

No 73.

rights were available to protect them against the claim of a third party. See the Decisions, § 1, & 2. *h. t.*

Answered; The decisions referred to only prove, that the defender must be assoilzied, unless the pursuer instruct a title to the subject in question. But, in this case, the pursuer supports his title sufficiently, when he connects it with the Countess of Findlater, the common author. And so the law is clearly laid down by Lord Stair, IV. 35. 13. and the Lord Bankton, IV. 43. 7. It is evidently *jus tertii* for the defender to object to the title of the Countess; because, by doing so, he does not support his own right, but effectually destroys it. At any rate, the right of the heir-male is out of the question, being cut off by the negative prescription.

THE LORDS found, that it is not competent for the defender to challenge the title of the Countess of Callendar, the common author both of pursuer and defender.

Reporter, *Pitfour.*Act. *Macqueen.*Alt. *Lockhart.*

G. F.

Fel. Dic. v. 3. p. 360. Fac. Col. No 71. p. 313.

* * * This case was appealed :

THE HOUSE OF LORDS, 29th April 1773, 'ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutor therein complained of be affirmed.'

1788. July 10. M'MASTER, INGLIS, and COMPANY *against* COLIN CAMPBELL.

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Effect of a
decree set-
ting aside a
sale of lands,
as in defraud
of creditors.

A REDEEMABLE right of lands, in favour of Colin Campbell, was set aside in an action at the instance of the creditors of the seller, as importing a conveyance *omnium bonorum* in favour of a particular creditor. But Colin Campbell having soon made a compromise with the creditors, by whom the action was brought, he continued in possession for several years.

Some time after these proceedings, M'Master, Inglis, and Company, became creditors to the bankrupt. They deduced an adjudication against the lands which had been sold to Colin Campbell, and then brought a process of ranking and sale; to which he was made a party. In support of this action, it was

Pleaded; An agreement that has been set aside as fraudulent, cannot afterwards be attended with any legal consequences. The rights of all parties thereby become the same as if no such agreement had ever been made. When an illegal transference of property has been attempted, the original owner must therefore be understood to be reinstated in all his former rights; and these must, of course, be liable to attachment, indiscriminately, by all his creditors. Without this, instead of making room for an equal distribution of the bankrupt's

effects, the right of the fraudulent acquirer would still subsist, so far as it did not interfere with those persons who had obtained the decret of redaction; and only such a part of the subjects in dispute, as corresponded to the extent of the debts due to them, could be brought to a judicial sale; a proceeding quite inconsistent with the established practice in cases of this sort.

Answered; Where a sale has been set aside, as injurious to the proprietor himself, the right of obtaining redress, as it is *in bonis* of him, must be available to his creditors in general. But where an agreement of this sort has been annulled, as hurtful metely to parties having a collateral or transitory interest, the effect of the decret is and must be so confined, as to afford a proper reparation to them only. With regard to the seller himself, and with regard to those, who, becoming creditors to him at an after period, can only stand in his right, the transference is equally valid as if no objection had been competent. And where, as in the present case, the right of the persons, at whose instance alone the agreement was reducible, has been united with that of him against whom the action was competent, it is evident every possibility of a challenge must be precluded.

The pursuers farther *contended*, that as the defender's right was redeemable, they might still, on payment of the sums advanced, carry on the sale. This argument, however, was considered to be inadmissible. As adjudgers of the seller, they might pursue a declarator of redemption, if such an action was competent to him; but they could not immediately bring to a judicial sale lands which *ex facie* did not belong to their debtor.

THE LORDS dismissed the action.

Reporter, *Lord Dreghorn*.
Clerk, *Home*.

Act. *Wight*.

Alt. *Cullen, Abercromby*.

C.

Fac. Col. No 30. p. 49.

1794. February 26. FRANCIS FRASER against DAVID MIDDLETON.

THE late Mr Fraser of Findrack, in his son Francis's contract of marriage, disposed to him, and the children of the marriage, the estate of Findrack, which he had long possessed in apparency, reserving to himself the possession and life-rent use of one half of it, and a power of burdening it with certain provisions to his widow and other children. The son, on the other hand, became bound to relieve him of a certain proportion of his debts; and his bride assigned her tocher of 7000 merks to her future husband. Francis, in 1772, took infettment upon the precept in the contract.

His father, in 1785, granted a lease, for 57 years, of the farm on which he resided, part of which was in his natural possession, to David Middleton. The

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Found in conformity with
Livingston
against War-
rock, No 73.
p. 7847.