right by progress from Agnes Sandilands, did insist against James Roxburgh, as representing his father, for employment of the annualrent of 3000 merks, conform to her contract of marriage.

It was ALLEGED for the defender, That he had already employed that sum, in so far as he had purchased a tenement of land, and provided her to the liferent thereof, which exceeds the annualrent of 3000 merks.

It was REPLIED, That her infeftment did expressly bear, that it was for implement of another clause of her contract, whereby she was provided to the liferent of the whole conquest during the marriage.

It was DUPLIED, That the infeftment was given on death-bed; and there was a reduction depending, wherein they now insisted upon these two reasons:—*1mo.* That the defender was heir, at least was content to serve himself heir, and so had good interest to reduce that infeftment, as depending upon the oblidgement of conquest, in so far as the annualrent of the tenement exceeded the annualrent of 3000 merks, to which she was provided; seeing, if the infeftment had not been given, in law she could only crave, in the *first* place, that the provision of her liferent of 3000 merks should be satisfied out of the rent of the tenement, and could only crave the rest of the rent as conquest; whereas, if this infeftment, granted on death-bed, be sustained, the liferent of the whole tenement would belong to her as conquest, and the heir should be burdened with the annualrent of 3000 merks. *2do.* The defender, albeit he were not heir, yet, as a lawful creditor to his father, he hath good interest to reduce the said infeftment; because no debtor can provide his wife to a conquest in prejudice of a lawful creditor, until first the conquest be ascribed to any provision or liferent made to her by her contract of marriage.

The Lords did sustain the first reason, the pursuer being served heir, for reducing the infeftment as granted *in lecto* to his prejudice; and did likewise sustain the second reason at his instance, as creditor, to make them ascribe the lands purchased in satisfaction of her liferent provision, in the *first* place, and for the remainder only to be ascribed to the conquest; because the law provides that just debt be first satisfied.

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1672. *January 5.* BARBARA HOME *against* ANDREW BRYSON.

IN a reduction of a right and disposition of a tenement of land, made by the said Andrew's father to him, at the instance of the said Barbara, upon the Act of Parliament 1621, against dyvors and bankrupts, as being in defraud of the liferent provided to her in her contract of marriage; in which there was a conclusion to hear and see it found and declared,—That the price of the said tenement, which he had sold, might be declared liable for making up her liferent provided to her; the said Andrew having deponed upon the price of the said tenement, with this quality,—that, as he had received it, so he had paid the same to a creditor of his father's:—

At the advising of the oath it was ALLEGED, That no respect ought to be had to that quality; because the disposition, being made by a father to his son, which being for no onerous cause, he could not dispose thereof, and apply the

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 fiar, 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 intenting 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 disponed his estate to the said Mr John, his brother, with full power to him to