

No 151.

the knowledge of the assignation, arrested in the hands of the debtor in the debt assigned, and having pursued a reduction of the assignation upon the second alternative of the act of Parliament 1621, the Lords found, 'That the denunciation not having been executed at the market-crofs of the head burgh of the shire, where the debtor lived, but only at the market-crofs of Edinburgh, and that no further diligence after horning had been used for so long a time, the case did not fall under the second clause in the act of Parliament.'

Such diligence only is sufficient to reduce a posterior gratuitous deed, as may, when followed out *sine mora*, affect the subject; and such a simple horning, as being followed out *sine mora*, to a denunciation at the market-crofs of the head burgh of the shire where the debtor lives, would make escheat fall, is a compleat diligence affecting the subject in question; but, as escheat does not fall by a denunciation at the market-crofs of Edinburgh, the subject cannot be affected by it; and it has therefore no more effect than the horning itself would have had without it, which, by a *mora* in following it out by denunciation at the market-crofs of the head burgh, loses its effect; and *mora* has been inferred from a delay of fewer months, than there had intervened of years in this case.

Fol. Dic. v. 3. p. 52. Kilkerran, No 2. p. 48.

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 S E C T. VI.

Reduction upon the Act 1621, whether competent at the instance of Creditors having done Diligence, against one another.

No 152.

Two creditors having charged; the first charger obtained assignation from the common debtor, intimated before the other creditor's arrestment.

The first was found preferable, because this was not a preference given to one creditor in prejudice of the more timely diligence of another.

1677. November 20. The BISHOP of GLASGOW *against* NICOLAS and BURN.

HECTOR MACKENZIE being debtor to the Archbishop of Glasgow in 1200l. by bond, he does thereupon arrest the same in Tarbat's hand, as due to Hector, and pursues for making furthcoming; Tarbat raises a double poinding against the Archbishop, arrester on the one part, and against Edward Nicolas and Edward Burn, merchants in London, who had obtained assignation from Hector M'Kenzie, the common debtor; and they allege they ought to be preferred, because the common debtor was fully denuded by an assignation in their favours, intimate before the Archbishop's arrestment.—It was *answered* for the arrester, That he ought to be preferred to the assignee, though his assignation be intimate before the arrestment, because, by the act of Parliament 1621, anent bankrupts, in the last clause thereof, it is statute, That bankrupts, or their confidents, cannot make any voluntary payment or right in defraud of the lawful and more timely diligence of another creditor, having used inhibition, horning, arrestment, &c. who shall be preferred to the co-creditor, who being posterior to him in diligence, had

obtained payment by partial favour of the debtor or his confident:—And it is offered to be proven, that Mackenzie, the common debtor, is a bankrupt or insolvent, and so his assignation being voluntary, ought not to prefer him to the arrester, who would have the only right, if this voluntary assignation had not been granted.—It was *replied* for the assignee, That he opposes the clause of the act of Parliament, which is only in favours of the creditor doing first diligence, that the common debtor cannot by voluntary gratification prefer a posterior diligence to a prior; but here the assignee had done the first diligence by horning, anterior to the horning at the arrester's instance, so that any thing done by the common debtor was not voluntary, and was not a preference of a posterior diligence to a prior, but he might and ought to have satisfied the creditor doing first diligence by payment or assignation, and the creditor might warrantably accept the same, and was not obliged to proceed further in any legal diligence; for it must be presumed, that if he had not gotten satisfaction, he would have made the first arrestment, or obtained the gift of the escheat of the common debtor before he was denounced at the arrester's instance; and, therefore, in the case betwixt Birnie *contra* Mowat and Crawford, 5th and 19th July 1673, No 159. p. 812. Crawford having first arrested, and thereupon obtained assignation, was preferred to Mowat, pursuing to make furthcoming upon a posterior arrestment, after conclusion of the second arrester's cause, the assignee compearing and producing his first arrestment, with his assignation intimate, was preferred, and it was found that he needed not insist upon his first arrestment, his diligence having obtained its effect; and therefore, in this case, both parties having used horning, the first user of the horning getting assignation from the common debtor before the other creditor did arrest, is preferable.

THE LORDS found, that both the creditors having charged, he who gave the first charge, obtaining assignation from the common debtor, intimate before the other creditor's arrestment, was preferable, and was not prejudged by the said clause in the act of Parliament 1621.

*Fol. Dic. v. 1. p. 79. Stair, v. 2. p. 560.*

1688. November.

YOUNG *against* CHARLES MURRAY.

A DEBTOR'S disposition to a creditor, who had charged him after he had been charged by another, being quarrelled as a gratification, it was *answered*, That the disposition being granted in obedience to a charge, it cannot be reputed a voluntary gratification.

*Replied*: That such a disposition cannot prejudice the more timely diligence of a creditor who was not *in mora*: Which reply the LORDS found relevant.

*Fol. Dic. v. 1. p. 79. Harcarse, (ALIENATION.) No 157. p. 35.*