

No. 20.

1803. December 22.

GRAY, Petitioner.

A SUMMARY application by the seller, for the price of goods which had been delivered immediately before bankruptcy, on the head of fraud, not competent.

Fac. Coll.

* * This case is No. 25. p. 14983. *vide* SUMMARY APPLICATION.

No. 21.

A father, makes advances to his eldest son to a considerable amount, and in about two years becomes bankrupt. His creditors cannot reclaim these from the son out of any separate estate he may have since acquired.

1804. January 31. MACDOUGALL'S Creditors, against MACDOUGALL.

WHILE Mr. Allan Macdougall was proprietor of an estate valued at upwards of £30,000, and carrying on considerable business as a Writer to the Signet, though at the same time indebted in large sums to many persons, he defrayed the expense of promoting his eldest son John, then a lieutenant in the army, to be a captain in the 91st regiment. This amounted to £1214. 11s. 3½d, which was regularly entered to his son's account in his books, as paid to him, or by his orders, in the course of his recruiting, in the end of the year 1793, and beginning of 1794.

In the end of the year 1796, Mr. Macdougall stopped payment, and conveyed his estate to a trustee for behoof of his creditors, who in their name brought an action against Captain Macdougall for repayment of the sum advanced by his father.

The Lord Ordinary pronounced this interlocutor, (6th June 1801): "In respect it is not alleged that there was any fraud on the part of Mr. Allan Macdougall, or that any diligence had been done against him at the time the advances in question were made to the defender, sustains the defences, as soilzies the defender from the conclusions of the libel, and decerns."

The creditors reclaimed, and

Pleaded: 1. The money advanced was not in the way of *donation*, but was set down to the son's account, of which, the father himself having now occasion for paying his debts, and still more his creditors, have a just title to demand repayment. The whole *items* of the account remain undischarged in any way whatever. Neither by entry in his books, nor by any act or deed at the time, did he express his intention of making it a gratuity. Indeed, in justice to the rest of his family, (laying his onerous creditors out of the question), he could never have formed the idea of giving so large a sum to his presumptive heir, at the risk of exhausting his funds, and leaving nothing to a numerous family of younger children. A father and son are apt to deal loosely in matters of business, leaving it to after circumstances to determine what shape the transaction shall assume; if he had been prosperous in life, perhaps he never would have

called back the money so advanced. But, on the other hand, by retaining this sum at his son's debit in his books, he reserved his claim against him, in the event of his being unable to provide otherwise for his younger children or onerous creditors. Of this reserved claim, his creditors are entitled to avail themselves.

2. But supposing the money was given, not on the footing of a debt to be repaid, but as an absolute grant, not subject to any power of revocation, or condition of repayment, it may be challenged upon the act 1621, which declares "all alienations, dispositions, &c. made by the debtor of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after contracting of lawful debts, to be null and of no avail," &c. That every father lies under a natural obligation to provide for his offspring, need not be disputed; but that this is "a true, just, and necessary cause," in the sense of the statute, taking off the effect of presumptive fraud, cannot be conceded. A father is bound to provide for his offspring, so long as he has the means of doing so; so long as he has any free estate to bestow; but no one is either bound or entitled, either by a natural or civil obligation, to provide for his family at the expense of others. It is not necessary to instruct actual fraud to justify a challenge, the policy of all the bankrupt acts being to declare certain acts to be fraudulent in the eye of law, independent altogether of the intention of the granter. The preamble of the act 1621, so far from making any exception in favour of children, on account of the natural obligation to provide for them, places them in the front of suspected persons, in whose favour devices are most likely to be practised to the injury of creditors. Provisions in favour of children have accordingly always been understood to be gratuitous in a competition with creditors; Mackenzie's observations on 1621; Ersk. B. 4. Tit. 1. § 34; Bankt. B. 1. Tit. 10. § 75. and 77; Stair, B. 1. Tit. 9. § 15; and children have always been obliged to show, that at the time of granting the provisions in their favour their father was solvent.

To obviate any plea of hardship, by obliging Captain Macdougall to sell his commission to repay the sum claimed, the creditors renounced all claim upon the commission, and agreed to restrict themselves to payment from the estate of Polquhain, to which he had lately succeeded from a distant relation.

Answered: 1. So little does it ever appear to have been Mr. Macdougall's intention, to retain the sums expended for fitting out his son as a debt against him, particularly when he was in possession of the family estate destined to that son, that he never thought of taking any obligation for repayment of the sums advanced. A father never can be allowed to act in such a manner, as that having put his son into a certain situation and rank in life, on the faith and understanding that he is making him a present for that purpose, he may afterward ruin all his future prospects, by calling back that money, on the pretence

No. 21. that it was a debt against him. The account was opened by the book-keeper, as evidence of the sums paid by him on the son's account; and vouchers were taken as evidence of these disbursements. If it had been intended that this should constitute a debt against the son, these would have been preserved; but they were delivered up to him on his going abroad, and no acknowledgment of any kind taken from him in return.

2. The argument upon the statute implies, that there was fraud in the transaction sufficient to set it aside; fraud on the part of the father, for advancing a moderate sum to his eldest son, befitting the station of one who had the *per successionis* of the estate, then the property of the family; and that there was also fraud in the son in accepting this sum of money, and this two years before his father was obliged to stop payment. But this advance was not made without "true, just, and onerous causes." The father lay under the strongest obligation to provide for the eldest son of his marriage; and, in discharge of that obligation, he expended a very moderate sum considering the situation and rank of the parties. Mr. Macdougall had at that time every reason to believe that his effects were equal to the discharge of all his debts. A natural obligation is sufficient to protect a deed granted in favour of a near relation from being reducible. By the statute, wives and children are put exactly on the same footing; yet a provision to a wife has been sustained though made by an insolvent person, even in a postnuptial contract; 11th January 1738, Robertson, No. 75. p. 957; 17th February 1738, Mackenzie, No. 76. p. 958; 22d January 1744, Lockhart, No. 74. p. 956; Creditors of Ferguson against Swinton, 2d February 1796, No. 109. p. 1001. No case has ever occurred, where the situation of wives and of children have been looked on in different points of view; and in no case has a provision to a wife been sustained, and a provision to a child, in the same circumstances, held ineffectual; Bean against Strachan, 1st August 1760, No. 37. p. 907; Creditors of Scott against his Younger Children, 13th June 1760, No. 100. p. 985.

Replied: There is a manifest distinction between provisions to a wife and provisions to children; the former being in the eye of law onerous, so far as rational; the latter gratuitous in a question with creditors.

The Court (11th December 1802) "sustained the defences;" and on advising a reclaiming petition, with answers, (31st January 1804) they "adhered."

The Court was divided in opinion. It was observed by one of the Judges in the minority, that the principle of an implied condition clearly applied to this case, as the son could now from his separate estate afford to replace this sum, if his father had required it; and that as his creditors now require it, they are entitled to urge the same plea as the father, who never gave any discharge of these advances.

Lord Ordinary, *Hermann*. For the Creditors, *Solicitor Gen. Blair, Arch. Campbell, jun. Scott.*
Agent, *H. Davidson, W. S.* Alt. *Lord Advocate Hope, Hay.* Agent, *Alex. Forsyth.*
Clerk, *Pringle.*

F.

Fac. Coll. No. 140. p. 316.