No 155. The Lords found, That John Glaſſels and Goning might legally confirm as executors-creditors to Thomas Glaſſels, and ſupport the aſſignation by the confirmation.

Fol. Dic. v. 1. *p.* 79. *Forbes, p.* 370.

SECT. VII.

Effect of this Reduction.

1682. *March.* Cunningham and Others *against* Hamilton.

No 156. A common debtor could not prefer one creditor to another, who had charged with horning; but it was found, that the right of the creditor who had uſed diligence, did not accreſce to other creditors who had uſed none.

John Cunningham and Others, the creditors of Robert Hamilton, merchant in Edinburgh, having purſued a reduction of a diſpoſition granted to Hamilton his ſiſter, of a tenement and ſhop in Edinburgh, and of his haill moveables, upon the act of Parliament 1621, as being granted in favours of a conjunct and confident perſon, in defraud of lawful creditors:—*Anſwered*, That the diſpoſition was granted to the defender for an onerous cauſe, which ſhe inſtantly inſtructed, partly by her contract of marriage, whereby her brother was obliged to pay her a certain ſum of money of tocher, and partly by bonds of borrowed money, equivalent to the value of the houſe and moveables diſponed.—*Replied*, That albeit the diſpoſition be granted for onerous cauſes, it muſt be preſumed to be in default of the creditors, being granted in favours of the ſiſter *omnium bonorum*; and the diſpoſition of the tenement was kept private and latent, no infeftment being taken thereupon for a year and a half thereafter, and was *retenta poſſeſſione*, the brother having ſtill retained the poſſeſſion of the houſe, and kept the ſhop and ſold the goods, and uſed merchandiſe as formerly; and the creditors being defrauded *ex eventu* by the debtor's granting of a diſpoſition of his haill eſtate, it muſt be preſumed that there has been *dolus propoſitus*; and whatever might be pretended, that the ſum in the contract of marriage ſhould be ſuſtained as an onerous cauſe *pro tanto*, yet the other bonds ought not to be ſuſtained, becauſe they being granted by a brother to a ſiſter, it muſt be preſumed that they had been granted of purpoſe to be made uſe of as a part of the cauſe for which the diſpoſition was granted, ſo that unleſs the ground of the debt were otherwiſe inſtructed than by theſe bonds, they ought not to be ſuſtained as a part of the onerous cauſe of the diſpoſition; and albeit the defender ſhould inſtruct ſufficient grounds of debt, equivalent to the value of the houſes and moveables, yet in this caſe where there is ſuch preſumption of fraud, the purſuers, as being lawful creditors, many of whoſe debts were prior to the diſpoſition; and the common debtor being regiſtrate to the horn, at the inſtance of ſome of the creditors, which did make him a bankrupt; their diligence ought to accreſce to the other creditors who had done no diligence, ſo as to give them likewiſe the benefit of the act

of Parliament; they ought at least to be allowed to come in *pari passu* with the defender, as was decided No 1. p. 879, and No 44. p. 914, where the Lords found that a debtor could not prefer his brother-in-law by granting of a diſpoſition of his eſtate if he was *particeps fraudis*, but that he behoved to come in *pari paſſu* with the other creditors, albeit they had not done diligence; and the 18th December 1673, the Creditors of Tarperſie againſt the Laird, No 29. p. 908. where a diſpoſition being granted by a nephew to his uncle, of all his eſtate, albeit for equivalent ſums, ſeeing thereby the diſponer became bankrupt, and he having preferred ſome creditors to others, and he being fugitive and latent in the Abbey, the Lords found, that the other creditors ſhould have acceſs to the eſtate, according to their ſums, and ſhould come in *pari passu*, as if the diſpoſition had been made to them all.—*Duplied*, That albeit the diſpoſition was granted to the ſiſter, yet ſeeing ſhe inſtructed an equivalent cauſe onerous, it ought to be ſuſtained, eſpecially ſeeing there was no diligence done at the inſtance of many of the creditors, before the granting of the diſpoſition; and they not taking ſaſine upon the diſpoſition till a year and a half thereafter, is no preſumption of fraud, ſeeing it is ordinary for the creditors to have ſuch rights for payment and ſecurity of their debts, and to ſuffer the debtor to continue in the poſſeſſion, and not to make uſe of the rights for a conſiderable time thereafter, until they find other creditors doing diligence for affecting the lands: And the defender is not obliged to inſtruct the onerous cauſe any other way but by the debtor's bonds; and bonds bearing borrowed money are not reducible upon the act of Parliament 1621, againſt bankrupts; for the bond itſelf does ſufficiently inſtruct the borrowing of the money as the onerous cauſe, as was decided 22d January 1630*, and Monteith againſt Anderſon, No 133. p. 1044. And it is clear by the common law, and the current of deciſions relating to the act of Parliament 1621, That a diſpoſition, granted by a debtor, in favour of a lawful creditor, for payment of his debt, cannot be reduced at the inſtance of other perſonal creditors, albeit their debts be prior, if they have done no diligence againſt the common debtor before the diſpoſition, even albeit the diſpoſition were *omnium bonorum* and *in meditatione fugæ*, as was decided 27th November 1629†, and No 25. p. 897. But now, eſpecially in this caſe, the debtor did continue to keep the ſhop, and traffic and merchandiſe, after the granting the diſpoſition, and *sibi imputet*, that they did not diligence timeouſly againſt the common debtor, before the granting of the diſpoſition, *cum jura vigilantibus non dormientibus subveniant*. And the deciſions adduced by the purſuer do not meet this caſe; becauſe, in the deciſion in the year 1629, the acquirer of the right was *particeps fraudis*; and the deciſion in the year 1673, the common debtor was fugitive and latent, when he granted the right.

No 156.

THE LORDS found that the common debtor could not prefer one creditor to another after diligence done againſt him by horning, in prejudice of thoſe credi-

* The caſe alluded to is Hop-Pringle againſt Ker, Durie, p. 484. *voce* PROOF.

† The caſe alluded to is Paterſon againſt Edward, Durie, p. 471. *voce* FRAUD.

No 156. tors at whoſe inſtance the horning, or other diligence, was uſed; and therefore reduced the diſpoſition as being ſimulate; *ad hunc effectum*, to bring in all the creditors *pari passu* together, that had uſed horning or other diligence againſt the debtor, before the granting of the diſpoſition: But found that the diligence uſed by theſe creditors did not accreſce to the other creditors that had done no diligence, ſo as to give them likewiſe the benefit of the act of Parliament, and to bring them in *pari passu* with thoſe creditors at whoſe inſtance diligence was uſed, and others in whoſe favours the diſpoſition was granted, ſeeing he was not latent nor fugitive, but continued to keep ſhop and uſe merchandiſe, after the granting of the diſpoſition.

Sir Patrick Home, MS. v. 1. No 248.

*** Preſident Falconer reports the ſame caſe:

In an action of reduction, purſued at the inſtance of Robert Hamilton, merchant, his creditors, for reducing a diſpoſition granted by him, in favours of his ſiſter and brother-in-law, of his houſe and ſhop, upon this reaſon, that the ſame was ſimulate, ſeeing it was made *retenta possessione*, he having continued in the poſſeſſion of the houſe and ſhop by the ſpace of two years; and having ſold and diſpoſed of the goods as formerly: The Lords found, in reſpect that the ſaſine upon the tenement was not taken for a year and a half after the date of the diſpoſition, and that the common debtor continued in poſſeſſion of the houſe, ſhop, and goods, as formerly, and kept an open ſhop; and the ſame being all the eſtate he had till he broke, they reduced the diſpoſition as being ſimulate, *ad hunc effectum*, to bring in all the creditors *pari passu*, according to their diligence. But the Lords did not incline to ſuſtain the reaſon of reduction following, viz. That by the act of Parliament 1621, he was bankrupt, and at the horn, and ſo could not diſpone to this defender, albeit a creditor, to prefer him to other creditors, the diſpoſition being *omnium bonorum*, ſeeing that the horning was not uſed at the inſtance of the purſuer, and the common debtor uſed trading and merchandizing, and kept a public ſhop long after granting the diſpoſition, and that the defender did offer to condeſcend upon and to prove the onerous cauſe, by producing and inſtructing by bond, that he was creditor *ab ante* to the common debtor. *See* Presumption.

Fol. Dic. v. 1. p. 79. Pres. Falconer, No 17. p. 9.

1683. *November.* Dempster of Pitliver *againſt* Morrison.

No 157. This act found to extend to *acquirenda*, and that a debtor cannot diſpone heritable rights ac-

John Morrison of Daerſie having diſponed to Mr Hary Morriſon an heritable right of 17,000 merks, due to the Earl of Southeſk; and Mr John Dempſter of Pitliver, having thereafter appriſed that ſum, and purſued a reduction of Mr Hary's diſpoſition, upon the act of Parliament 1621, as being granted after the ſaid John Morriſon was bankrupt and at the horn; after which he could make