

1680. February 25.

KINLOCH *against* the EARLS of SOUTHESK and NORTHESK.

DAVID GRAHAME of Fintry having disposed the lands of Glenproffin and Killiemuir, to Kinloch of Bandoch, with consent of his eldest son; but the father having died before Bandoch's infeftment, the son was entered and infeft, and did also infeft Bandoch in implement of his father's disposition; but there being a prior apprising at the instance of Walter Lyel against the son, to whom these lands were disposed by his contract of marriage, to which apprising the Earls of Northesk and Southesk have right, whereupon there were mutual reductions:—It was *alleged* for the said Earls, That their author having apprised from Fintry, the disposition granted to Bandoch thereafter was *inter conjunctos*, Bandoch being Fintrie's sister-son, so that the narrative in the disposition will not instruct an onerous adequate cause; but the right is presumed to be without a cause onerous, in defraud of Lyel the anterior creditor.—THE LORDS found, That Bandoch behaved to instruct the cause onerous.—It was further *alleged* for the said Earls, That albeit the onerous cause were instructed, yet by the act of Parliament 1621 anent bankrupts, after lawful diligence by horning, apprising, &c. the debtor cannot by voluntary disposition, or other gratifications, prefer another creditor, not having done more timeous diligence.—It was *answered, imo*, That the clause alleged upon, relates only to disposing in favours of a creditor, in prejudice of the prior diligence of another creditor; but where the debtor disposes to a third party, who is no creditor, but buys *bona fide* for a competent price, and pays the same, the buyer can never be questioned, or otherwise commerce of lands behaved to cease; for there is no record by which a buyer may know the diligence of creditors, except what appears by the register of hornings, inhibitions, and sasines, and this right is before the late act of Parliament, allowing apprisings to be registrated. *2do*, The privilege of the act of Parliament in favours of creditors doing diligence, can only be understood where they persist in their diligence, to the effect that while they are *in cursu diligentie*, the debtor cannot disappoint their diligence by voluntary dispositions; but if the creditor persist not, but prove negligent, it cannot be imagined that all inchoate diligences should be as valid as inhibitions; and that till forty years run, none might buy or take security in the debtor's land; *ita est*, nothing followed upon this apprising by charge, infeftment, or otherwise, for some years before Bandoch's right, and therefore voluntary dispositions are preferable to apprisings, whereupon nothing follows within a year, as is observed by Spottiswood, p. 43, Hamilton *contra* M'Gulloch, *voce* BONA et MALA FIDES, where the Lords found the voluntary disposition preferable to the apprising, whereupon no diligence followed for several years before the right. There was also a reason *ex capite inhibitionis*; against which it was *alleged*, That the inhibition was null, not being execute at the head burgh of the regality wherein the lands lay. It was *answered*, That the execution was during the usurpation, when regalities

No 160.

Where there has been an improper degree of *mera*, in following out diligence, alienation in prejudice of it will be sustained.

No 160.

were suppressed.—It was *replied*, That it was offered to be proven, that inhibitions used to be even then executed at the head burgh of the regality.

THE LORDS sustained the inhibition, albeit some persons, for the more security, inhibited at the head burgh of the regality, during the time of the usurpation. See INHIBITION. *Stair, v. 2. p. 762.*

1686. *January 27.*BATEMAN and CHAPLANE *against* HAMILTON, &c.

No 161.

A disposition *omnium bonorum*, by a person *obscutus*, reduced, in so far as to the prejudice of creditors who had charged him with horning; although there was no denunciation nor registration at the time; and some of the creditors seemed in *mora*, by not denouncing for a month after.

See No 158. p. 1067.

ALEXANDER CHAPLANE, writer to the signet, having raised a reduction of a disposition *omnium bonorum*, granted by Sir George Drummond, late Provost of Edinburgh, in favours of Bailie Thomas Hamilton, and two or three more of his creditors, in prejudice of all the rest, and especially of the pursuer, who had charged him with horning prior thereto, on the act of Parliament 1621, and that he was then *in meditatione fugæ*, and could not prefer one creditor before another. The Lord Cattlehill, who heard the cause, reduced the said disposition.

But, on a bill, this being heard in presence on the 9th of February, it was then *alleged* for the defenders, that the first branch of the act of Parliament does not reach them; because it only concerns dispositions made by bankrupts, to conjunct or confident persons without onerous causes; but *ita est* this disposition was for most onerous causes of debt and cautionry, and they were neither conjunct nor confident to the Provost. *2do*, It was not *dispositio omnium bonorum*, but he had a real estate behind. *3tio*, His shop being *in commercio*, they might bargain for the same, even as they might have bought 100 ells of cloth from him after these hornings, and paid for it, and it could not have been evicted, nor quarrelled, on this act. *4to*, *Non cessit foro*, for some time after this disposition; and a naked charge of horning, without being denounced or registered, did not incapacitate him. See Durie, 31st *January* 1627, Scougal, No 1. p. 879.; Paterfon against Edwards, Durie, p. 471. *voce* FRAUD; and 2d *February* 1632, Jack, No 25. p. 897.; *Stair*, 8th *January* 1669, Preston, No 26. p. 897.; and 3d *February* 1672, Home, No 4. p. 881.; and the decision, *January* 1682, Cunningham, &c. against Hamilton, No 30. p. 902.; where dispositions made by bankrupts, even that same day they fled, were sustained, where no previous diligence was done against them. *5to*, The *actio revocatoria pauliana* cannot be founded on, unless it were subsumed that the receivers of the disposition were *conscii* as well as the granter; but so it is they were not *participes fraudis*; and that the Roman law *in edicto fraudatorio* made two distinctions; *1mo*, Between him who had got a right from a bankrupt *ex titulo oneroso*, whose right was valid even against other creditors, unless he was *particeps fraudis*; and him who had only right *ex causa lucrativa*, as by donation; and there *fraus in concilio* of the granter, and *in eventu*, (though the receiver was ignorant of his condition,) was sufficient to annul it. *2do*, *Vel bona erant possessa ex praetoris edicto*, (which answered to our diligences,) *vel non*. In the first case, the debtor could not any