DIVISION II.

Alienation after Diligence.

SECTION I.

What Sort of Deeds reducible upon the Head of the Statute 1621, which protects inchoated Diligence.

1695. *January* 9. CREDITORS of HUNTER, Competing.

No 124. Creditors, holding rights, to be completed by infeftment, cannot be prevented, by the intervening diligence of other creditors, from effectually taking infeftment, posterior to the bankruptcy of the granter.

ON a bill and answers between the Creditors of Mr James Hunter of Muirhouse only, and the Creditors that had both the father and son bound to them jointly, the son having given renunciations to his father's creditors on their charges against him; this was quarrelled by the other creditors, that he being a notour bankrupt, could do no deed to their prejudice, either to gratify, prefer, or bring in others *pari passu* with them, or omit and dissemble any defence.——THE LORDS found, seeing he did not refuse to renounce to one more than another, that the father's creditors' diligence in order to adjudge could not be stopped; but all these objections were to be reserved *contra executionem* in the mails and duties when they came to compete.

December 16. 1696.—THE LORDS advised the debate between the real and personal creditors of James Hunter of Muirhouse (mentioned 13th December 1695)* and found there did not arise any hypothic, or *jus reale*, to the personal creditors on his bank-routing, so as to impede those who had heritable bonds, to take infeftment on their precepts of sasine, even though they had charged with horning before the completing their rights by infeftment; seeing the act of Parliament 1621, discharges the debtor after diligence inchoate against him to do any voluntary deed or gratification to their prejudice; but here was no deed of the debtor's who had given the heritable bonds long before, and the creditors might *uti jure suo quandocunque*; and the act anent registrations in 1617, did not lay any such necessity upon them, or prescribe a time in which they ought to have taken infeftment; and that the creditors cannot be repute interposed persons for the debtor, seeing their precepts were procuratories and mandates *in rem suam*; and

* Fountainhall, v. 1. p. 688. *voce* INFEFTMENT.

No 124. there was no ſufficient evidence of fraud in their delaying to take their ſaſines, or in their doing it when they heard Mr James was dying, and under incumbrances; and found the act of Parliament 1696, regulates this caſe only *pro futuro;* and that the word *declare* does not import a retroſpect, unleſs the act had expreſsly determined it ſhould be ſo; and therefore preferred the real creditors.

An heir renounced *intra annum deliberandi:* pleaded for creditors, that this was a voluntary deed, which had the effect to bring in creditors within year and day, who otherwiſe would not. Found, that the heir was not bound to uſe the privilege.

July 15. 1697.—The creditors of Mr James Hunter of Muirhouſe, who had both him and his ſon bound, purſue a reduction of the adjudications led by theſe creditors who had only the father's bonds, and not the ſon's, on this ground of nullity; that the ſon, after he was bankrupt and in the Abbey, being charged within his *annus deliberandi* to enter heir to his father, at the inſtance of thoſe who were only his father's creditors, and not his, as to whom he might have refuſed to renounce, and craved the benefit of his *annus deliberandi*, yet he did it not; but fraudulently, and evidently to the prejudice of his own creditors, he immediately renounced to them alſo, whereby they came in within year and day with his own creditors adjudging; whereas, if he had defended, by taking the benefit of his year of deliberation, they would not have come in *pari paſſu* with the purſuers; and as he was then incapable to grant them any voluntary right, ſo he was as much incapable to grant them a voluntary renunciation, which brings in their diligence *pari paſſu* with his own creditors; and it falls under the prohibition of the act of Parliament 1621, and of the common law, by which bankrupt debtors might not omit a temporary defence, nor pay a ſum before the term, *l.* 10. § 12. and *l.* 17. § 2. *D. Quæ in fraud creditor.* The prætor conſtructs that to be fraud, *quæ tempore ipſo committitur;* and *l.* 28. *D. de verbor ſignificat. Is quoque alienare dicitur qui non utendo amiſit.*—*Anſwered* for the father's creditors: That the apparent heir may take the benefit of his *annus deliberandi*, and defend againſt his father's creditors till it be run out; but no law obliging him to it, it is altogether in his option to make uſe of it or not as he pleaſes; and it is rather reputed fraudulent, where an apparent heir renounces to one, and refuſes to renounce to another. See Stair, tit. HEIRS. And, by the ſame rule, it would have been more ſuſpicious, if he had renounced to his own creditors, and defended againſt his father's; and by the common law, *l.* 6. *D. Quæ in fraud. creditor.* a debtor omitting to acquire, does nothing againſt the prætor's edict, which ſtrikes only *contra patrimonium ſuum diminuentes;* and the deſign of deliberating being to diſcover whether the *hæreditas* be *lucroſa* or *damnoſa*, young Muirhouſe could ſoon reſolve himſelf of that queſtion. The ſon's creditors opponed the 106th act 1503, where for year and day the heir is not liable to his father's creditors.—THE LORDS aſſoilzied from the reaſons of reduction, and found there was no fraud in young Muirhouſe's giving in renunciations within the year to his father's creditors, no more than there was in doing it to his own. *See* HEIR APPARENT.

Fountainhall, v. 1. *p.* 656. 743. 786.

1744. *February.*

Competition betwixt JOHN WODROP, Truſtee for the Creditors of GRIERSON and GAIRNS, Merchants in Edinburgh, and Meſſrs FAIRHOLM and ALEXANDER ARBUTHNOT and Company.

No 125.
An eventual claim of damage, was aſſigned before decree had been obtained. Arreſtment had likewiſe been uſed, both before decree and before the aſſignation. The aſſignation reduced on account of prior diligence, and the arreſters preferred.

GRIERSON and GAIRNS having ſhipped a cargo of brandy, &c. from Holland for Norway, the ſhip was driven (by ſtreſs of weather) up the Forth, where John M'Naughton, collector of the cuſtoms at Anſtruther, ſeized the ſame as run goods: Upon which the owners brought an action of treſpaſs againſt him before the Court of Exchequer, concluding for damages, for unlawfully ſeizing their property. This cauſe came on in Candlemas term 1741-2, and on Whitſunday term thereafter; in both which terms it was put off at the defendant's requeſt, he paying coſts of ſuit. At laſt, on Whitſunday term 1743, the cauſe was determined, when the plaintiffs recovered a verdict for 210l. Sterling of damages, and likewiſe 55l. Sterling for coſts of ſuit.

In Auguſt 1742, Meſſrs Fairholm and Arbuthnot and Company, being creditors to Grierſon and Gairns, arreſted in the hands of M'Naughton all ſums due by him to their debtor; and, on the 14th of June 1743, Grierſon and Gairns aſſigned over this claim againſt M'Naughton, to their creditors; which aſſignation was intimate the next day: Arreſtment was likewiſe uſed by Alexander Arbuthnot and Company, in the hands of M'Naughton, on the 17th June 1743. Theſe claimants having intimated their claims to M'Naughton, he raiſed a multiplepoinding.

For the truſtee it was *pleaded*, That he ought to be preferred to Meſſrs Fairholm and Arbuthnot, becauſe the arreſtee was not debtor to the common debtor at the date of their arreſtments, which were laid on long before the judgment given in Exchequer; which was evident from this, that the common debtors might have deſiſted from the action, or might have diſcharged the ſame againſt the arreſtee; in either of which caſes the arreſters could have had no remedy. The verdict of the jury did indeed conſtitute him a debtor in a ſpecial ſum therein expreſſed; but this was done poſterior to the arreſter's diligence; and that it is *triti juris*, if the arreſtee is not debtor to the common debtor, the time of the arreſtment, no ſupervenient debt will be affected by the prior arreſtment, which ariſes from the conception of the diligence, rendering litigious the effects of the common debtor in the hands of the arreſtee, only at the very point of time it is laid on, and has no concern with what happened before, or is to paſs afterwards.

In the next place, the truſtee ought likewiſe to be preferred, in virtue of his aſſignation, to the arreſters, with reſpect to the ſum awarded in name of coſts of ſuit; not only for the reaſons already given, but likewiſe, in reſpect no part of theſe coſts of ſuit were laid out at the date of the arreſtments, nor for ten months thereafter. That it was not eaſy to diſcover, how an arreſtment laid on, not only before theſe expences were modified by a judge, but before any part of

No 125. them were incurred, or laid out by the common debtors, could be the foundation of a furthcoming for theſe expences or coſts. That arreſtments did not reach *acquirenda*, was certain; and, that the common debtor had no right to them till they were modified by a proper judge, was equally certain: Surely they had no title to demand them from the arreſtee until they were laid out; conſequently the arreſters (who muſt put themſelves in their place) can have no right whatever to theſe expences.

For Meſſrs Fairholm and Arbuthnot, arreſters, it was *pleaded*, That the aſſignation granted by the common debtors to the truſtee, was the deed of perſons inſolvent, under diligence of horning and caption at the time, clearly in defraud of the arreſter's diligence, and to convey away the ſubjects, to their prejudice, to other creditors whom the diſponers favoured more, and who had done no diligence at all; and therefore the aſſignation, though it might denude the cedent, could not be ſet up to compete with the diligence of any lawful creditor, far leſs with them, in defraud of whoſe more timely diligence the aſſignation was made, only two days before the judgment was recovered; and, that the aſſignation was granted on purpoſe to exclude their arreſtments, is evident from a clauſe therein, which debars ſuch creditors as did not paſs from their diligence, from having any benefit thereby, ſo that it was plain the aſſignation was null, and reducible on the act 1621. If this point is with the arreſters, as they apprehend it is, it ſuperſedes entering into the argument, How far arreſtment was proper and habile before judgment actually recovered? and particularly, Whether it can carry the ſum awarded for coſts, which are ſaid to have been incurred after the arreſtment was uſed, as they uſed another arreſtment after judgment had been recovered, which muſt for certain carry the ſubject, if the aſſignation is null? But, ſuppoſing it was not null, they apprehend that arreſtment was competent during the dependence; and, as their arreſtment was long prior to the aſſignation, it muſt give right to what came afterwards to be decerned, in name of damages and coſts. Here it may be proper to obſerve, that the aſſignation itſelf was prior to the judgment, as well as the arreſtment. And it would be a very extraordinary doctrine, that a debtor ſhould be poſſeſſed of a right, which he might convey by voluntary aſſignment; and yet that right was not affectable by the diligence of his creditors. Every ſubject a debtor is poſſeſſed of, and every claim he has, is affectable by ſome one diligence or other, for payment of his debts: And, as arreſtment was the only diligence for affecting this claim that Gairns and Grierſon had againſt M'Naughton for ſeizing their goods, the arreſtment was therefore habile and competent, and did ſtate the creditors in the right of their debtor: It was indeed uncertain before judgment, whether M'Naughton was debtor to Gairns and Grierſon; for, if he had been acquitted, all demand muſt have ceaſed: But the claim, ſuch as it was at the time, was carried by the arreſtment; and the arreſters had right to whatever came in the event to be decerned to Gairns and Grierſon; nor can it be admitted that they could have deſiſted or diſcharged their action after arreſtment was uſed, to the prejudice of the arreſters,

who had right, as judicial aſſignees, to have followed furth the claim competent to their debtor. *See* 12th June 1734, Snee, *infra h. t.* 3d February 1736, Earl of Aberdeen, *infra h. t.* No 125.

THE LORDS, found the aſſignation reducible upon the act 1621, there having been diligence by horning at Meſſrs Fairholm and Arbuthnot, and Alexander Arbuthnot's inſtance, prior to the granting of the aſſignation; and preferred the arreſters.

C. Home, No 263. p. 421.

1793. *June* 18.

The CREDITORS of THOMAS DUNBAR *againſt* SIR JAMES GRANT.

No 126.
A bond of corroboration falls under the ſecond clauſe of the act 1621.

THOMAS DUNBAR of Weſtfield having become inſolvent, a variety of adjudications were led againſt his eſtate, of which that obtained by Mr Cuming of Altyre on the 29th November 1788 was the firſt effectual, and in February 1789 a ſummons of ranking and ſale was executed againſt him.

On the 2d May 1789, Mr Dunbar granted to Sir James Grant a bond of corroboration, accumulating into one ſum, bearing intereſt from Whitſunday 1788; the principal and intereſt due at that term on the following claims, viz. A bill payable in 1781, upon which no diligence had followed; a bond, in which Sir James was cautioner for Mr Dunbar; a bond and a bill, in which Sir James, though in reality only cautioner for him, was *ex facie*, joint obligant. The three laſt had been paid by a truſtee for Sir James, who afterwards aſſigned the ſecurities to him.

Upon the bond of corroboration Sir James adjudged on the 4th Auguſt 1789. And on his producing this intereſt in the ranking, the common agent, beſides ſtating a variety of objections to the original grounds of debt, on which no judgment was given, *contended*, that the bond of corroboration was reducible on the act 1621, as being prejudicial to the prior diligence of other creditors.

Sir James Grant, on the other hand, *pleaded*, The act 1621 was intended ſolely to repreſs the fraudulent tranſactions of bankrupts. It ſtates, in its preamble, the miſchiefs ariſing from their gratuitous deeds in favour of conjunct and confident perſons in defraud of lawful creditors. It declares liable to reduction, 1*mo*, All alienations of that deſcription. 2*do*, Any voluntary payment or right made 'by 'a dyvour, or an interpoſed partaker of his fraud,' to one creditor in defraud of the prior diligence of another, at the inſtance of the party injured, and it puniſhes with infamy all parties concerned in ſuch tranſactions.

The ſtatute muſt therefore have had in view deeds of a very different complexion from the bond now in queſtion, which can be conſidered in no other light than as a renewal of the voucher for a juſt debt, and which, ſo far from being fraudulent, it was the duty of the debtor to grant. Its ſole object was to ſave the expence of a decree of conſtitution, which, with an adjudication follow-