

1740. *July 25.* ALISON and JEAN M'BANE *against* WILLIAM ORMISTON.

THE M'Banes being creditors to Ormiston, adjudged some tenements belonging to him; upon which they afterwards took out a decreet of maills and duties, and recovered some small sums due of the rents of these tenements. But as there was still a considerable part of the debt not paid, they applied for a horning on the decreet. And for them it was pled, that there was nothing to hinder a creditor's using all the diligences the law has provided, either against the person or effects of his debtor, until he thereby operate his payment. That the matter had been carried so far by the practice of the court, that separate diligences led against different subjects, whether belonging to the same or to several co-debtors, are found entitled to be ranked each for the whole debt upon every several fund, but so as the debt shall be once drawn out of them all; so much does the law favour the accumulating diligences, when the intent is only to draw once payment of a just debt: so that it would seem contrary to the genius of the law, to maintain that, because a creditor had once led an adjudication, by which he was not able to operate his payment; therefore it shall not be now competent to him to affect a new subject of his debtors, which he may afterwards discover, either by adjudication, arrestment, or any other diligence. And, if that is competent, there does not appear any reason why personal diligence should not also be competent, if that is found the properest and easiest method of making the debt effectual: nor that it should make any odds whether the adjudger has been in possession or no; except that, in so far as he has been in possession, his diligence must be restricted; and, if he does not so restrict, it will surely be found unwarrantable.

As to the ground of doubt arising from the Act 1672 it is plain the clause forbidding diligence to be used by an adjudger, only refers to the case where the adjudger is in possession by virtue of a special adjudication, by which the lands adjudged must amount to the full value of the debt, and a fifth part more; and it is subsequent to this part of the statute, that the general adjudication is introduced: to which there is no provision annexed against the creditor's doing other diligence either against his debtor's person or other effects; but the matter is left upon the same footing as it was by the former law, which does not hinder a creditor to use all manner of diligence until he recover actual payment of his debt.

The Lords passed the bill of horning.

*N. B.* There was no memorial in this case but one for the M'Banes.

*No. 154. page 258.*

1743. *July 21.* GEORGE DEMPSTER, Merchant in Dundee, Pursuer, *against* JAMES FERGUSON of Kinmundy, Defender.

ANNO 1732, These parties entered into a contract, whereby the defender obliged him to deliver to the pursuer, at Peterhead, yearly, 350 bolls farm-meal, the growth of the defender's lands, specified in the contract, and that for a certain pe-