

shore of Leith; whereupon he craved preference, especially upon that ground, That he had the first complete diligence, not only by assignation, but having obtained decret: whereas the arrester had only arrested the said ship by an execution at the skipper's house; whereas, by the custom of the Admiralty, a ship could only be arrested in the harbour.

It was ANSWERED and ALLEGED for George Monteith, the arrester, That, notwithstanding, he ought to be preferred; because the assignation was not lawfully intimated to the skipper, who was out of the country, by letters of supplement at the market-cross of Edinburgh and pier and shore of Leith; but only by an order granted by the assignee himself: whereas the arrester had petitioned and obtained letters of supplement, by warrant of the Lords, and, by virtue thereof, caused execute the arrestment at the market-cross of Edinburgh and pier and shore of Leith. And, as to the arrestment, it was most lawful, albeit it was not upon the ship itself in the harbour; because the vendition of the ship being only in name of the skipper, who had granted a disposition only, with a bond to make forthcoming to the owners, the arrestment against the skipper was most lawful.

The Lords did prefer the arrester, as having executed the same, by virtue of letters of supplement, at the cross of Edinburgh and pier and shore of Leith; without which, they found that the assignee could not intimate, the skipper being out of the country: and likewise found, That the whole property of the ship being in the person of the skipper, who was only obliged to make forthcoming; an arrestment at his dwelling-house, market-cross, and pier and shore of Leith, was sufficient; albeit the ship itself was not arrested.

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1677. July 19. PATRICK MURRAY of KEILLER against JOHN DRUMMOND of MACHANIE.

IN a reduction of a right and disposition of lands, made by John Murray to Drummond of Machanie, by a minute, subscribed in November 1673, at the instance of the said Mr Patrick Murray, upon this reason,—That the pursuer had the same lands disposed to him by a minute from the common author, which was prior to Machanie's minute; and whereupon he had raised horning, and thereby declared him bankrupt; and so made Machanie's right to fall within the Act of Parliament 1621, against divours and bankrupts.

It was ANSWERED, That the defender's right could never be reduced upon that ground; because, albeit the minute whereby he had right was posterior, yet he, having first completed his right by public infestment, he ought to be preferred to the pursuer, who had nothing but a minute, whereupon no diligence was done for completing his right: and, as to the horning, it could not make the common author in the condition of a bankrupt, and so any right granted by him thereafter to fall within the foresaid Act of Parliament; because the pursuer was no just and lawful creditor to John Murray, the common author, as having lent him any sums of money, or being cautioner for him, or having undertaken any debts in contemplation of his minute; and, therefore, it could be no ground to reduce the defender's posterior right, and make it fall within

the Act of Parliament: seeing neither a lawful creditor was prejudged nor preferred, nor any prior diligence which could affect these lands; there being nothing but a minute and a horning; which could not incapacitate any subject to acquire the right of these lands, and to have the benefit of the first public infestment against all prior latent deeds.

It was REPLIED, That that pursuer, having not only a right by a prior minute, but having used horning thereupon, he was a true creditor by the said minute; and, by denouncing the common author rebel, did thereby make him bankrupt; and so any posterior right to fall.

The Lords did sustain the reason of reduction; and found, That Machanie's right did fall within the Act of Parliament as granted by a bankrupt: Which seems to be very hard; seeing Machanie had the undoubted right, by the first public infestment:—that the Act of Parliament was clear and positive against fraudulent dispositions of lands, in prejudice of prior lawful creditors; whereby they would be deprived of their debts, by conveyance of their estates to others who had not affected the same by lawful diligence, whereof they could not be prejudged: whereas Murray of Keillar was never creditor, never having lent money, or engaged any way for the common author; neither was his horning for payment of any debt, but only for completing a minute; by the not doing whereof, he was frustrated of no debt, but wanted the benefit of the real right of the lands, which our law did take from him for not doing diligence before another who got a posterior right, but did first complete the same. Likeas, it was of a general concernment, as to all trade and commerce, that a naked horning, whereupon neither a gift was given in Exchequer; nor declarator raised, to make it public; and whereupon nothing could have followed but the life-rent escheat; should be a ground to reduce a personal and absolute right of property of lands by our law, and give it to another who had nothing but a naked minute; whereupon he did no real diligence, and so was justly deprived of the benefit thereof.

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1677. July 25. The EARL of SOUTHESK *against* The EARL and COUNTESS of TRAQUAIRE.

IN a reduction of a decret-arbitral, pronounced by the Archbishop of Glasgow and the Earl of Queensberry, upon a reference made to them by the deceased Earl of Southesk, with power to grant an abatement of what sums they should think fit, after count and reckoning, whereby they decerned the abatement to be £20,000;—the decret was craved to be reduced upon these reasons;—*1st.* That the decret was pronounced after the Earl of Traquaire's decease. *2d.* That, by the submission or reference, the abatement was only to be granted after count and reckoning, that it might be known what was the true *quota* of the just debt. *3d.* That the reference did expressly bear to be given in contemplation of a decret of declarator, as consented to by the Earl of Traquaire, declaring Southesk's right, made by the Earl of Traquaire's father, to be irre-

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