

No 65.

*legate*, and so might be revoked by the second.—*Answered*, These words of style were explained by the clear words whereby she made them her irrevocable assignees and assignees, and excepted only 100 merks to herself, *et exceptio firmat regulam in casibus non exceptis*.—THE LORDS found the plain words over-ruled the dubious, and preferred the first assignation. Then it was objected, that the second assignation was first intimated.—*Answered*, It is null, and reducible on the act of Parliament 1621, I being an anterior creditor by the warrandice of the assignation; which the Lords found, albeit they were both lucrative and gratuitous assignations. But, in regard the first assignees offered once to suffer the Hospital to be preferred for their pious legacy, therefore the Lords would not permit them to refile from that consent, and accordingly preferred them *quoad* the 200 merks.

*Fol. Dic. v. 1. p. 69. Fountainball, v. 1. p. 686.*

1699. February 7.

HAY against HAYS.

No 66.

Found in conformity with Alexander against Lundy, No 64. p. 940.

IN a competition betwixt Anne and Helen Hays, daughters to Leyes, and John Hay of Pitfour, being two assignees to one sum; Pitfour craved preference on his posterior assignation, because it was first completed by intimation.—*Answered*, Where both the rights are gratuitous and lucrative, the first, whether intimated or not, is preferable on the act of Parliament 1621, because the second is granted in prejudice of my warrandice, which, even in donations, is from all future facts and deeds, as was expressly decided, 15th of July 1675; Alexander *contra* Lundy, No 64. p. 940. *2do*, The sum assigned is the ground of an adjudication; and so being an heritable right, needs no intimation, as Stair affirms lib. 3. tit. 1.—*Replied*, The second assignation bears onerous causes, besides the narrative of love and favour, and the adjudication is posterior to the first assignation.—THE LORDS having read both assignations, they found neither of them were onerous; and therefore, on the clause of warrandice, preferred the first, though not intimated.

*Fol. Dic. v. 1. p. 69. Fountainball, v. 2. p. 41.*

1706. January 24.

WILLIAM WILSON Merchant in Edinburgh, against the LORD SALINE.

No 67.

Found in conformity with Frazer against Phillorth, No 62. p. 938.

WILLIAM WILSON having right by progress to a base infestment of annual rent out of Alexander Short's estate, expedie in May 1661, but never clothed with possession, pursued reduction against the Lord Saline, of a disposition granted to him by the said Alexander Short, his brother-in-law, completed by a public infestment in February 1662; as being a presumed gratuitous deed to a conjunct person in prejudice of the pursuer, a prior lawful creditor. The defender pro-

duced a bond for 20,000 merks, granted to him by the granter of the disposition, of the same date with it, which he contended was a sufficient onerous cause to support the disposition; as it would have been a good title to adjudge or use any other real or personal diligence upon; and differed from the case where the onerous cause is specified in a disposition, upon which narrative no execution could have followed. Now, if a bond of borrowed money, granted to a conjunct person, cannot be reduced upon the act of Parliament as gratuitous, 28th June 1665, Monteith *contra* Anderson, (*infra h. t.*) but proves its onerous cause by the narrative; Why may not a disposition of lands be granted by one conjunct person to another in satisfaction of such a bond? *2do*, Albeit the disposition had been gratuitous, it must subsist; because the disponent had *aliunde* a sufficient estate to pay his debt; 10th Nov. 1680, McKell *contra* Jamieson and Wilson, No 47, p. 920.

*Replied* for the pursuer: The 20,000 merks bond cannot be obtruded as the onerous cause of the disposition, in respect they are of the same date, and yet have no relation to one another; but might have been made use of separately against the debtor and his estate. There is again a manifest disparity betwixt a bond of borrowed money in the ordinary way of commerce, and a bond granted for so great a sum, at the same time with a disposition, containing the bulk of the granter's estate; but no material difference betwixt a disposition containing the onerous cause in the narrative, and one of the same date with a latent bond for a great sum; except that these two concurring, argue more fraud in the contrivance. The decision 1665 is not to the purpose; seeing the bond was not there craved to be reduced as made *inter conjunctas personas*, but as being granted after Anderson's diligence, which was justly repelled, for that horning doth not hinder a man to contract debt. *2do*, A gratuitous right cannot prejudice another's special right of the same subject, more than a posterior donation could prejudice a prior; for that the prior donatar, by the warrandice implied in his right, is a creditor as to the subject gifted; and his debt could not be rendered ineffectual by a voluntary gratuitous deed; *multo magis* ought the reduction to proceed at the instance of the pursuer, a lawful and onerous creditor. The decision 1680 doth not meet the point; for the pursuer doth not insist to have the disposition in favours of the defender reduced upon the head of bankrupt, but upon this reason, That the annualrent disposed to him out of certain lands, by Alexander Short, could not be prejudged by any posterior gratuitous disposition, though first completed by a public infestment.

THE LORDS found the disposition to the Lord Saline was presumed gratuitous, and the 20,000 merks bond not sufficient to instruct the onerous cause thereof. And repelled the allegiance of a separate estate, in respect of the pursuer's prior infestment. See PROOF.

*Fol. Dic. v. 1. p. 70. Forbes, p. 86.*