

1702. November 14.

JAMES ANDERSON against SIR JOHN DEMPSTER of Pitliver, and DUDGEON  
in Inverkeithing.

SIR JOHN being elected commissioner for representing that burgh of Inverkeithing in the Parliament 1681, to capacitate him for that office, one Anderson, a burgher, disposes to him a tenement of land, whereon Sir John is infeft; but Anderson continues in the possession all the days of his lifetime. His relict, after his death, marries one called Dudgeon, and they enter into a transaction with Sir John Dempster, whereby, for L. 1000 Scots, he disposes the tenement over to them. Upon this, Anderson's heir raises a declarator and reduction, that the right given to Sir John was in trust to the particular end and effect above-mentioned, and therefore craves the right made by Sir John to Dudgeon to be reduced, and fall in consequence. And the Lords having ordained Sir John to be examined upon the onerous cause of his disposition, he very ingenuously depones, that he paid nothing for it, but got it on the consideration foresaid, to put him in a condition to be their Parliament man, and that no backbond nor declaration of trust was required of him; and it being argued, That his transmission and conveyance to Dudgeon must fall in consequence, the LORDS found, That Dudgeon having acquired it by an onerous title, equivalent to the value of the house, the trust in Sir John's person could not affect his right, it not being a *vitium reale*, and that Sir John his cedent and author's oath could not prejudice him, unless it could be qualified that Dudgeon was *consciens fraudis*, or knew of the trust; but they inclined to think Sir John would be liable, both in respect of his own acknowledgment that the disposition was given him on the account foresaid, and that *nemo presumitur donare vel suum perdere*; and the *natura negotii* seemed plain that a gift was not here designed, especially being *retenta possessione* by the disponent all his lifetime; but the summons being rather a reduction of Dudgeon's right than a declarator of trust, they assilzied Dudgeon from the reduction; but allowed Sir John to be further heard as to any personal conclusion of trust or damage against him for contravening the said trust.

*Fol. Dic. v. 2. p. 65. Fountainhall, v. 2. p. 159.*

1715. July 14. BRUGH of Finmouth against FORBES of Ballogie.

SIR DAVID THOIRS having acquired the lands of Wester-Lochgellie from William Malcolm; he, without being infeft, assigns the same to Sir Robert Forbes, who granted backbond, acknowledging he had paid no price, but that the right was granted to him, in order that he might sell the lands for relieving himself of what debts he had paid for Sir David, or should thereafter pay; and

No 45.

A party, who was in fact only a trustee, disposed a subject. Found, that the trust could not affect the purchaser's right, not being *vitium reale*.

No 46.

A trustee in a disposition to lands, in order to sell them, gave a backbond to the disponent to account for