

1685. November.

SHAW against M'MILLANS.

A DISPOSITION *omnium bonorum* being quarrelled by the disponent's creditors, that had done no diligence, upon this reason, That he was notoriously bankrupt, and so could not prefer one creditor to another, as was found in Farperfie's case, No 28. p. 899.

THE LORDS sustained the reason thus qualified, viz. That the disponent was under several hornings, and his debt exceeded his free gear before the disposition, and the disposition was of all his estate, real and personal; and resolved to determine so in other cases: But found, That the raising of horning was not sufficient, unless the party were denounced, and [the horning] registrate; and it would appear that one horning would not be found sufficient.

Harcarse, (ALIENATION.) No 138. p. 29.

1686. February.

SIR JAMES COCKBURN against Provost MILN and Others.

IN a competition of the creditors of Grange, it was alleged for Sir James Cockburn, That the common debtor being denounced at his instance, could not prefer and gratify another creditor, who had done no diligence.

Answered, 1mo, The denunciation being only at the market-cross of Edinburgh, where the party did not live, it could only be the foundation of a caption, and could not affect any part of the debtor's estate, seeing the contempt did not infer rebellion; and so cannot be reputed such a diligence as the act of Parliament requires. *2do,* The debtor was not bankrupt by that horning, for he was then in a reponsal condition.

THE LORDS sustained both the answers.

February 1686.—FOUND, That a denunciation to the horn at the market-cross of Edinburgh, where the party did not live, was not a sufficient diligence to hinder gratification, since his escheat did not fall thereby; and it was not a diligence *ordinata* to affect the goods, as other hornings are.

Harcarse, (ALIENATION.) No 140. 143. p. 29. 30.

1686. March 16.

BAILIE GARTSHORE against SIR JAMES COCKBURN.

A CREDITOR having executed an inhibition against Sir Walter Seaton his debtor, personally, upon the first of February, and published it at the market-cross of Linlithgow upon the 4th, registrate the same upon the 6th day: The debtor,

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No 141.

One horning, particularly when not followed by denunciation and registration, held not sufficient to found reduction.

No 142.

Denunciation at the market-cross of Edinburgh, (where the debtor did not reside,) found not sufficient diligence.

No 143.

An inhibition not yet registered, but *in cursu*, sufficient to

No 143.
found reduction on the
act 1621.

upon the 2d of the said month of February, subscribed a minute of sale of his lands to another creditor, which was quarrelled both as a gratification of one creditor after inhibition at the instance of another, contrary to the act of Parliament 1621, and anticipation of the inhibitor's diligence when he was *in cursu*.

Answered: The inhibition was not registered till four days after the minute; and diligence is only to be considered after it is public by registration.

THE LORDS reduced the minute as a gratification to a creditor, and unlawful anticipation of another's diligence. See LITIGIOUS.

Fol. Dic. v. 1. p. 78. Harcarse, (INHIBITION.) No 639. p. 176.

* * * Fountainhall remarks the same case:

ALEXANDER GARTSHORE of that ilk, and ——— Crawford his daughter-in-law, pursue reduction of a disposition made by Sir Walter Seaton to Sir James Cockburn *ex capite inhibitionis*.—*Alleged*, The disposition is prior to the publication at the market-crofs.—*Answered*, It was enough if it is posterior to the executing it against the party.—This being reported by Harcarse, the LORDS find the pursuer was *in cursu diligentie* by raising and executing his inhibition against the debtor, albeit before the execution thereof against the leiges at the market-crofs, he was prevented by the defender's disposition; and therefore they reduced the same as fraudulent, and intervening after the inhibition is begun, of purpose to evacuate it.

Fountainhall, v. 1. p. 408.

1687. November 25.

MR. HUGH DALRYMPLE Advocate, *against* JANET LYELL.

No 144.

An inhibition, if duly executed, found sufficient diligence to prevent preferences, even out of moveables.

THE suspension of a charge in the year 1649, at the instance of one Lyell, against Sir William Dick, not being discussed by reason of the war, and interruption of justice, till the year 1662, and then the charger having proceeded, without denouncing, to apprise in the year 1653, and to raise inhibition which was executed and registered in the 1654; Sir William assigned a moveable bond to one Mowat; of the which assignation Lyell raised reduction, as being a gratification after his diligence.

Alleged for the defender: That the charge on which denunciation and registration did not follow, was not a sufficient diligence to hinder the assignation; and the inhibition cannot be regarded, seeing it affects not moveables; and besides, it is null; for that the execution bears not, that a copy was left at the crofs. *2do*, It is not sufficient that diligence was inchoate, seeing the creditor was *in mora* to consummate the same.

Answered: When a person raises horning, in order to apprise for his debt, he needs not proceed to denunciation, which is designed to make the debtor's escheat;