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blishing the debt, upon incurring the warrandice, was not obtained, till after the disposition.

the price.—It was *answered*, That there was no debt constituted against Glafs before the disposition, but by a process long after the same.—It was *replied*, That the process did not constitute, but declare the debt; but the debt was constitute before the bargain for the feeds, which did imply warrandice against latent insufficiency: And suppose the bargain had been after the disposition, yet it being betwixt two good-brothers, without a cause onerous, it must be presumed to have been a contrivance *animo fraudandi*, to let Glafs go on to trade and to deceive him; and in case he should be questioned, his good-brother should enjoy his tenement, as was found in the case Street *contra* Jackson and Masson, Stair, v. 2. p. 197. *voce* FRAUD, where a disposition by a father to the son was reduced upon debts contracted thereafter; and the like, Reid of Balloch mills *contra* Reid of Daldilling, Stair, v. 2. p. 144. and 234. *voce* FRAUD.

THE LORDS found the reasons of reduction relevant; that the bargain for the feeds was before the disposition, or though posterior, that the disposition was made upon the fraudulent design alleged; but found it not inferred, because it was granted to a conjunct person, unless he were partaker of the fraud; therefore found the contrivance only proven by writ or his oath; but if other pregnant circumstances in fact were adduced to infer the contrivance, the Lords would consider the same.

Fol. Dic. v. 1. p. 74. Stair, v. 2. p. 710.

1702. July 25.

JAMES MAN Merchant in Dundee *against* ANDREW WALLS, and OTHERS, his Creditors.

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In a declarator of bankruptcy, the Lords would not sustain the presumption, that a bill had been accepted the same day it was dated. The acceptance being posterior to a disposition by the bankrupt to other creditors, it was found that the party claiming on the bill had no title to challenge the disposition, unless he could show evidence otherwise, of a debt owing to him, prior to the disposition.

THE said Andrew Walls being debtor to sundry persons, he, on the 14th of February 1700, grants a disposition of the whole ware of his shop, and plenishing of his house, and other moveable debts, in favour of some particular creditors therein named; and the very same day there is a bill drawn on him, payable to James Man, another creditor, but not contained in the disposition foresaid, which is accepted by the said Andrew Walls, but without any date; but it is protested on the 15th of February for non-payment. After this, Walls leaves the town of Dundee for some weeks, and then returns, and is imprisoned by some of his creditors. This being the case, James Man raises a declarator of bankrupt against the said A. Walls on the 5th act of Parliament 1696, and thereon concludes reduction of the said disposition made by him in favour of some particular creditors to the prejudice of the rest; and he founded on this new act, in regard the act of Parliament 1621, against fraudulent alienations of bankrupts, will not comprehend this case, the disposition not being to conjunct persons, nor did it want onerous causes; nor was it in defraud of any diligence done by James Man, anterior to the disposition quarrelled; but he contended it fell precisely within the terms of the said last act 1696, because it was in prejudice of him, a creditor; and after he was under horning and caption at another creditor's instance, though not at his, and that he was then insolvent, and fled, and absconded. *Alleged* for the creditors in

the disposition, *1mo*, You, James Man, have no title nor interest to pursue this declarator, because none can pursue a reduction of a disposition made for onerous causes, but he who is a creditor at the time of the said disposition; but *ita est*, you was none, for your bill is only dated the same day of the disposition, and bears an acceptance without any date; and being a mandate, it constitutes no debt till acceptance, which can only be known by the protest, which is on the 15th of February, a day posterior to the disposition. *Answered, 1mo*, Posterior creditors have been allowed to reduce anterior fraudulent dispositions, as was decided in 1673, in the famous case of Street against Jackson and Mason*: but, *2do*, The acceptance wanting date, must be presumed to have been the very same day of the bill, seeing they both dwelt in one town, and it might have been easily presented and accepted within an hour after its subscribing:—THE LORDS did not sustain the presumption, that the acceptance was of the same day's date with the bill, unless it was otherwise proven; and found he was not creditor to Walls till acceptance, and which being posterior to the disposition, he had no interest to quarrel the same; which could only be done by anterior creditors, unless he could attract and fortify his bill by some grounds of debt owing by Walls to him prior to the same. *2do*, *Alleged* for the defenders, That the horning and caption produced being only on general letters for the excise of brandy, is not equivalent to the diligence required by the 5th act 1696, which should be for some obligation of debt, or on a decret; whereas general letters are prohibit by the 13th act of Parliament 1690, and go of course for any branch of his Majesty's revenue against the best merchants in the kingdom, and can be no qualification of bankruptcy. *Answered, 1mo*, The act of Parliament speaks of a horning and caption, without making any distinction; *et ubi lex non distinguit, non est nostrum distinguere.* *2do*, It is not horning and caption alone that infers the conclusion of bankrupt, but it must be conjoined with insolvency at the time; and some of the alternatives of the said act, as his retiring to the Abbey, flying, absconding, deforcing, &c. THE LORDS repelled the defence, and found the horning sufficient. *3tio*, *Alleged*, The withdrawing proven was not in the terms of the act of Parliament, but only he went to the country to get in some debts owing him. But the LORDS having advised the probation, found it was to evite imprisonment and other diligences that he retired, and so reduced the disposition, James Man the pursuer proving he was a creditor anterior to his bill. THE LORDS were the more circumspect in deciding this case, because it was amongst the first pursuits that have been founded on that late act of Parliament, and it was fit to clear the same for the future. (This case referred to in Sect. 1. of Division 3. *b. t.* and *voce* BILLS of EXCHANGE.)

November 7.—IN the action mentioned, 25th July 1702, Man *contra* Andrew Walls and his creditors, the LORDS having there found that he could not quarrel the disposition, because his bill whereby he was creditor, and his protest, were posterior thereto, unless he could attract the onerous causes of his bill to be some debt anterior to the disposition; John Man, for proving thereof, adduced fundry

* Stair, v. 2. p. 197. *voce* FRAUD.

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witnesses to asfruct that he had delivered to Walls several quantities and parcels of merchant goods some time before the date of the bill, and which were the cause thereof: Against whom it was *objected*, That no witnesses could be received in this case, but he behoved to prove the onerous antecedent cause of his bill *scripto*, especially seeing the interlocutor in the act did not determine the *modus probandi*, and that he seemed to have elected that manner of probation by writ himself, in so far as he had cited sundry persons to depone on the having of Andrew Walls's count-books, whereby it would appear he was creditor *ab ante* to the disposition. *Answered*, The act was indeed indefinite, without determining the manner of probation, but that made for him; seeing where the *modus* is not specified, law always understands to be *prout de jure*; and his calling for the count-books was no passing from his probation by witnesses, seeing he may use both. *Replied*, If you have declared your manner of probation at the time of making of the act, and offered to prove an anterior ground of debt by witnesses, then I would have elided it by this answer, offering to prove that the said debt was satisfied by Walls *aliunde*, and so could not be the onerous cause of the bill of exchange, from which I am now precluded. THE LORDS considered, that in administrations and asfructions of this nature, they did not require a full and positive probation; and that where a bond is quarrelled, as granted on deathbed, or as being holograph, and so presumed to be *in lecto*, as not proving its own date, they used to sustain a reply, offering either to prove an antecedent ground of debt prior to the sickness, or that the writ was seen and read by severals before contracting the sickness whereof he died, and that both these are in use to be proven by witnesses: Therefore the LORDS repelled the objection, and allowed the witnesses to be received; but would not permit him both to prove by them, and likewise to call for writs, unless it were *quoad* distinct articles; and therefore ordained him to elect any of the two he pleased, but not to make use of both *quoad* the same points. (See PROOF. See DEATHBED.)

December 2. 1704.—In the action mentioned 7th November 1702, pursued by John Man against Reid, Maxwell, and the other creditors of Andrew Walls, the disposition being reduced as granted within sixty days of his flying, this new point was started, that the disposition was only reduced in so far as it was a partial gratification and preference of one creditor to another, but could not hinder the receivers of the disposition to come in *pari passu* with the other creditors-arresters; for if we had not relied on the faith of the said right, we would have done diligence as soon as you; but we supposed our disposition to be good, and therefore neglected any farther security: Neither could we arrest in our own hands the goods disposed to us in property; and the Lords in many parallel cases have found where parties have been put *in tuto* by a right, then looked upon as valid, if *ex post facto* it come to be annulled, it has been sustained so far *ad hunc effectum* as to bring them in equally with the other creditors who did diligence; as on the 25th of July 1672, Gray *contra* Gray *, a husband of an heiress having

* Stair, v. 2. p. 109. *vide* DEATHBED.

a disposition from her father, and that being reduced, yet the Lords sustained it to give him the liferent and courtesy, though his wife was never infeft, because it was presumed, that if he had not got that disposition, he would have infeft his wife, as heir, and so have got the courtesy. *2do*, In the case of Kinloch *contra* Blair, No. 14. p. 389. a disposition reduced by an adjudger, yet was so far sustained as to bring in the receiver of it (though he had not adjudged) *pari passu* with the adjudger, on this plain presumption of law, that if I had not got the said disposition, I would certainly have adjudged within year and day of you. *3tio*, They cited Balmerino's case, 18th February 1662,* who being the Earl of Somerset's trustee, and pursued by Bedford, he was allowed retention of what debts were contracted afterwards, even against a singular successor. *Answered*, The act of parliament 1696, defining notour bankrupts, declares such dispositions made within 60 days of their breaking to be simply void and null in themselves, *et quod ipso jure nullum est, nullos sortitur effectus*; and if the receivers of such dispositions were so far countenanced and supported as to bring them in *pari passu* with the other creditors, every bankrupt would be courted by some of his creditors to grant such dispositions, knowing that, at the worst, they would come in equally with other creditors neglected by the bankrupt, but who had prevented them in affecting the subject by doing legal diligence. And, as to the decisions cited, they were stretches of the Lords *officium nobile*, in supplying their omissions, which are not to be drawn in example.—THE LORDS found the disposition simply null, and that it could not even subsist to bring them in *pari passu*; and so preferred the arresters. In this process it was farther urged for these creditors who had carried on this reduction on the head of bankruptcy, that they having removed this middle impediment of the disposition out of the way, they ought to have the expences wared out in this process, over and above their debts, as is done in rankings, and the sale of bankrupt's lands; this being as profitable to the creditors behoof as these common actions are. It was not determined at this time, but was afterwards refused in this process. (Referred to in Section 8th, Division 3d, *b. t.*)

Fol. Dic. v. 1. p. 74. Fountainhall, v. 2. p. 156, 158, 244.

SECT. XV.

Of Alienations to singular Successors.

1672. February 6. DOCTOR HAY *against* MARJORY JAMISON.

DOCTOR HAY pursues a reduction of a tack for two nineteen years granted by Patrick ———, his debtor to Kinnaird his spouse, of the land of Attroch, for 20 pounds yearly, and payment of the teind; the narrative of the tack bears, that he had given a promise before, to grant the same, whereby the benefit of the

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A reduction of a gratuitous right, upon the act 1621, is sus-

* Earl of Bedford against Lord Balmerino, Stair, v. 1. p. 101. *voce* MUTUAL CONTRACT.