

in so far as, in the bond granted by Broomhall to her father, it was expressly provided, that, failyieing of her father by decease, the money therein contained should be paid to her, conform to the substitution.

Whereunto it was REPLIED by the said Robert Brown, that the foresaid substitution and provision is null, and falls within the compass of the Act of Parliament 1621, as being a provision by a father in favours of his own daughter, in prejudice of him, an anterior creditor; whereupon he has reduction depending.

Whereunto it was DUPLIED, That the provision could not be reduced, unless the said Robert would allege and prove that the father, Andrew Bryson, was bankrupt.

The Lords preferred the creditor, Robert Brown, to the bairn whose name was inserted in the bond; and found, That a father cannot provide his own children to the prejudice of lawful creditors; especially in this case, where the ground of the debt was præexisting the granting of the bond, albeit it was not constituted by a decreet-arbitral till a year after. &c.

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1666. June 28. JOHN SCOTT *against* SIR ROBERT MONTGOMERIE.

John Scott, merchant, having pursued Sir Robert Montgomerie for payment of a debt owing by Sir James Scott of Rossie to him; and having pursued Sir Robert and his lady, as intromitters with the goods and gear of Sir James Scott;

It was ALLEGED for Sir Robert, That his intromission was by virtue of a disposition from Rossie; and whereof he was in possession before Rossie's decease.

To which it was REPLIED, That no respect could be had to the disposition and possession; because it was by Rossie, his good-father, to him, a confident person, being his son-in-law, and in prejudice of a lawful creditor, *et post contractum debitum et realem possessionem*; in so far as the pursuer offers him to prove, that Rossie remained in the possession of the whole plenishing of his dwelling-house of Rossie, where he staid aye and while his death, and while they were intromitted with by the defender; so that he being *in libello*, ought to be preferred to the probation.

The Lords found the disposition of the moveables, with the instrument of possession, sufficient to liberate the defender from a vicious intromission; without prejudice to the pursuer, to pursue for the goods themselves.

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1666. July 3. The EARL of CALLENDER *against* SIR ROBERT ELPHINGSTOUN of QUARREL, and OTHERS.

THERE being a spuilie of teinds, pursued at the Earl of Callender's instance, against Sir Robert Elphingstoun of Quarrel, and divers others; and the Earl, having produced his seasine, and several inhibitions and tacks from the parson of Falkirk:—

The Lords would not sustain process, because the pursuer did not libel upon his tacks, but only as heritable proprietor of the teinds; whereunto the Lords

would have no respect,—this right being only a right of comprising : [and] would not allow the pursuer to produce his author's right.

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1666. July 10. ANDREW YOUNG *against* JOHN FAIRFOULL and SOMERVAILL.

JOHN Fairfoull as principal, and Somervail as cautioner, by their bond, dated 2d December 1619, are obliged to pay to Walter Turnbull, chirurgeon, for himself, and in name and behalf of the trade, a certain sum ; which bond being assigned by the deacon of the trade, with consent of the masters thereof, to Arthur Temple, he did thereafter transfer the bond to Andrew Young, writer. The debtor, being charged, suspends upon a reason of double poinding ; viz. by this charger on the one part, and James Campbell, writer, on the other part.

It was ALLEGED for James Campbell, That he being donatar to the gift of bastardy of John Bisset, chirurgeon in Edinburgh ; and having obtained general declarator of the said gift, and a decret of special declarator against the said John Fairfoull, decerning him to make payment, to the said James Campbell, of the whole goods confirmed by him in Bisset's testament, and meddled with by him : and that he ought to be preferred in the right of the said sum, because he offered him to prove, by Young's oath, that the charge was to the behoof of Arthur Temple, his cedent ; at least he offered him to prove that he intented action, and arrested the same ; and thereby made the same litigious before the said transaction : which being proven, he offered him to prove, by Arthur Temple his oath, that the true cause of the granting the said bond was a legacy left by the said umquhile John Bisset, bastard, to the said incorporation ; whereupon the said John Fairfoull gave bond : which being also proven, the said James Campbell, as donatar, must be preferred in the said sum ; because the said Bisset, having died bastard and illegitimate, he had no *testamenti factionem* ; and so could leave no legacy in prejudice of the king and his donatar. And the said bond being truly given for the said legacy, the sum therein contained must be decerned to be the donatar's.

Whereunto it was ANSWERED by Andrew Young, That Arthur Temple being denuded in his favours, he could not swear : that the allegeance proponed for the donatar was only probable by Young his oath.

The Lords found that it was only probable, by the assignee's oath, and not by the cedent, that the transaction was to Arthur Temple's behoof.

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1666. July 13. WILLIAM OLIPHANT *against* JAMES CLERK of PITTENCREIF.

IN a suspension raised at William Oliphant's instance, against James Clerk of Pittencreif, of a minute of contract, whereby the said Oliphant was obliged to cause John Oliphant of Carpon, with consent of the curators, dispone to the