

1709. February 23.

WILLIAM HAMILTON Writer in Edinburgh, and COLIN MACKENZIE Goldsmith
there, against SIR JAMES CAMPBELL of Aberuchil.

IN a competition betwixt William Hamilton and Colin Mackenzie, as assignees by Sir David Thoirs advocatē, to a debt due to him by the Lady Greenock, and Sir James Campbell, who craved to be preferred upon an arrestment posterior to the intimation of their assignation, upon this ground, That the assignation was granted by Sir David in the abbey, after a charge of horning given to him by Sir James Campbell, and so reducible upon the act of Parliament 1621.

Alleged for the assignees, *1st*, An unregistered horning could have no effect, more than an unregistered inhibition, against onerous singular successors: Especially considering, that Sir David Thoirs was not insolvent, Stair, Instit. L. 4. tit. 35. § 18. And the act of Parliament 1621 concerns dyvours. *2dly*, If Aberuchil, who is secured for his money by other rights and diligences, shall be preferred to the assignees, as to the debt due by the Lady Greenock, he ought to assign to them his other rights and diligences for operating their payment: As a creditor, who, having an univerfal infestment, attacks and carries away a particular subject, whereto another creditor had right by a posterior infestment, is bound to assign to that other for making up *quod illi deest* by the eviction.

Answered for Sir James Campbell, *1st*, Horning without denunciation or registration, is a sufficient ground to reduce upon the act 1621; February 21. 1623, Craw *contra* Irving, Durie, p. 48. *voce* COMPETITION; and in the case, Chaplain and Bateman *contra* Creditors of Provost Drummond, (*infra h. t.*) *2dly*, Sir James is not bound to assign, in respect his payment is out of the debtor's own effects, whereby the debt is extinguished.

Replied, Though the effects out of which Sir James is seeking payment were once the debtor's, they belonged to the assignees at the time Sir James affected the same: And therefore he who comes in upon their right, *per emulationem*, should assign his other funds to them.

THE LORDS sustained the reason of reduction, and preferred Sir James Campbell; but ordained him to assign his other security to William Hamilton and Colin Mackenzie, upon receiving payment from them. See PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 1. p. 79. Forbes, p. 325.

1742. July 22. DUFF of Kilmuir against the REPRESENTATIVES of BELL.

A CREDITOR having, in 1732, charged his debtor with horning, and denounced him at the cross of Edinburgh; and thereupon taken out caption, and, in about three months thereafter, the debtor having assigned a debt to his brother in security of a debt formerly due to him; in the year 1740, the creditor coming to

No 150.
Reduction on
the act 1621
sustained up-
on an unre-
gistered
horning.

No 151.
Found in con-
formity with
No 141. p.
1051.

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.

 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 pointing 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