

No 4.
not to induce
any *mala fides*,
so as to pre-
vent a subse-
quent volun-
tary disposi-
tion from be-
ing effectual.

took *saſine*, Myrton ſold a part of the ſame lands to Thomas M'Culloch, who was infeſt therein, and in poſſeſſion by virtue thereof. Thomas Hamilton intended a reduction of this diſpoſition and infeſtment made to Thomas M'Culloch, in reſpect that it was made after the comprifing, by which the analzier was ſo denuded of all the right and title he had, that he could not afterwards make diſpoſition thereof in prejudice of the comprifer.—*Answered*, That the reaſon of reduction was not relevant, becauſe nothing had followed upon the purſuer's comprifing for the ſpace of ſix years, which might have put the defender in *mala fide* to buy the ſame lands from Myrton, viz, neither inhibitions executed, nor *ſaſine* taken upon his comprifing.—*Replied*, That the denunciation of the lands to be comprifed was a public deed, which, with the comprifing following thereon, not only denuded the analzier of all right he had, but alſo put all others in *mala fide* to take any diſpoſition from him of theſe lands, otherwiſe there ſhould be no difference between a comprifing, (which is real) and a contract of alienation.—
THE LORDS, in reſpect of the long time that intervned between the comprifing and *ſaſine* following thereon, during which he had done no diligence to get himſelf infeſt upon his own comprifing, Found the reaſon of reduction not relevant. But, if the comprifer had been infeſt ſoon after his comprifing, or yet had charged the ſuperior, or done other diligence to get himſelf infeſt, the reaſon would have been thought moſt relevant to reduce on.

Spottiswood, p. 43.

No 5.

A public infeſtment was given to a man and his wife in conjunct fee. A baſe infeſtment to a third party intervned before confirmation. The effect of the confirmation drew back to the date of the public infeſtment, becauſe the baſe infeſter had acknowledged the conjunct ſiar's right, by ſtipulating for her conſent to his right.

1629. February 4.

HOME of Aiton *againſt* HOME.

THE young Laird of Aiton and the Lady purſuer, then his contracted ſpouſe, by contract of marriage betwixt them, wherein old Aiton was obliged to infeſt the young Laird and his future ſpouſe in conjunct-fee, in the lands of Hundwood, to be holden of the ſuperior, and conform thereto they were infeſt; after which infeſtment granted ſo to be holden, and before the ſame was confirmed by the ſuperior, the old Laird and the young ſell the lands to another, to be holden of themſelves; and, in the contract of alienation, the buyer takes them obliged to procure the young Laird's wife, now purſuer, her conſent to the alienation, and her ratification thereof in judgment; and upon this contract the buyer is infeſt holden of the analzier, and by virtue thereof, in poſſeſſion thereafter two or three years; and before the young Laird's deceaſe, that infeſtment given to him and his wife, is confirmed. After the huſband's deceaſe, ſhe purſues for the duties of the lands, by virtue of her ſaid infeſtment of conjunct-fee; and the relict of the buyer of the lands, ſhe being tencer, defending with the ſaid infeſtment granted to her huſband, and his poſſeſſion, and that the purſuer's rights and her huſband's were null, being given to them to be holden of the ſuperior, and not confirmed before her huſband's right acquired for great ſums;

and that the subsequent confirmation could not be drawn back, in prejudice of that infeftment intervening, which was a mid impediment:—THE LORDS found, That the Lady conjunct-fiar had good right, notwithstanding of the alienation before the confirmation; seeing that alienation was granted to be holden of the analzier, who being their author and superior, they could not quarrel his right nor her's, which were one; likeas the buyer had acknowledged that right, by taking the feller obliged, under a pain, and for which pain they had obtained sentence, to procure the Lady, now pursuer, her consent *habili modo*, to the said alienation; and so they could not quarrel the pursuer's right, upon that alleged nullity; especially the said nullity being supplied by a confirmation, perfected in her husband's lifetime; therefore the allegiance was repelled, founded upon the said alienation, in respect of the said reply, and the pursuit sustained, upon the said confirmed infeftment.

A. Craig.

Alt. Belsber.

Clerk, Gibson

Fol. Dic. v. 1. p. 105. Durie, p. 421.

* * The same case is reported by Spottiswood :

SIR PATRICK HOME of Aiton having infeft his son Sir John, and his Lady, in conjunct-fee, in the lands of Hyndwood and Fairnyfide, to be holden of the superior; before that this infeftment of theirs was confirmed by Sir John Stuart superior, Sir Patrick, and Sir John his son, dispone the same lands to Mr Alexander Home, to be holden of themselves; whereupon he is infeft, and in possession for the space of seven or eight years. After Sir John's decease, his Lady, as being infeft in conjunct-fee in the same lands, pursued for the mails and duties thereof.—*Alleged* by him that had the base infeftment, That her infeftment was null, not being confirmed by the superior; and that it was lawful for Sir Patrick to dispone the same of new again to any other before the confirmation.—And where it was *replied* by the pursuer, That her infeftment was confirmed, albeit after the disposition made to Mr Alexander; and that it being confirmed *quocunq. tempore*, should be drawn back to her saine and contract of marriage, whereupon it proceeded:—*Duplied, Obesse medium impedimentum quod prohibeat confirmationem cum confirmato conjungi, viz.* the posterior disposition to be holden of the disponer's self:—THE LORDS repelled this allegiance, notwithstanding, in respect it was *in materia dotis*, which is most favourable in the law.—And further, Mr Alexander, in taking of the same disposition from Sir John, as well as from Sir Patrick, had in a manner acknowledged her right, which was conjunct with her husband's; likeas he had taken them both bound in the contract to procure her consent to the disposition; and so not being ignorant of her right, seemed to have taken it with the hazard. And lastly, he had provided himself of warrandice of other of Aiton's lands, but she had no other lands to take her to. *Quibus omnibus concurrentibus*; the exception was repelled.

Spottiswood, p. 57.