

*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 heiritor 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

No 164.

the horning, dismissed, because he had been *in mora*; not having denounced for five months after the charge. See No 149. p. 1057.

affect the common debtor's lands and goods, can be no ground to reduce the right made to the defenders.

*Answered* for the pursuer:—The act of Parliament 1621 requires only to found reduction thereon, that a bankrupt make a voluntary right in fraud of the lawful and more timely diligence of another creditor having served inhibition, or used horning, &c. And the pursuer hath used horning by giving a charge, which is using thereof in a proper sense; denunciation being only the effect of disobedience to the charge. Law requires not consummated and complete diligence actually affecting the subject, which *per se*, would be a title to reduce after voluntary deeds, without the benefit of the statute 1621; but such as may thereafter affect, and be completed. Bathgate *contra* Bowdoun, No 140 p. 1049; and December 11, 1691, The Creditors of Langtoun, *voce* COMPETITION, where the execution of a charge of horning against a debtor was found relevant in the terms of the act 1621 to reduce posterior voluntary rights.

*Replied* for the defender:—By inchoate diligence in the statute 1621, is meant where the creditor is *in cursu diligentia*, and goes on without delay to complete it in due time, Stair, Instit. lib. 1, tit. 9. page 83. (85.) lib. 4. tit. 35. § 17. Hamilton *contra* McCulloch, Spottiswood, p. 43. (*voce* BONA et MALA FIDES.) And can the pursuer be understood to have been *in cursu diligentia*, who forbore to denounce for six months after the charge? Again, by horning we understand denunciation, or such a diligence as can affect the dyvour's lands or goods, 11th November 1675, Veitch *contra* Pallet, No 127. p. 1029.; 18th July 1677, Murray *contra* Drummond, No 139. p. 1048.; which a simple charge can never do.

*Duplied* for the pursuer: Seeing the statute prescribes no definite time for completing diligence, in order to found reduction thereon; it sufficeth to prosecute the same within the year, which law and custom allows for denouncing upon a charge of horning. *2do*, The defender cannot obtrude *mora* to the pursuer, seeing the assignation made to him within ten days of the charge, would have been unquestionably reducible, had denunciation followed a few days after the assignation, as in Major Bateman and Provost Drummond's case, p. 1067. and p. 1076.: And the pursuer's delaying to denounce could not validate the null assignation; for that, *quod ab initio vitiosum est, tractu temporis convalescere non potest*. Besides, it is the interest of a trading place, that creditors be not forced immediately to the utmost step of rigorous diligence; but left to use their discretion in allowing some reasonable time to the person charged, to recover and extricate himself before the fatal completing of diligence against him. The practiques cited by the defender, are not to the purpose; for in that betwixt Veitch and Pallet, denunciation had been used before the date of the voluntary right: And a simple charge would not have been good in competition with a voluntary right, granted a year after the charge, upon which no subsequent denunciation could have followed effectually. When it is said in Murray and Drummond's case, that horning has a general effect both as to lands and moveables; that is not so to be understood, as if denunciation anterior to the voluntary right were necessary; but only that a charge of horning

may lawfully affect these when completed by denunciation. What is cited out of Spottiswood, is as little to the purpose; for there the acquirer of the voluntary right had not taken the same in security or payment of bygone debt, but for a price paid long after the reducer's apprising.

THE LORDS repelled the reason of reduction upon the act of Parliament 1621; in respect that, albeit the pursuer had used horning by a charge before the affignation, yet he had not connected and completed his diligence by denunciation for five months thereafter, No 149. p. 1057.

*Fol. Dic. v. 1. p. 80. Forbes, p. 334.*

No 164.

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## S E C T. IX.

### Reduction of Preferences granted by means of Interposed Persons.

1682. February.

NEILSON *against* ROSS.

JOHN NEILSON, merchant in Edinburgh, having right to a comprising led against James Farquharson of Hollies, pursued a reduction of a disposition, made by him to Alexander Sutherland, of the lands, which by progress came in the person of Mr John Ross of Pendreich.—THE LORDS found, That in respect the pursuer's author had neglected to obtain a prior investment, or to have charged the superior upon the comprising, that the comprising being an incomplete right, the same could be no ground to reduce the voluntary right, in case the same had been *bona fide* acquired with ready money; but found, That if the said voluntary right was either a gratification or a voluntary preferring of one creditor to another, the same was reducible. And thereafter it being allowed by Sutherland, that by the contract by which the lands were disposed to him, he was obliged to make payment of the price of the lands to the creditors therein mentioned; the LORDS sustained the allegiance, that he made payment to the creditors before citation at the pursuer's instance, to assilzie him; reserving to the pursuer action of repetition against the co-creditor who received payment as accords.

*Fol. Dic. v. 1. p. 81. Sir P. Home, MS. v. 1. No 148. p. 226.*

\* \* \* In the similar case, Grant of Kirdells against Birkenburn, No 32. p. 902. the disponee having paid debts after intending a reduction of his right, the LORDS refused to sustain these payments; but they found the defender, even after reduction was intended, might pay any debt he had undertaken before to pay.

No 165.

In a reduction of a disposition, as granted by a bankrupt after diligence, the defence was sustained, that the purchaser had paid, *bona fide*, and before citation in the reduction, a full price to creditors of the disponer, as taken bound in the disposition. Action was reserved, (as accords) against the creditors who had received payment.