

1703. *January 14.*ALEXANDER DEANS *against* JEAN HAMILTON.

No 154.

One was charged to provide his wife in a life-rent, in terms of their contract of marriage; there after he was charged by another creditor. He disposed a bond to his wife: Not reducible, being granted in favours of the creditor who had done most timely diligence.

RANKEILLOR reported the competition betwixt Alexander Deans in Prestonpans, and Jean Hamilton, relict of Mr Robert Deans, advocate. By his contract of marriage with her, he was bound to provide her to the life-rent of 20,000 merks; and being charged by the friends, at whose instance execution was appointed to pass, he gave her an assignation to a bond of 1000 merks owing to him by Hamilton of Caldcoats. Alexander Deans being a creditor, and charging him with horning, he suspends, and in regard he could not find caution, he consigns a disposition *omnium bonorum* in place of a cautioner, in the terms of the act of federunt; and Alexander at last obtaining a decreet of suspension, he arrests the sum due by Caldcoats to the said Mr Robert, and craves preference, on these grounds, that he had charged him with horning before he made the assignation to his wife, and that being a voluntary gratification of a debtor *oboratus*, it must be reducible on the act of Parliament 1621, being *inter conjunctas personas*, and in prejudice of his prior diligence.—*Answered*, Though my assignation be posterior to your charge; yet it was not a voluntary deed, but in obedience to a charge of horning, prior to yours, for implement of his contract of marriage: *2do*, It falls not under the act 1621, because it was for a most onerous cause, she being creditor by her contract of marriage in the annual-rent of 20,000 merks, and this is all she can get for it; and though her husband had disposed this to the said Alexander to procure his suspension, prior to her right, yet that can be no ground of preference; for that assignation was never intimate, and her's was the first complete right.—THE LORDS preferred the relict, unless Alexander could prove him bankrupt at the time by absconding, retiring to the Abbey, being in prison, or the like qualifications contained in the act of Parliament 1696.

Fol. Dic. v. 1. p. 79. Fountainball, v. 2. p. 173.

1709. *December 22.*JOHN HENRY, Cordiner in Edinburgh, *against* JOHN GLASSELS and GEORGE CONING, Merchants in London.

No 155.

Found, that a party having received a voluntary assignation from his debtor, in security of by-gone debt, and having recovered the sum assigned, might, not-

THOMAS GLASSELS, merchant in Glasgow, having, in security of bygone debt due by him to John Glaffels, his brother, and George Coning, assigned to John Glaffels, his interest in the capital stock of the African Company; by virtue of which assignation the money was uplifted from the commissioners of the equivalent: John Henry, creditor to Thomas Glaffels, raised reduction against John Glaffels, of the foresaid assignation, upon the act of Parliament 1621, as being granted to a conjunct person, after Thomas Glaffels was at the horn for the debt due to the pursuer. The defender, for supporting the assignation, produced a

confirmed testament, wherein he and George Coning are confirmed executors *qua* creditors to Thomas Glassels; the common debtor.

Alleged for the pursuer:—The sum uplifted by the defender by virtue of the assignation, could not be confirmed as *in bonis defuncti*; in respect the defunct was denuded by the assignation.

Answered for the defenders:—Although they had taken assignation from the defunct; yet, if they thought it lame or defective, they might pass from it, or not make use of it, and establish a better title by legal diligence as they thought fit: And the pursuer, who quarrels the assignation, can never pretend that the goods were not *in bonis defuncti*, because he was denuded by it: For, how can that deed turn to the pursuer's advantage, that he impugns, as done to his prejudice? Can he both reduce it, and crave the benefit of it at the same time? This is inconceivable: The most that he can pretend to is, to have it taken out of the way to afford him access to the subject.

Replied for the pursuer:—The act 1621 doth not simply annul the rights craved to be reduced, so as to make the property of the subject disposed return to the debtor; but only obligeth the receiver of the voluntary right, to make forthcoming what he recovered thereby, to the creditor that used the first diligence. Sir George Mackenzie, in his treatise on that statute, is of this opinion; and also thinks, that a disposition made to a posterior creditor, accrues to him that had done anterior diligence: Which is consonant to the current of decisions; December 18, 1673, Creditors of Tarpersie *contra* L. of Kinfauns, No 29. p. 900.; July 1673, Street and Mason *contra* Lord Torphichen, Stair, v. 2. p. 210. *voce* REDUCTION; January 18, 1678, Kinloch *contra* Blair, No 14. p. 889.; June 16, 1676, Erskine *contra* Reynolds, No 79. p. 960. And the defenders cannot repudiate the assignation after their acceptance of it, and recovering payment by virtue thereof.

Duplied for the defenders:—The intendment of the act of Parliament is, That no partial gratification in favours of a creditor, shall be prejudicial to a co-creditor's more timely diligence; and not that it shall accrue to him who quarrels it. The effect of repetition proceeds only upon supposition that the party favoured hath no other title in his person to defend against repetition: Whereas the defenders have a separate title, *viz.* A confirmation *qua* executors creditors. Sir George Mackenzie in his treatise, argues only upon the nice point of *vinco vincentem*, for the preference of a first to a second compriser, betwixt whom a voluntary right intervenes: Whereas had the competition been with the person having that voluntary right, the preference could only have operated the taking that out of the way; and not the making use on't as an accruing right, to exclude the assignee himself, clothed with another right in his person. The cited decisions do not meet the present case: For there the creditors quarrelling the dispositions had done no diligence, and the receivers of the dispositions had no other right to compete upon; so that the making the dispositions accrue proportionably to the whole creditors, did not hinder the receivers of the dispositions to drop these, and betake themselves to other titles.

No 155.

withstand-
ing, after the
debtor's de-
cease, con-
firm the same
sum, as exe-
cutor credi-
tor to him,
and by the
confirmation
support the
assignation,
quarrelled
upon the act
1621, at the
instance of a
co-creditor
insisting for
repetition.

No 155.

THE LORDS found, That John Glassels and Coning might legally confirm as executors-creditors to Thomas Glassels, and support the assignation by the confirmation.

Fol. Dic. v. 1. p. 79. Forbes, p. 370.

S E C T. VII.

Effect of this Reduction.

1682. March.

CUNNINGHAM and Others against HAMILTON.

No 156.

A common debtor could not prefer one creditor to another, who had charged with horning; but it was found, that the right of the creditor who had used diligence, did not accresce to other creditors who had used none.

JOHN CUNNINGHAM and Others, the creditors of Robert Hamilton, merchant in Edinburgh, having pursued a reduction of a disposition granted to Hamilton his sister, of a tenement and shop in Edinburgh, and of his hail moveables, upon the act of Parliament 1621, as being granted in favours of a conjunct and confident person, in defraud of lawful creditors:—*Answered*, That the disposition was granted to the defender for an onerous cause, which she instantly instructed, partly by her contract of marriage, whereby her brother was obliged to pay her a certain sum of money of tocher, and partly by bonds of borrowed money, equivalent to the value of the house and moveables disposed.—*Replied*, That albeit the disposition be granted for onerous causes, it must be presumed to be in default of the creditors, being granted in favours of the sister *omnium bonorum*; and the disposition of the tenement was kept private and latent, no infestment being taken thereupon for a year and a half thereafter, and was *retenta possessione*, the brother having still retained the possession of the house, and kept the shop and sold the goods, and used merchandise as formerly; and the creditors being defrauded *ex eventu* by the debtor's granting of a disposition of his hail estate, it must be presumed that there has been *dolus propositus*; and whatever might be pretended, that the sum in the contract of marriage should be sustained as an onerous cause *pro tanto*, yet the other bonds ought not to be sustained, because they being granted by a brother to a sister, it must be presumed that they had been granted of purpose to be made use of as a part of the cause for which the disposition was granted, so that unless the ground of the debt were otherwise instructed than by these bonds, they ought not to be sustained as a part of the onerous cause of the disposition; and albeit the defender should instruct sufficient grounds of debt, equivalent to the value of the houses and moveables, yet in this case where there is such presumption of fraud, the pursuers, as being lawful creditors, many of whose debts were prior to the disposition; and the common debtor being registrate to the horn, at the instance of some of the creditors, which did make him a bankrupt; their diligence ought to accresce to the other creditors who had done no diligence, so as to give them likewise the benefit of the act