

No 92.

and repeats her reason by way of duply, viz. If she was compelled by her husband, it was by just fear; because she offered to prove by witnesses, that he threatened her to consent, or else he should do her a mischief; and that he was a fierce man, and had many times beaten her, and shut her out of doors; and offered to prove by the notary and witnesses insert, that at the time of the subscription, she declared her unwillingness.

THE LORDS found the defence and duply relevant.

Fol. Dic. v. 2. p. 69. Stair, v. 1. p. 113.

1662. July 23.

LORD FRASER *against* PHILORTH.

No 93.

It being *pleaded*, That payment made by the debtor is not sufficient to extinguish an infeftment upon an apprising *contra singularem successorem*; and that intromission with the mails and duties of the lands appraised has this effect by statute only, not by common law; this was repelled.

Fol. Dic. v. 2. p. 71. Stair.

*** This case is No 62. p. 938. *voce* BANKRUPT.

1667. December 18.

AUCHINLECK *against* WILLIAMSON.

No 94.

REDUCTION upon the head of fraud is good against gratuitous acquirers, tho' not partakers of the fraud.

Fol. Dic. v. 2. p. 69. Stair.

*** This case is No 243. p. 6033. *voce* HUSBAND and WIFE.

1672. July 16.

DUFF *against* FOWLER.

No 95.

A right granted by a son to his father, *contra fidem tabularum nuptialium*, cannot be challenged upon that head in the person of a singular successor, purchasing *bona fide* from the father.

DONALD FOWLER of Culnald, in his son's contract of marriage, provides him and his future spouse to certain lands for their entertainment, during the father's life; but takes a tack from the son of the same lands, for a tack-duty far within the worth, which he assigns to his brother, and he transfers the same to William Duff, who pursues the son for mails and duties. The son *alleged*, *imo*, That this tack not being granted to assignees, the pursuer as assignee could not make use thereof, because tacks are *stricti juris*. It was *answered*, That life-rent tacks by many decisions are excepted from that rule; and that they do extend to assignees, if they be not excluded, though they be not expressed.

THE LORDS repelled this defence, in respect of the reply.

The son further *alleged*, That this tack is null, as being fraudulent *contra fidem tabularum nuptialium*; for the father having, by his solemn contract of marriage, provided the land to his son and his wife, during the father's lifetime, it was a most fraudulent deed to take a tack of the same lands, far within the avail, which was not known or consented to by the wife, or the contractors on her part, and is to the detriment both of husband and wife, as to their present subsistence.

THE LORDS found this defence relevant, if the tack was granted at the time of the contract of marriage, or any time thereafter before the marriage; and that not only in favours of the wife, as to her liferent, but as to both husband and wife as to their present subsistence.

And it being *alleged*, That this fraud could not extend to Duff as assignee for an onerous cause, who was not partaker of the fraud,

THE LORDS ordained the defenders to condescend if they could instruct that either Duff's right was without an onerous cause, or that when he took it he knew that it was contrary to the contract of marriage. See PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 2. p. 69. Stair, v. 2. p. 102.

* * * Gosford reports this case :

DONALD FOWLER in Inverness being provided by his father, in his contract of marriage with his wife, to the conjunct fee of a tenement of land, and the fee to the heirs of the marriage; at that same time the father did most fraudulently take a tack from the son during life, which he did assign to William Duff, who thereupon pursues his son to enter him to the possession. It was *alleged*, That the tack being purchased by fraud and circumvention by the father, *contra fidem tabularum nuptiarum*, it was *vitium reale*, and ought not to prejudice the wife and children, and in law is null, not only as to the father, but as to all right from him. It was *replied*, That the pursuer being an assignee for an onerous cause, unless it were proved that he were *particeps fraudis*, might not be prejudged of the benefit of the assignation.

THE LORDS did sustain the defence, notwithstanding of the reply; and found, that such fraudulent conveyances betwixt a father and a son, ought not to prejudice the wife and children; and that the assignation in favour of the pursuer being posterior to the contract of marriage, the pursuer must seek relief of the father, but could be in no better condition, as to the wife and children, than the cedent himself; fraud and deceit being *vitium reale* doth affect singular successors. The pursuer being assignee for an onerous cause, as to the rent of the houses, they found, that during his lifetime, he had right to pursue; and therefore decerned, unless the defender would allege, that he was *particeps fraudis*.

Gosford, MS. No 512. p. 271.