

No 161. it requires a tract of time to complete it; and, though the disposition quarrelled was not *omnium bonorum*, yet the Provost, about the same time, made two other dispositions of his whole estate, and was thereby in the case of a bankrupt.

*Replied*:—Bateman's diligence was not sufficient, in respect of his negligence to denounce after the days of the charge, which he might have done before the date of the disposition.

*Duplied*: Creditors cannot be obliged to so exact diligence; and it is ordinary to wait some time after the elapsing of the days of the charge, to see if the debtor will pay before he be denounced.

THE LORDS sustained the reason of reduction, in so far as it prejudged the fore-said diligences of Chaplane and Bateman.

*Harcarse, (ALIENATION.) No 141. p. 30.*

No 162.

1688. November.

YOUNG against KIRK.

ONE having charged his debtor without denouncing for four months after, and taken a disposition after the charge; before which disposition, but after the charge, another creditor having charged and denounced, and quarrelled the disposition;

THE LORDS reduced the disposition as a voluntary gratification, the first charger having been negligent in delaying so long to denounce.

*Fol. Dic. v. 1. p. 80. Harcarse, (ALIENATION.) No 156. p. 35.*

1707.

JAMES GORDON of Davach, against WILLIAM DUFF of Dipple.

No 163.

Reduction upon the act 1621 refused, of a disposition made in prejudice of anterior diligence by horning, used at Edinburgh, not at the head burgh of the shire where the debtor lived, no other diligence to affect either the debtor's heritage or moveables having been done for several years after.

IN the reduction upon the act of Parliament 1621, anent bankrupts, at the instance of James Gordon against William Duff, for reducing a disposition granted to the defender by Andrew Geddes of Afile, the pursuer's debtor, after he had been charged with horning, denounced and registered by the pursuer:

*Answered* for the defender:—The act of Parliament 1621, relates only to dispositions granted to one creditor in prejudice of the more timely diligence used by another. Whereas Dipple, at the granting of the disposition made to him, paid a full and adequate price for the same, and got only allowance therein of a small debt that was secured, and preferable by the first investment affecting the subject disposed. *2do*, Albeit the defender had got the disposition quarrelled in satisfaction of bygone debt, the pursuer could not impugn the same upon the act 1621; seeing he did not complete his horning by denouncing the debtor at the market-crofs of the shire where he lived, to make his single escheat fall, and affect the price in the defender's hands; or, by using any other diligence of adjudication, inhibition, &c. to affect either moveables or heritage for several years: But had only denounced at the market-crofs of Edinburgh, in order to caption.

*Replied* for the pursuer:—The Lords have cleared by the constant course of their decisions, (which is *optima legum interpretis*) That a charge of horning is all that is requisite by the act 1621, to hinder a debtor to gratify any creditor in prejudice thereof, Veitch *contra* Ker's Executors, No 159. p. 1073.; Murray of Keillor *contra* Drummond of Machiny, No 139. p. 1048. And seeing the very using of horning (which is reckoned a step of diligence equal to the serving of inhibition against the bankrupt) was sufficient to tie him up from preferring one creditor to another: The denouncing and registering *ex abundantis*, cannot render the diligence less effectual, *ne utile per inutile vitietur*.

*Duplied* for the defender:—The cited decisions are alien from the point. For in that betwixt Veitch and Executors of Ker, the Lords reduced an assignation of a moveable sum falling under escheat, at the instance of the donatar, upon whose horning the escheat fell as being granted in payment of a posterior debt, for which no diligence had been done: And, in the other of Murray and Drummond, it was found that an heritor could not grant a second minute of sale of his lands, in prejudice of a former entered into with another party, which was just, though there had been no diligence used on the first minute; the granter of double rights being guilty of stellationate. But the defender ought to be affoizied conform to what was decided, February 8, 1681, Neilson *contra* Ross, No 134. p. 1045. which, *in terminis*, comes up to the case in hand.

THE LORDS found, That Davach, the pursuer, is not in the case of the act of Parliament 1621, his denunciation not being duly executed at the cross of the head burgh of the shire where the debtor lived, and he not having proceeded in diligence after the horning: And therefore affoizied the defender from the reason of reduction founded on the said act.

*Fol. Dic. v. 1. p. 80. Forbes, p. 165.*

1709. July 9.

Mr. DAVID DRUMMOND, Treasurer to the Royal Bank, *against* ALEXANDER KENNEDY of Glenour, and JOHN REID, Taylor in the Canongate.

In an action, at the instance of the treasurer of the bank, upon the act of Parliament 1621, for reducing a voluntary assignation, granted by Alexander Paxton, stabler, when insolvent, in favours of Glenour and Reid, within ten days after he was charged with horning by the pursuer, for security of a debt contracted before the charge:

*Alleged* for the defenders:—The pursuer having charged the common debtor with horning on the 2d February, ten days before the assignation to the defenders, and intimated the 23d, and used no further diligence for a matter of five or six months after the charge; he was *in mora*, and his inchoate diligence, by a simple charge, so neglected to be consummated by denunciation, or pointing, &c. to

No 164.

A person insolvent, after he was charged with horning, granted a voluntary assignation in security of a debt contracted before the charge. Reduction upon the act 1621, at the instance of the user of