

was a prior diligence used by any of the creditors, and therefore the creditors being all in a like case, they were brought in *pari passu* together, effecting to their fums.—THE LORDS preferred Major Bateman, and decerned so much of the prices of the goods arrested to be made furthcoming as would satisfy the pursuer's debt. See PROCESS.

*Fol. Dic. v. 1. p. 79. Sir P. Home, MS. v. 2. No 760. & 888.*

\* \* See Clerk against Ferguson (Kilkerran, p. 47.) *voce* COMPENSATION, RETENTION.

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## S E C T. VIII.

### Effect of *Mora* in the conduct of the Creditor Reducer.

1675. February 12. VEITCH against EXECUTORS of KER and PALLAT.

THIS cause being debated the 9th of February instant, (Stair, v. 2. p. 318. *voce* COMPETITION,) and the assignee having obtained payment; Veitch the donatar further *alleged*, That he ought to be preferred as creditor, having assignation from Nairn, who in *anno* 1648 used horning against Sanderfon the common debtor, and thereby is a preferable creditor by the act of Parliament 1621 anent bankrupts, by the last part whereof it is declared, ' That where a creditor uses diligence by inhibition, horning, comprising, or otherwise, he shall be preferred to any other con-creditor obtaining a voluntary assignation or disposition from the common debtor, who shall refund what he recovered thereby ;' so that the pursuer's cedent having used horning against Sanderfon the common debtor, long before the assignation made by him to Ker and Brown, of the Stewarts bonds, albeit the assignees had gotten actual payment, they must restore ; much more when the fum is yet in the hands of Sir George Maxwell, who gave bonds for the Stewarts ; especially, seeing that assignation was granted by Sanderfon, when he was a notour bankrupt, insolvent, and fled.—It was *answered*, That it were of dangerous consequence, if a horning used should incapacitate all creditors to obtain satisfaction by voluntary payment or assignations ; for thereby creditors would be obliged to refund, albeit they had received their money *in specie*, or in moveable goods for satisfaction thereof. *2do*, If this be the effect of hornings, it will not only exclude creditors getting payment thereafter from notour bankrupts, but that clause of the act is general, as to all creditors and debtors. *3tio*, That clause can only be extended to creditors who have used horning or other legal diligence duly ; to affect their debtors estate ; but here there is no more done but the horning, and neither arrestment nor apprising hath followed. *4to*, All preferences are only competent to those who are not negligent, but do insist in their rights ; but the pursuer's cedent never having further insisted, but only used horning, and being supinely negligent for more than 20 years,

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It was found, that after diligence by horning, the common debtor who was bankrupt, could not grant any voluntary right, in prejudice of the diligence, although the creditor had allowed it to ly over for 20 years. See No 127. p. 1029.

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he cannot now crave preference. *5to*, The sum assigned was due by Sir Robert Stewart, who resided in Ireland, and no statute or diligence in Scotland could have hindered him to have paid the assignee.—It was *replied* for Veitch, That his reason of preference upon the act of Parliament, stands yet relevant by the express conception and terms of the act, which hath no limitation, either of doing diligence, or of any time; nor was the pursuer obliged to know of this bond of Sir Robert Stewart's; so that the pretence of inconveniency cannot alter the express terms of an act of Parliament. And on the contrary, the inconveniency was far greater, if bankrupts might gratify what creditors they please, by voluntary payment or assignation, contrary to the very words and intent of the act; but after it appears that any person is broken, this act doth sufficiently warn all his creditors to use legal diligence, and not to rest upon payment made voluntarily. Neither will this extend to payment obtained by all debtors against whom horning is used; for the statute bears expressly, 'That if any dyvour, or person interposed, shall make any voluntary payment or right, in defraud of the more timely and lawful diligence of another creditor;' so that if the debtor be fully solvent, and noway broken, his creditors getting payment by assignation, or otherwise, will not thereby repeat; and albeit there had been no more diligence but the horning against a broken person, it is sufficient to incapacitate him to make partial preference; but a horning is a diligence general against all estates, for it is requisite, before apprising, to make the sums apprised on moveable; and the habile way to affect moveables after horning, is to take the gift of the escheat, or to affect the moveable goods and sums falling under escheat, which by the act of Parliament 1592, cap. 145. are burdened and hypothecate for satisfying of the debt of the horning; so that Nairn having used horning, is preferable to the Stewarts bond, which is a moveable bond, and a part of the escheat goods, not only to the donatar, but to any other creditor, and so is preferable to Sir George Maxwell's bond, coming in place of the Stewarts; neither doth it import that the sum was due by a residenter in Ireland, seeing personal rights, such as this bond is, follow the person, and being now become payable by Sir George Maxwell residing in Scotland, the same is affected by the pursuer's diligence.

THE LORDS found the reason of preference relevant, that Vietch as assignee to Nairn, had used horning against the common debtor, and the assignation granted by him to the Stewarts bond, was granted when he was insolvent and bankrupt; and therefore preferred Veitch for the sums contained in the horning. See No 127. p. 1029.

*Fol. Dic. v. 1. p. 80. Stair, v. 2. p. 321.*