

No. 120.

certainly more than a personal action. Again, though reduction upon the statute were not real, fraud in a transaction betwixt conjunct persons in prejudice of creditors, is *vitium reale*, which makes posterior transactions fall in consequence with the first; especially where the second acquirer could not be ignorant of his author's relation to the first disponent, as here where the relation is expressly mentioned in the father's disposition to Lauchlan Leslie, 24th January 1680, Crawford *contra* Ker, No 118. p. 1012. Nor is there any difference betwixt voluntary purchasers and creditors using diligence; seeing the latter could only adjudge *omne jus quod erat in debitore, tantum et tale*. Dirleton, Doubts and Questions, p. 21 and 175. And adjudgers cannot be understood lawful purchasers by true bargains, for just and competent prices, in the terms of the act, M'Kenzie, Observ. p. 32.

THE LORDS found, That Catharine Leslie is in the common case of an heir of provision, and has thereby interest to quarrel any gratuitous deed done by her father to her prejudice; and that the disposition granted by James Leslie to Lauchlan his brother-in-law, doth not prove the onerous cause thereof; and that the same bearing the relation betwixt the disponent and Lauchlan Leslie, that they are brethren in law, Lauchlan's creditors are in no better condition than he, and therefore must instruct the onerous cause of the disposition, otherways than by the narrative of the writ itself. See PROVISION TO HEIRS AND CHILDREN.

Fal. Dic. v. 1. p. 75. Forbes, p. 400.

1711. February 2.

MR DAVID GUTHRIE and ALEXANDER WILLIAMSON *against* MR WILLIAM GORDON, Advocate.

No 121.
A disposition to a conjunct person, bearing to be for security of a sum owing to him, by the granter, solvent at the time, not having been quarrelled for 58 years; found that a singular successor to the receiver of the disposition was not, in competition with anterior creditors of the granter, obliged to

In the process at the instance of Mr David Guthrie and Alexander Williamson, who stand infest in annualrents out of the teinds of Balcomy, against Sir William Hope the purchaser, for payment of the price: Mr William Gordon craved to be preferred upon a disposition of these teinds granted by Sir James Lermonth in anno 1654 to Sir William Gordon of Lesmore his son-in-law, bearing for security of 4000 merks owing by Sir James to Sir William; and also upon two expired appraisings of these teinds in the same year 1654; to which disposition and appraisings Mr William Gordon hath right by progress. Mr David Guthrie and Alexander Williamson *alleged*, by way of reduction upon the act of Parliament 1621, That the disposition, being *inter conjunctas personas*, could not prejudice them anterior onerous creditors, unless the onerous cause thereof were instructed *aliunde* than by writ itself. *2dly*, Albeit that were instructed, the pursuers offer to prove that Mr William Gordon and his authors were more than satisfied of the 4000 merks, by their intromission with the teinds.

Answered for Mr William Gordon. *Esto* the disposition had been gratuitous, it cannot be quarrelled, because Sir James Lermonth was solvent in the 1654

when he disposed, and had an estate sufficient to pay the 4000 merks and all his anterior debts; nay, his affairs turned not in disorder till after his death, when he could not be said to defraud his creditors, Stair, *Instit. lib. 1. tit. 9. p. 82.* (84.) And the disposition not being called in question for fifty-eight years, the narrative of it must be sustained to instruct its onerous cause, which, after so long a time, cannot be otherways proved. *2dly, Non relevat*, that Mr William Gordon intromitted with as much of the teinds as would pay the debt: Because he had a right to two expired apprisings before any intromission, to which he ascribed his possession as the most profitable titles, and so is not countable for his intromissions.

Replied for the pursuers, They need not say that Sir James Lermonth at the date of the disposition to his son-in-law was bankrupt; but it is insufficient to annul that right, that the granter's estate was then incumbered by many infeftments of annualrent and apprisings, whereby *in eventu* he became insolvent, Feb. 6. 1663, *Lourie contra Dundee*, No 40. p. 911.; February 10. 1665, *Craig contra Lourie*, No 56. p. 931.; Dirleton, Decif. June 30. 1665, Clerk *contra* Stuart, No 46. p. 917. Stair, *Instit.* p. 82, (84.) and Mackenzie upon the act 1621. For when an estate is incumbered with debts and diligences, it is more reasonable that a conjunct and confident person should want a donation, than an anterior creditor be frustrated of his just debt. Upon which account, the Lords are in use to rank children for their bonds of provision *ultimo loco*, though equal in diligence with other creditors, February 10. 1688, The Creditors of William Robertson, No 83. p. 969.; the case of the Creditors of Cardon, *anno* 1700, *voce* PROVISION TO HEIRS AND CHILDREN; and the late Competition of the Creditors and Children of George Marshall, *voce* ADJUDICATION, p. 47. Albeit infeftments granted to children *foris-familiate*, when the granter's credit was entire and unquestionable, have been sometimes sustained according to their dates. *2dly*, Mr William Gordon and his author having once entered to possess the teinds by virtue of the disposition a redeemable right, they could not invert the cause of their possession, and liberate themselves from counting by purchasing expired apprisings. Besides, the apprisings founded on cannot defend him from counting, because they were reduced or opened in the ranking of the creditors of Balcomy.

Duplied for Mr William Gordon, Albeit his apprisings were opened and turned to securities for the true debt, because of some nice informality; yet any prior intromission thereby was *bona fide*, and the sentences reducing or opening had no retrospect to make the intromitter liable for bygones, July 19. 1664, Douglas and Sinclair of Longformacus *contra* Laird of Wedderburn, Stair, v. 1. p. 217. *voce* BONA FIDE CONSUMPTION; February 17. 1624, Thomson *contra* Law, Durie, p. 111. *voce* BONA FIDE CONSUMPTION; January 18. 1677, Dick of Grange *contra* Oliphant, Stair, v. 2. p. 496. *voce* PRESUMPTION. For voluntary rights, as well as apprisings, may chance to be reduced upon nullities or prior diligences: And if apprisers be holden to count for fruits *bona fide* uplifted and spent, purchasers by consent would run the same fate, which would mightily unsettle all manner of property.

No 121.
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No 121.

THE LORDS found, That Sir James Lermouth having been solvent in the 1654, the time of granting the disposition, and the same never having been quarrelled for so many years; Mr William Gordon cannot now be obliged to prove the onerous cause thereof. And found, That Mr William Gordon instructing that he had the rights of apprising (then unquarrelled) in his person, the time of his entering to possession of the teinds, as well as the voluntary right by disposition; he can ascribe his intromissions wholly to the apprising *media tempore* till the same were found to be only a security for the sums therein contained; and preferred Mr William Gordon's disposition to the infestment of annualrent. See INDEFINITE INTROMISSION.

Fol. Dic. v. 1. p. 75. Forbes, p. 492.

1723. January.

LYON against CREDITORS OF EASTER OGLE.

No 122.

As a second gratuitous disposition of the same subject elad with the first infestment, is reducible at the instance of the first, though the granter have funds *aliunde* sufficient to pay his debts; so the reduction was found to have place against the second disponees creditors, who had adjudged the estate from him, in respect the second disposition was from a father to his son, and bore to be gratuitous. See p. 233. and *vide* PROVISION TO HEIRS AND CHILDREN.

Fol. Dic. v. 1. p. 75.

1730. January 9.

ALLAN against THOMSON.

No 123.

Unless there be evidence *ei mala fides* in the singular successor; his right is secure, although his immediate author's right may have been challengeable as *inter conjunctos*.

WILLIAM SANGSTER having disposed a tenement in Aberdeen, narrating an onerous cause, to Charles Sangster, who happened to be his brother, Charles disposed the same over again to his daughter and her husband, in their contract of marriage, but without making mention that the subject was derived to him from his brother William. A great number of years thereafter, action of reduction upon the act 1621 was intended of these dispositions, by a prior creditor of William Sangster's libelling, that the disposition from William to Charles being betwixt conjunct and confident persons must be presumed gratuitous; and that therefore Charles' daughter and her husband who knew of the said conjunction, though, in the eye of law onerous purchasers, can be in no better case than their author. The defence was, that it was extremely likely, the daughter and her husband knew of the relation betwixt William and Charles Sangster's, but at the same time there was no sort of evidence of their knowledge that Charles's right was derived from his brother William, without which they were in *optima fide* to purchase; and unless this knowledge be proved they can never be brought in as *participes fraudis*: THE LORDS, in respect there was no evidence that the defender was in the knowledge that Charles Sangster's right flowed from William Sangster his brother; therefore they assailed from the reduction.

Fol. Dic. v. 1. p. 75.