

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.*