

debates, upon the 4th of July 1673, it being *alleged* for the defenders, That the decret given against John Watt, wherein he was holden as confessed, was by mere collusion, in so far as there could be nothing produced for proving his intromission with the debts due by the Laird of Fren draught, or that ever Fren draught was debtor to their father; and if it were sustained against a prior lawful creditor, that a decret, wherein a common debtor is holden as confessed, were sufficient to constitute debt, it were to take away the security of all creditors;— it was *answered*, That the decret being given twelve years ago, and never reclaimed against, and homologated by payment of a part of the sums contained in the decret and apprising, and the parties obtainers being dead, and there being no presumption that John Watt should collude with his brethren to prejudice his own children, and being now become bankrupt, and *lapsus bonis*, it were of a far more dangerous consequence to sustain collusion, to be proved by witnesses, in prejudice of an assignee, for an onerous cause, and that without any reduction *ex capite fraudis*. THE LORDS did, notwithstanding, sustain the collusion, to be proved by the common debtor's oath, to which they did repone him, and by the oath of the Laird of Fren draught, the verity of the debt, and payment thereof to John Watt; and gave warrant to both parties to adduce witnesses, or any writ for proving the verity thereof; which seems hard, there being no reduction *ex capite fraudis*, to take away any assignee's right for an onerous cause, by way of defence.

*Fol. Dic. v. i. p. 474. Gosford, MS. No 599. p. 342.*

1675. July 21. MENZIES of Raw *against* ———.

In a reduction of a disposition of certain lands at Menzies' instance, *ex capite inhibitionis*, it was *alleged*, for the defender, That albeit his infestment was after the inhibition, yet it depended upon a prior bond, whereby the common debtor was obliged in general to dispoise lands for satisfaction of the defender's true debt. It was *replied*, That the defence ought to be repelled, because the common debtor being infest the time of the inhibition, could not dispoise these lands in prejudice thereof. THE LORDS did sustain, and found it sufficient that the common debtor, before inhibition, by a minute of contract was obliged to dispoise lands in general for satisfaction of his just debt; and that any intervening inhibition could not hinder particular lands dispoised to take effect, nor the disposition to be drawn back to the date of the first bond, as the cause thereof; which being prior to the inhibition, nothing following in consequence could be prejudged thereby; yet nevertheless the case of legal diligence ought to be well considered; for there may be great danger in suffering the benefit of inhibitions and comprising against a debtor infest to be of no force, if upon pretence of prior latent bonds, whereupon nothing followed, a creditor who was in *bona fide* to contract in contemplation of a real estate in the person of his debtor, more

No 98.

No 99.

An obligation to dispoise lands in general, without mentioning a particular subject, found sufficient to support a posterior disposition of particular lands against a reduction *ex capite inhibitionis*.

No 99.

worth than any sums of money lent him, and doing real diligence by inhibition and comprising, which incapacitates the common debtor to make any voluntary right; notwithstanding thereof, upon pretence of a personal bond, he shall be judged to have as full power to infeft when he pleases, as if he were not inhibited; and albeit the case was only as to the effect of an inhibition, yet it seems in reason that no more can be said for a comprising, they being both founded upon one principle of law, viz. to incapacitate a common debtor, by any voluntary rights, to prejudge lawful diligence.

*Fol. Dic. v. I. p. 474. Gosford, MS. No 787. p. 494.*

1675. July 22. GORDON *against* SEATOUN and Others.

No 100.

Inhibition found not effectual to reduce infeftments following on anterior bonds, containing obligation to infeft generally or particularly.

SIR GEORGE GORDON of Haddo pursues reduction of the rights of certain lands *ex capite inhibitionis*. The defenders *allege*, That their infeftments, though posterior, yet are granted for debts anterior, containing an obligation to infeft the creditors in the debtor's lands therefor, and so the infeftments are no voluntary right, but such as the granter might have been compelled to grant. It was *answered*, *Non relevat*, unless the obligation were special to infeft in particular lands, for such a general obligation is not sufficient.

THE LORDS found the inhibition not to be effectual against infeftments for satisfaction of prior bonds, containing obligations to infeft generally or particularly.

*Fol. Dic. v. I. p. 474. Stair, v. 2. p. 360.*

1681. June 23. GARDNER *against* BRUCE.

No 101.

Inhibition found not a sufficient ground for reduction of a posterior disposition, made in implement of a prior obligation.

PATRICK GARDNER having apprised from William Baillie of Torwood-head, all right to the lands of Torwood-head, and being infeft thereon, pursues the tenants for mails and duties. Compearance was made for Michael Bruce, who craves preference, because he was infeft in an apprising against James Lord Forrester, of all rights he had to the lands of Torwood-head; and albeit Gardner's apprising and William Baillie his author's infeftment appraised, be prior to Bruce's apprising, yet both rights flowing from James Lord Forrester, he was inhibited upon the grounds of the apprisings, before he disposed to William Baillie his brother; and he repeats his reduction *ex capite inhibitionis* of William Baillie's right, which was a wadset from the Lord Forrester, as being after his inhibition, wherewith Gardner's apprising from William Baillie falls in consequence. It was *answered* for Gardner, That inhibitions do only reduce posterior voluntary rights, but cannot reduce William Baillie's right, because it was necessary, and James Lord Forrester might have been