a horning, arreſtment, compriſing, or other lawful mean to affect the dyvor's land or eſtate; and that horning is not ſuch a diligence as does affect, being only perſonal execution againſt the debtor; and that the ſaid debt of Stewarts was many years contracted by the rebel after the ſaid horning; and that the ſaid Stewarts reſiding in Ireland, and their bond being conceived after the ſtile of Engliſh bonds, did not fall under Sanderſon the creditor's eſcheat. No 127.

Whereunto it was *answered*, That by the ſaid act of Parliament, bankrupts, after they are at the horn, cannot make any voluntary right or payment to gratify or prefer other creditors; ſo that there is no neceſſity to debate whether horning doth affect or not; and yet the truth is, horning is ſuch a diligence as doth affect, ſeeing thereby all the eſcheatable goods are affected, and do belong to the King, and to the creditor at whoſe inſtance the horning is, who is preferable to the King, and has an intereſt in the ſaid goods; and that whatever belongs to a rebel, whether the time of the rebellion, or at any time how long ſoever thereafter during the rebellion, the ſame accrues to the King, and conſequently to the creditor in the horning; and that *nomina debitorum* and debts *non habent situm*, but are perſonal intereſts, and *ſequuntur perſonam creditoris*; and if they be moveable, do fall under his eſcheat, which is a legal aſſignation, as ſaid is.

The Lords inclined to prefer Vietch. But becauſe ſome of the Lords in voting were *non liquet*, the buſineſs was delayed. *See* Sect. 8. of this Diviſion. *See* Escheat.

November 10. 1675.—The Lords having reſumed the debate, and it appearing upon trial, that the common debtor Sanderſon, the time of the granting the aſſignation in *anno* 1662 in favours of Ker and Brown, was not only rebel, but was in effect *fallitus & lapsus*; they preferred Vietch to Pallat.

Dirleton, No 249. 255. & 296. *p.* 118. 123. & 145.

1709. *July* 9.

Margaret Dalgliesh, Lady Riccarton, *againſt* Thomas Gibson, Writer in Edinburgh.

No 128.
A landlord obtained from his tenant, a diſpoſition for payment of arrears of rent, not falling under the hypothec, after the tenant had been denounced, by another creditor.

Thomas Gibson, factor appointed by the Lords for the eſtate of Riccarton, having obtained a decreet before the Sheriff of Edinburgh againſt Robert Cleghorn one of the tenants, for his rent of the crop 1703, and in time coming, the terms of payment being firſt come and bygone: In November 1704 he charged and denounced thereon: In December thereafter the Lady Riccarton denounced this Robert Cleghorn, who was her debtor; and about September 1705, Mr Gibſon took a diſpoſition from him to the corns then on the ground for payment of three years rent, viz. For the crops 1703, 1704, and 1705, and by virtue thereof recovered payment.

No 128.
The landlord found not bound to repeat, more than if he had poinded; although, in a competition, the creditor who had firſt done diligence would have been preferred.

The Lady raiſed reduction of the ſaid diſpoſition againſt Mr Gibſon, upon the ſecond part of the act of Parliament 1621, as made to him in prejudice of the purſuer's lawful and more timely diligence; and craved, that in the terms of that ſtatute, he might be ordained to make furthcoming to her what was voluntarily paid to him, by the common debtor's partial favour, for the crop 1704; which neither the decreet obtained by the defender before it fell due, nor his hypotheck for the ſubſequent year could warrant the payment of.

Answered for the defender: He having received payment of his own rent out of the product of the ground, by virtue of the diſpoſition taken for preventing the expence of poinding, had noways contravened the act of Parliament 1621; whereof the grand deſign was only to prevent fraudulent diſpoſitions, in prejudice of anterior lawful diligence uſed by others. For albeit it mentions that the doer of the diligence has action to recover what was voluntarily paid, in prejudice thereof, by the debtor to his creditor; no inſtance can be given where ever the law took effect as to that clauſe: Seeing, as a perſon under diligence can, for the favour of commerce, ſell and diſpone of his moveables for what price he pleaſeth to a creditor as well as to another; ſo he may likewiſe ſell and diſpone them to his creditors in order to be ſold and applied for their payment. And it were out of meaſure hard if a maſter, who for ſecurity of his rent takes a diſpoſition from his tenant, ſhould ly open to the tenant's creditors, who having ſimple obligements, are in a capacity to do more timely diligence; eſpecially conſidering, that the radical right of all the product of the ground is in the maſter for his rent, and the tenant has only the exerciſe *pro cultura et cura*. Though our law allows the maſter a hypotheck but for one year's rent, yet he has ſuch an intereſt in his tenant's goods even for other years rents, as may always exclude his taking a diſpoſition for payment from the conſtruction of fraud.

Replied for the purſuer: Albeit in a competition, a donatar of eſcheat, (who is preferable to an aſſignee obtaining right *ſtante rebellione*,) could not repeat from a creditor getting payment in that interval; yet in the caſe of diſpoſitions granted by bankrupts, (which are moſt unfavourable) there is no diſtinction betwixt a competition and repetition, 11th November 1675, No 127. p. 1029. Vietch *contra* Pallet; 14th November 1679, No 16. p. 890. Pollock *contra* Kirk Seſſion of Leith; 10th February 1685, Brown *contra* Watſon and Drummond, No 18. p. 892. Nor doth it alter the caſe, that the diſpoſition here was by a tenant to his maſter; for a maſter (who hath a hyphtheck but for one year) ſuffering more years rent to ly unuplifted in the tenant's hand, is conſidered *quoad* theſe only as another common creditor; and any voluntary right granted to him in ſecurity thereof, falls under the act of Parliament 1621. If maſters were preferable for the rents of precedent years, the credit of all tenants would be quite ruined; for nobody would deal with or truſt them, as not knowing what rents may be owing to their maſter: Nor doth the factor's *bona fides* in accepting the diſpoſition avail him; becauſe, that might be pretended by any other creditor, *qui ſuum recipiendo nulli videtur fraudem facere*, and law, without regard thereto, preferreth the anterior diligence of another creditor, *qui ſibi vigilavit*.

No 128.

Duplied for the defender: He is not pleading upon his right of hypotheck, but upon his diſpoſition which he lawfully took, and diſpoſed of the ſubject, by virtue thereof, for payment of his rent, without any trouble or interpellation from the purſuer. The diſpoſitions mentioned in the deciſions cited by her, were not granted by tenants to their maſters; and the ſubjects diſponed were ſtill extant unuplifted.

THE LORDS found, That in the caſe of a maſter obtaining a diſpoſition from his tenant, though in a competition another creditor doing diligence might be preferred; yet the maſter having obtained payment *bona fide* by virtue of the diſpoſition, he cannot be liable to repeat what he received, more than if he had poinded.

Fol. Dic. v. 1. *p.* 77. *Forbes, p.* 344.

1715. *June* 7. ALEXANDER TWEEDIE *againſt* JOHN DIN, and OTHERS.

No 129.
Denunciation with inſolvency not ſufficient foundation to reduce poſterior payments made by the common debtor, unleſs at the ſame time he had been commonly reputed bankrupt, or the receiver were *particeps fraudis*.

ALEXANDER TWEEDIE having ſold a ſtock of ſheep to John Din, for which he got his bond; he regiſtrate him at the horn, and a few months thereafter, endeavouring to poind, he found the ſheep diſpoſed upon to ſome neighbours; and having arreſted in their hands, and purſuing a furthcoming, they deponed, they had got the goods, but that they had bought them, for payment of debts due to them by the common debtor, or wherein they were cautioners for him: But for theſe their debts, no diligence ſave regiſtrations of their bonds was uſed, and the common debtor ſtill continued to trade in buying and ſelling ſheep, &c.

Tweedie now inſiſting upon the latter clauſe of the act of Parliament 1621, and *alleging*, That he was in the preciſe words thereof; becauſe he had uſed diligence to affect his debtor's goods, by a regiſtrate horning againſt a bankrupt and dyvour; and that the other creditors had obtained payment (by the partial favour of the debtor) though poſterior to him in diligence; and therefore he had good action to recover what was thus voluntarily paid.

And the co-creditors defenders, having *alleged*, 1*mo*, That there was a difference betwixt bankrupt and inſolvent, and that the law was only to be underſtood of the firſt; and here the common debtor was not bankrupt. 2*do*, Betwixt creditors partakers of the fraud, and thoſe who are not. 3*tio*, Betwixt thoſe who had got payment, and ſuch who only were competing for preference, on a ſubject yet outſtanding.

Answered for the purſuer, 1*mo*, That there is a difference betwixt bankrupt by the act 1696, ſo to operate the effect of that law, and bankrupt by the act 1621, to afford the benefit of that act: That leſs is requiſite to make one bankrupt by the latter than the former; becauſe the effect of the act 1621, is nothing ſo general as of the act 1696. So that with reſpect to the benefit of the act 1621, it was ſufficient that a horning was regiſtrate againſt the common debtor. And this was ſo found 11th December 1691, the Creditors of Langtoun competing, *voce* COMPE-