

money received as the price to the satisfaction of any creditor who had done no diligence, he being but an interposed person, in prejudice of one who was both a prior and a privileged creditor by her contract of marriage; and if this were allowed, it were a compendious way to a debtor, or those intrusted by him, to prefer one creditor to another, as they pleased.

It was REPLIED, That it is clear, by the Act of Parliament, that dispositions made by debtors themselves, far less by any getting right from them, albeit for no onerous cause, can be questioned, but where they are made to the prejudice of creditors who had done prior diligence by horning or otherwise.

The Lords did assoilyie from the reduction; and found, That the defender, having made no benefit, but paid a lawful creditor, who might have done diligence, could not be liable to the pursuer, who, upon her contract of marriage, had used no execution, notwithstanding, she, being in family with her husband, and not knowing his condition, was prejudged by this right made by a father to his second son of his first marriage; for, albeit he might be pursued *ex capite fraudis*, yet they found he could not be questioned by the Act of Parliament 1621, against deeds done by bankrupts.

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1672. January 12. BISHOPTOUN against KELSO and OTHERS.

ROBERT Kelso, as liferenter, and John, his son, as far, having sold the land of Kelsoland to Bishoptoun, did take bond for the price thereof, to be applied, in the *first* place, towards the payment of such creditors, to whom he was bound as cautioner for his father. There being other creditors to whom he was not bound, who did arrest in Bishoptoun's hand; he did raise double poinding against the whole creditors, and against John Kelso, the son.

It was ALLEGED for these other creditors, That the father, who was their principal debtor, having purchased these lands to himself in liferent, and his son in fee, with his own means and estate; the son being then *in familia*, and having no means of his own, his father's creditors might have affected the same by a declarator, to the effect that comprising, or other diligence, might be used against the lands, as if the right and fee had been taken in the father's person; so that the son could not thereafter dispone the lands, and, by applying the price thereof, prefer one creditor to another, as he pleased.

It was ANSWERED for the son, That, albeit the fee of the lands was purchased by the father's means, yet he thereafter becoming cautioner for his father, and these other creditors using no diligence against him nor his father, by intending action or serving inhibition, he might lawfully dispone the fee of his estate for relief of these debts, for which he was cautioner, and prefer those to whom he was bound.

The Lords did sustain the bond, preferring John Kelso to these other creditors; and found, That he might take that bond for his relief of his cautionary; albeit it did give preference to those to whom he was bound, there being no legal diligence done against him to hinder him; as was found in a case betwixt Mr John Preston and Captain Newman, where the Laird of Craigmillar, having disposed his estate to the said Mr John, his brother, with full power to him to

sell the same, and pay such creditors as he should think fit, the Lords did sustain his power to prefer such creditors, to whom he himself was bound as cautioner.

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1672. January 16. DUNBAR *against* The BISHOP of MURRAY and his SON.

ALEXANDER Dunbar, alleging that he was commissary-clerk of Elgin before the King's restitution;—and that, when the Bishops were restored, he was induced to pass from his right by fraud and circumvention; in so far as the Bishop did persuade him, that, by Act of Parliament, he had the sole right to that place;—and that he had never subscribed any demission; yet, notwithstanding thereof, the Bishop had entered his son to the possession,—did pursue the Bishop and his son for the whole profits and emoluments of the office since the time that the Bishop's son and his deutes had exercised the said office.

It was ALLEGED for the defenders, That, long after the Act of Parliament restoring Bishops, the pursuer had entered in a contract, whereby he had accepted of a tack of the said office for payment of a yearly tack-duty; as likewise, had made payment thereof, and received a bond from the Bishop's son's deutes, and accordingly had gotten payment, for that only reason, that he had demitted his place; and, in pursuance thereof, had delivered up all the registers of the commissariat; and that without either protestation or intending action thereupon, and suffered the Bishop's son and his deutes to exercise the said office by the space of six or seven years.

It was REPLIED, That the contract subscribed by the pursuer was thereafter cancelled, and so was null and past from, and no allegiance could be founded thereupon; and a demission was not probable but *scripto vel juramento* of the pursuer, which he was content to find relevant, and which not being proven, he, by virtue of his office, had good right to pursue this action.

It was DUPLIED, That, albeit the contract was cancelled, yet it was offered to be proven, that it was truly subscribed upon a transaction that the pursuer should have a tack, which he was most willing to receive, for the space of three years only; which being elapsed, the contract was cancelled; and he, having homologated the Bishop's son's right by the deeds foresaid, could not now be heard to quarrel the same.

The Lords, before answer, having examined witnesses *ex officio* upon the transaction, who were very clear that the pursuer had voluntarily entered in that contract, and truly subscribed the same, did sustain the defence; and, in respect of the homologations of the defender's rights, which were all instructed, did find, That the pursuer could not quarrel the Bishop's son's right, and his deutes, upon fraud and circumvention, after so much licence, and his voluntarily delivering up of the registers, and receiving of a sum of money upon that account; which they found equivalent to an acknowledgment of the defender's right, and that there was no necessity to prove a demission *scripto vel juramento*; and therefore they assoiplied the defenders from that pursuit.

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