THE LORDS having considered the act of Parliament 1695, anent principal and cautioners, whereby it is provided that cautioners should be bound for no longer than seven years, and that what legal diligence by inhibition, horning, arrestment, or any other way, should be done within the seven years, by creditors against their cautioners, for what fell due in that time, should stand good, and have its course and effect after expiration of the seven years, as if the said act had not been made; they found that the petitioners might raise, use, execute, and registrate inhibition, without arrestment, and raise, use, and execute adjudication, and call the same, reserving to the Viscount of Kilsyth, at calling thereof, to propone against pronouncing act or decreet thereupon; and likewise raise horning without poinding or arrestment, and charge thereupon, *ad hunc effectum* only, to entitle the petitioners to the benefit of the diligence mentioned in the said act.

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also to raise horning, without poinding or arrestment; to the effect of preserving the recourse against the cautioner, in terms of act 5th Parl. 1695.

Fol. Dic. v. 1. *p.* 573. *Forbes, MS. p.* 7.

1714. *January* 20.

GEORGE LOCKHART of Carnwath *against* The CREDITORS of KERSEWELL.

No 8.
A Member of Parliament compearing by his lawyers in a ranking, who produced his interest, which got a place in the ranking, was found excluded by the defence of *res judicata*, from reducing the decree of ranking.

GEORGE LOCKHART of Carnwath, a real creditor upon the estate of Kersewell, raised reduction of a decreet of ranking of the creditors, upon several grounds. His first reason of reduction was, that there were interests of some creditors produced and ranked in the decreet after the 7th February 1711, the date thereof, and yet no decreet was put in the minute book, which ought to have been done, seeing the interlocutors preferring the admitted parties are all now sentences; yea in the case of Glendinning of Partoun against Irvine of Drumcoltran, the Lords opened a decreet *in toto*, because extracted before it was read in the minute book. Now it is yet more absurd to extract an old decreet after new preferences, which were plainly a passing from it. *See* PROCESS.

Answered for the defenders; Where, after a decreet of ranking pronounced, giving direction and rules for classing the creditors according to their several rights and preferences, another creditor appearing is preferred in a new class or order by himself, a new decreet of ranking and preference used to be put up in the minute book; but, where the interests of other creditors can be brought within the compass or order decerned, and are ordained to be ranked with other creditors in particular classes already ranked, no new decreet ought to be put up, but the decreet goes out of the date of the great rule, giving the admitted creditors preference in such classes and order.

THE LORDS repelled this reason of reduction, that, posterior to the date of the decreet of ranking, the interests of some creditors were taken in and ranked, without putting up a new decreet in the minute book, in respect that, by the

No 8. taking in and ranking of the said interests, there was no new scheme or class made in the said ranking, but those interests were only joined into the classes of the creditors formerly ranked.

The pursuer insisted upon this *second* reason of reduction, That several rights of the creditors were preferred in the decreet to his interests, which were preferable to all.

Answered for the defenders; The pursuer is preferred in the order sought by his procurators and lawyers compearing for him and producing his interests, which must have the effect of *res judicata*, and any thing to be said against it was either competent and omitted, or proponed and repelled.

Replied for the pursuer; Competent and omitted cannot be obtruded against him, because he was absent *reipublicæ causa*, attending the Parliament as a Member of the House of Commons, when the decreet of ranking was pronounced. And seeing he had not renounced his privilege of Parliament, nor given any special mandate to any lawyer to compear for him, what was then judicially done in his absence is void and null. For though in the ordinary judiciary procedure, an advocate's gown be his mandate, yet, in many things, the bare compearance of an advocate will not bind his client, as, by confessing a thing for him which requires the party's judiciary confession to be signed by him, or compearing for one absent out of the country; and the privilege is of no less import, yea hath this farther, that it stops procedure even of a process legally commenced.

Duplied for the defenders; Since the privilege of Parliament could not hinder the pursuer to compear in the ranking, and crave his just preference, it can never annul the decreet pronounced upon his insisting or craving. In a competion of creditors, every one, with respect to his co-creditors, is a pursuer. Albeit the privilege of Parliament proponed might stop process against the privileged person, yet where any member of Parliament claims a preference in prejudice of other creditors, no privilege can hinder these creditors to defend their interests, and compete or hinder sentence to follow upon such a competition. It is not necessary here to debate how far an advocate may wave the privilege, seeing it is no stop to process, unless it be claimed, and may be tacitly omitted or waved without a positive renunciation, as the pursuer did in this case, by suffering his lawyers to produce and insist upon his interest, and afterwards extracting the decreet, and putting it to execution, which was an homologation so direct as excludes all pretence of error or mistake.

THE LORDS sustained the defence of *res judicata* against the pursuer, in respect that it was not competent to him upon production made by him in the decreet of ranking, to crave a new preference to the creditors preferred to him by that decreet.

Fol. Dic. v. 1. p. 573. Forbes, MS. p. 15.