

tioned in the act, it is thought, are to be understood, conveyances of *nomina*, or other subjects *in solutum*; and not those made in ready money. Nor does the act 1696 extend to this case; for although the word *deeds* in it has been found to extend to the delivery of goods, which is a species of alienation; yet payment in cash being a natural extinction of the debt, cannot be recalled. Nor can the debt be revived by the debtor's afterwards becoming a notour bankrupt; 26th January 1751, Forbes *contra* Brebner, *infra*, *b. t.* The annulling such payments would be in effect destructive of all commerce.

'THE LORDS found, The payment made to Rachel Strachan, the defender, does not fall within the act 1696; and therefore affoilzie the defender, and decern; but find no expences due.'

Act. Burnet.

Alt. Rae, Ferguson.

D. Rae.

Fol. Dic. v. 3. p. 48. Fac. Col. No 243. p. 444.

1766. July 25. JANET GIBB *against* ALEXANDER LIVINGSTON.

LAURENCE GIBB, upon the narrative, that he had borrowed and received from Andrew Williamson, his son-in-law, the sum of L. 50 Sterling, granted an heritable bond for that sum, over a tenement in the town of St Andrew's. This bond was adjudged by Livingston, a creditor of Williamson.

Janet Gibb, a creditor of Laurence Gibb, having brought a reduction of this bond, upon the first branch of the act 1621, the first question was, whether a reduction was competent against the defender, a creditor-adjudger of the bond. The Court 'Repelled the defence, that adjudgers from a conjunct and confident person, are not liable to the challenge arising from the act 1621; but, in respect of the particular circumstances of this case, found that the defender is not obliged to astruck the heritable bond in question.'

The pursuer having offered to prove by witnesses, that the bond was gratuitous, the defender *contended*, That parole-evidence was not competent to redargue the narrative of the bond; founding both upon the general principal, that writing cannot be defeated by witnesses, and also on the tenor of the act, which mentions only a proof by writing, or the oath of party.

Answered for the pursuer, A proof by witnesses is admitted in all cases of fraud, though the effect of that proof may be to cut down a writing. Had it been alleged that Laurence Gibb was imposed on in granting the bond, parole-evidence would have been unquestionably competent. It ought to make no difference, that Gibb himself was a partaker of the fraud.

The act only says, That a proof by oath or writ of party shall *be sufficient*. But this is not absolutely exclusive of a proof by witnesses.

No 38.

In a reduction of a bond upon the first branch of the act 1621; found competent to redargue by parole evidence the narrative of the bond, bearing to be for borrowed money.

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.