

No 39.

When the Court requires a proof, that a deed challenged upon this act was onerous, as is always done when the conjunct or confident person is himself the defender, parole-evidence is admitted; 5th July 1673, Home *contra* Smith p. 899.; 15th December 1671, Duff *contra* Culloden.* It seems reasonable, that the same species of proof ought to be received, when, from the circumstances of the case, as, here, the Court sees fit to lay the *onus probandi* upon the pursuer.

'THE LORDS found, That it was competent to the pursuer Janet Gibb to abstract, by facts and circumstances, the grounds of her reduction, and allowed her to prove, both by witnesses and writing, the several facts mentioned in her condescence.'

Upon advising a reclaiming bill and answers, the LORDS 'adhered.'

A& Burnet.

Alt. Rae.

Clerk, Pringle.

A. Rolland.

Fac. Col. No 44. p. 78.

S E C T. IV.

Gratuitous Alienations.

1628. February 16. KILGOUR *against* THOMSON.

No 40.
A party granted a gratuitous disposition of lands, while he was in entire credit, and no diligence had been done against him; yet having failed soon after, the alienation was reduced, at the instance of a creditor.

IN an action betwixt Kilgour and Thomson, mentioned 24th January 1628.† Thomson *alleging*, that he ought to be preferred to Kilgour who was infest; because he alleged that the right made to Kilgour was acquired from Mr Alexander Linton heritor of the lands, who was debtor to Thomson before the disposition made by him to Kilgour; which disposition he alleged was made without an onerous cause, but *ex titulo lucrativo*, the disponent being since become bankrupt, and unable to satisfy his debt: This allegiance was found relevant; albeit Kilgour *answered*, that it was lawful to him to take a disposition of the land from Linton, debtor to the excipient, seeing at that time he was not bankrupt, and was not inhibited by Thomson, nor no diligence done by him against his debtor, which might make it unlawful to Kilgour to acquire and receive the land from the said debtor, either by gift, or by buying. This reply was not respected, for the LORDS found; that it was more reasonable and just, that the land given to Kilgour, if it was disposed without a cause onerous, or a preceding debt, or sums of money, should be rather forthcoming to the just and true creditor, for satisfying of his lawful debt, than that Kilgour should bruik the same *ex titulo lucrativo*, albeit the creditor had done no diligence against his debtor, at the time of the acquiring of Kilgour's right, seeing immediately thereafter the debtor became bankrupt, and so unable to pay this party his just debt.

Fol. Dic. v. 1. p. 68. Durie, p. 347.

* Stair, v. 2 p. 23. voce PROOF.

† Durie, p. 331. voce INFESTMENT.