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withstanding of the right to be given to the son heritably by virtue of the said contract, for fulfilling of the which promise and condition the said tack was set ; and in respect of the which tack, bearing the said promise, and that the father, now defender, *alleged*, That he had continued in real possession of the duties of the lands libelled continually, by virtue of the said promise, since the date of the said contract many years, to the time of the setting of this tack ; and that also he had uplifted a term's mail of the land since the date of the tack, and so the same was clad with possession ; therefore he *alleged*, That he ought, conform to his tack, to be answered of the rest of the terms controverted, viz. all the terms after that term whereof he had received payment, as said is ; especially seeing he needed not to prove any further of the promise, than by the narrative of the tack, and that conform to the act of Parliament anent dyvours, that he was content to give his oath upon the true cause, and that the promise was then truly made, so that there was no necessity of any other anterior writ. The other party Binnie *alleged*, That he ought to be preferred, in respect the tack was set to the father by the son, who was at the setting thereof *in meditatione fugæ*, and thereafter shortly became bankrupt, and he was his creditor who had registered the son's bond a day before the setting of the tack, and had comprised the lands, and was infest therein before any terms had passed, except that one alleged uplifted by the father, which one only term could not make the tack lawful against the compriser, there being nothing extant in writ to verify any anterior promise ; which promise made so fraudulently the time of the contract of marriage, ought not to be allowed, especially where there is nothing to qualify but the assertion of the son, done so long after the contract and made to his own father, and in prejudice of him a lawful creditor who had done all diligence ; for as that tack could not meet the son's wife, who had her conjunct-fee right of that land given to her, if her husband had been dead, no more now ought the same to meet the creditor. This allegiance of the creditor's was admitted, and the father's allegiance repelled and the creditor preferred, and decerned to be answered and obeyed.

Clerk, Gibson.

Fol. Dic. v. 2. p. 252. Durie, p. 235.

No 439.

An assignation by a bankrupt to his brother, bearing to be for security of debts owing him, found reducible, unless the assign-

1629. January 29.

AULD against SMITH.

ONE being made assignee to a debt owing to the cedent, and thereafter the same debt being arrested by another creditor to the cedent, the said cedent being bankrupt, and the dispute being betwixt the arrester and the assignee, the assignee craving preference as anterior to the arrester, and the assignation being made for debts owing by the cedent, and for satisfying some others of the cedent's true creditors ; it was found, That if the assignee could not instruct by

writ that the cedent was, the time of the assignation, debtor to himself, that the assignation could not be sustained, and it was not found sufficient probation of the debt, that the assignee offered to give his own oath thereon, alleging no other probation to be required by the act of Parliament anent bankrupts; which the LORDS found was not sufficient, but was found ought to be proved otherwise than by the assignee's oath, specially because there was evident presumption of fraud, qualified betwixt the said assignee and the cedent, who were confident persons, being two brethren, and there were some circumstances qualified, whereby it appeared that there was simulation betwixt them, and consequently that the assignee could not dispoise the same by making election to pay such of the cedent's creditors as he pleased, and thereby to prejudge another creditor, and which other having arrested and comprised that same debt assigned, albeit after the assignee was denuded in favours of other creditors whose debts were true and instructed, yet the said creditor compriser was preferred as said is, because of the defect in the assignation made by the one brother to the other, who could not shew any debt owing to him for which it was made.

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nee would instruct otherwise than by his own oath that he was creditor.

Clerk, Gibson.

Fol. Dic. v. 2. p. 252. Durie, p. 418.

1630. January 22.

HOP-PRINGLE against KER.

IN a reduction of a bond of 40,000 merks granted by the Lo. Borthwick to Mark Ker, and whereupon Mark had comprised, at the instance of the said Hop-pringle's prior creditors to the Lo. Borthwick, founded upon the statute of dyvoury, viz. because the said bond was made to a confident person without any true, just, or necessary cause, and in the prejudice of the pursuer, his anterior creditor, subsuming *in terminis*, as the act bears; the LORDS found, That the pursuer ought to prove that part of the reason, viz. that the bond was made without any just or necessary cause, either by writ or by the oath of the party-receiver of the bond, and that they would not respect it as a negative, which proved itself; neither found it necessary that the creditor, receiver of the bond should be holden to prove any cause of the debt anterior to the bond, or by any other manner of way, but by the bond confessing the debt, which was sustained; for, when parties borrow monies, or contract mutually; there is no other way to prove the borrowing or contracting but by the writ then made at the time when the same is done; for there can be no other thing extant therefor before the writ then made, as is daily seen in all bargains and obligations betwixt parties; and therefore the LORDS found, That the reducer of any such bond upon that act ought to prove that negative, and that the said act required and

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A bond for borrowed money, granted by a bankrupt to a conjunct and confident person, found to prove its onerous cause.