, v.* 1. *p.* 402.

1697. *November* 19.

ALEXANDER MILN of Carridden *against* SIR WILLIAM NICOLSON'S CREDITORS.

No 136.
Actual insolvency allowed to be proven, tho' the debtor was not at the time of alienation publicly known to be bankrupt.

ALEXANDER MILN of Carridden pursues a reduction against some of Sir William Nicolson's creditors on the act of Parliament 1621; that either their debts were contracted, or else they had taken bonds of corroboration in security of their prior debts, after he had charged the common debtor with horning in 1685.—*Answered*, He was not in the terms of the act of Parliament, unless, 1*mo*, He say, that Sir William was dyvour or bankrupt. 2*do*, That his diligence was compleated by denunciation before granting their rights.—*Replied*, He needs not allege notour bankrupt. It is sufficient if he prove Sir William was then *obæratus* and insolvent. And for the second, the act makes the using of a horning sufficient diligence; so where one has charged, it cannot, in propriety of speech,

No 136.

be denied, but he has used horning.—*Duplied*, If he had immediately prosecute the charge, there might be some pretence to found this reduction; but he was so far *in mora* that the denunciation and registration was ten or eleven months posterior to the charge, and their rights intervened.—*Triplied*, Any time within the year was sufficient, no law requiring a denunciation sooner; and, by many decisions, rights after a charge of horning (though prior to the denunciation) have been reduced as in defraud, 12th February 1675, Vietch *contra* the Executors of Ker and Pallat, No 127. p. 1029.; 18th July 1677, Murray of Keillor against Drummond, No 139. p. 1048.; January 1681, Bathgate *contra* Bowdoun, No 140. p. 1049.; and in the case of Cockburn's creditors, (*infra*, *h. t.*)
——The Lords considered, That a charge of horning was a foundation either for affecting the personal or heritable estate of the debtor; and that a charge of horning satisfied the terms of the act of Parliament; therefore they sustained Carridden's reduction, he proving Sir William's insolvency at that time, though his condition was not then so propaled as to make him holden and repute a notour bankrupt, the standard being but lately fixed by the act of Parliament containing a notour bankrupt's marks and definition.

Fol. Dic. v. 1. *p.* 77. *Fountainhall, v.* 1. *p.* 796.

SECT. V.

What Diligence sufficient to found Reduction upon the act 1621.

1621. *December* 12. John Richardson *against* James Eltone.

No 137.

A Bankrupt *post fugam vel in fuga* may do no voluntary deed in prejudice of a creditor *que habit paratam executionem*. A decreet of registration is found to be diligence, *quoad concreditorem* who has no decreet, but a voluntary assignation.

Kerse, (Creditor.) *MS. verso of fol.* 56.

1623. *February* 21. James Craw *against* David and Thomas Persone.

No 138.

The Lords found that bankrupt might be proven by a charge; and that thereafter he was denounced rebel; and that the assignation, made *medio temporis*, was null by the statute, except it be proven that it was upon an onerous cause.

Kerse, (Creditor.) *MS. verso of fol.* 56.