

the Act of Parliament: seeing neither a lawful creditor was prejudged nor preferred, nor any prior diligence which could affect these lands; there being nothing but a minute and a horning; which could not incapacitate any subject to acquire the right of these lands, and to have the benefit of the first public infestment against all prior latent deeds.

It was REPLIED, That that pursuer, having not only a right by a prior minute, but having used horning thereupon, he was a true creditor by the said minute; and, by denouncing the common author rebel, did thereby make him bankrupt; and so any posterior right to fall.

The Lords did sustain the reason of reduction; and found, That Machanie's right did fall within the Act of Parliament as granted by a bankrupt: Which seems to be very hard; seeing Machanie had the undoubted right, by the first public infestment:—that the Act of Parliament was clear and positive against fraudulent dispositions of lands, in prejudice of prior lawful creditors; whereby they would be deprived of their debts, by conveyance of their estates to others who had not affected the same by lawful diligence, whereof they could not be prejudged: whereas Murray of Keillar was never creditor, never having lent money, or engaged any way for the common author; neither was his horning for payment of any debt, but only for completing a minute; by the not doing whereof, he was frustrated of no debt, but wanted the benefit of the real right of the lands, which our law did take from him for not doing diligence before another who got a posterior right, but did first complete the same. Likeas, it was of a general concernment, as to all trade and commerce, that a naked horning, whereupon neither a gift was given in Exchequer; nor declarator raised, to make it public; and whereupon nothing could have followed but the life-rent escheat; should be a ground to reduce a personal and absolute right of property of lands by our law, and give it to another who had nothing but a naked minute; whereupon he did no real diligence, and so was justly deprived of the benefit thereof.

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1677. July 25. The EARL of SOUTHESK *against* The EARL and COUNTESS of TRAQUAIRE.

IN a reduction of a decret-arbitral, pronounced by the Archbishop of Glasgow and the Earl of Queensberry, upon a reference made to them by the deceased Earl of Southesk, with power to grant an abatement of what sums they should think fit, after count and reckoning, whereby they decerned the abatement to be £20,000;—the decret was craved to be reduced upon these reasons;—*1st.* That the decret was pronounced after the Earl of Traquaire's decease. *2d.* That, by the submission or reference, the abatement was only to be granted after count and reckoning, that it might be known what was the true *quota* of the just debt. *3d.* That the reference did expressly bear to be given in contemplation of a decret of declarator, as consented to by the Earl of Traquaire, declaring Southesk's right, made by the Earl of Traquaire's father, to be irre-

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deemable, notwithstanding that his son, the Earl, who was then living, had a prior right to Southesk, and had never consented to his father's right.

It was ANSWERED to the *first*, That they opposed the submission, which was conceived only in the words of a reference by Southesk; so that there was no necessity to obtain Traquaire to subscribe the same: and, albeit Traquaire died before the decret, yet that did not take away the arbitrators' power, during the Earl of Southesk's lifetime, to pronounce that sentence.

It was ANSWERED to the *second*, That the reference was opposed; which bears nothing of the arbitrators being made judges of the count and reckoning; but only, that, there being a count and reckoning before the Lords of Session, they should have power to determine the abatement after the count should be stated: as to which Traquaire and his curators are yet willing.

It was ANSWERED to the *third*, That the submission expressly bears, that Traquaire had consented to the Earl of Southesk's declarator of his irredeemable right; which was done by his procurator's compearance for him, and consenting to the decret; which accordingly was put in the minute-book, and might have been extracted by Southesk: Likeas, they are content yet to cause this Traquaire grant whatsoever is in his power.

It was REPLIED for Southesk, to all these reasons; That he opposed the submission, which bears expressly a reference as to the questions and depending actions betwixt him and Traquaire, with that express quality and condition, that they should have power to determine the defalcation, after just count and reckoning; which being first in order, and reason requiring no less than that the true *quota* of the debts should be stated, before the arbitrators should exercise their power; the count never being stated, and in the meantime Traquaire dying, they had no power thereafter to pronounce their decret, and grant a defalcation of £20,000; which was a great and exorbitant sum, before they did know what was the true sum that was justly resting owing: and, farther, it was urged, that, by the death of the Earl of Traquaire before ever he did subscribe a consent to Southesk's right, he was clearly prejudged of that security, which, by the reference, is the sole cause of his submission; and creditors of Traquaire, comprising, may yet question his right; and this Earl, not being heir to his father, is not in capacity to make that right irredeemable.

The Lords, having considered the whole debate, with the submission itself, as likewise the oaths of the Archbishop of Glasgow and the Earl of Queensberry, who were the arbitrators, conjunct with the Marquis of Montrose, but so that any two of them should have power to determine, the Archbishop being always one; they did find,—That the decret-arbitral, giving the abatement, was good and sufficient, notwithstanding that Traquaire died before pronouncing; but did qualify the decret, so that there should be a count and reckoning, and the £20,000 should be the most, supposing the debt to be near 200,000 merks; but, if the true *quota* of the debt became less, the abatement to be proportioned: As likewise, they found, That, before the benefit thereof be obtained, this Traquaire should give a valid consent to Southesk's irredeemable right, as coming in place of his father. Which seems hard.