

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.

Page 228.

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.

Page 231.