

THE LORDS ordained Mr George to instruct so far as he could the cause onerous, reserving to themselves how far it should operate.

No 456.

Fol. Dic. v. 2. p. 253. Stair, v. 2. p. 773.

1694. December 19. THOMAS MERCER against WALTER DALGARDNO.

THE LORDS found that the bond being taken to the wife in liferent, the husband could not discharge it; and though it was *alleged*, that it was *donatio inter virum et uxorem*, yet the LORDS finding it quadrated exactly with the sum provided to her in her contract of marriage, though it did not relate thereto, nor bear to be in specific implement thereof, they presumed it was in satisfaction of that obligation, unless they offer to prove it was fulfilled *aliunde*.

No 457.
A step-father and a step-son are conjunct persons, consequently bound to instruct the onerous cause of deeds between them.

1695. January 16.—In this case it came to be debated, if a step-son receiving right from his step-father, was to be reputed such a conjunct person, in the terms of the act of Parliament 1621, as to be obliged to prove the onerous cause of his disposition? Though there uses to be small amity betwixt such relations, yet the LORDS thought them conjunct persons; for they could not marry, nor be witnesses nor judges for one another.

Fol. Dic. v. 2. p. 254. Fountainhall, v. 1. p. 652, & 659.

1706. January 24. WILSON against LORD SALINE.

A SECOND disposition of the same subject to a conjunct and confident person, first completed by infestment, bearing onerous causes in general, proves not its narrative against the first disponee; and a bond for a large sum of money of the same date with the disposition, but not referring to it, found no instruction of the onerous cause; for both, probably, were meant as donations; and if the first disponee was preferable, the second disponee could have it in his power to prefer himself *ex post facto*, by giving a valuable consideration, which he would do by discharging the bond.

No 458.

Fol. Dic. v. 2. p. 253.

* * This case is No 67. p. 942, *voce* BANKRUPT.

1707. December 5.

ISOBEL M'LIERIE, relict of THOMAS GLEN against JAMES GLEN Merchant in Edinburgh.

IN the reduction at the instance of Isobel M'Lierie against James Glen, for reducing his adjudication of a tenement in the Canongate belonging to the deceased Thomas Glen the pursuer's husband, upon this ground, That the

No 459.
Adjudication on a bond granted by one brother to another,

No 459.
payable in five weeks time, led instantly after the term of payment, found reducible, as gratuitous, and made *in fraudem* of the grantor's relict and co-datrix by her contract of marriage, unless the adjudger should instruct the onerous cause of the bond.

bond whereupon the adjudication proceeded being granted by the defunct to James Glen his brother, a conjunct person, for the sum of 3000 merks (ten times more than James was worth) payable about five weeks after the date, and adjudication thereon led instantly after the term of payment; it was reducible upon the act of Parliament 1621, as gratuitous and granted *in fraudem* of the pursuer, who was her husband's creditor *ab ante* by her contract of marriage.

Answered for the defender, That he ought to be assolizied from the reason of reduction; because, *1mo*, The act of Parliament 1621 relates not to bonds, but only to dispositions, assignations, &c. and such correctory statutes being *strictissimi juris*, are not to be extended beyond the words thereof. June 28th 1665, Monteith *contra* Anderson, No 444. p. 12555.; *2do*, Albeit the act could be extended, yet seeing the bond whereupon the adjudication followed bears for borrowed money, there is no necessity further to prove the onerous cause thereof, January 22d. 1630, Hop-Pringle *contra* Ker, No 440. p. 12553.; for to require the cause of bonds of borrowed money to be otherwise instructed than by the narrative, would ruin all commerce between near relations; seeing there would be the same reason for obliging to prove the onerous cause of a bond produced as an instruction of the onerosity of another, as to prove the cause of that other, and so *in infinitum*; and there is frequently borrowing and lending without witnesses, and borrowing of money is not probable by witnesses.

Replied for the pursuer, The act of Parliament reduceth all fraudulent alienations in general, so that to restrict it to dispositions and assignations specially mentioned, as the more ordinary sort of conveyances were *fraudem facere legi, et captare verba*, without noticing the scope and meaning thereof. Were it not absurd to allow a conjunct and confident person receiver of a bond, by adjudging thereon the next day, carry to off the bankrupt's estate; and yet to annul all other deeds without an adequate onerous cause? this were to pave a way to bankrupts for effectually defrauding their creditors. *2do*, The difficulty of proving the onerous cause of the bond is not so great as represented; for if the money was truly lent, it may be instructed by antecedent bargains betwixt the conjunct persons; or that the defender uplifted so much money from another hand, and took bond for it from Thomas Glen, whereas it is notour, that the defender was never capable to lend such a sum, nor was ever master of 100, far less of 3000 merks; and the small time betwixt the date and term of payment of the bond, with the hasty leading of adjudication thereon, do clearly argue a deceitful design to carry off the lands in prejudice of lawful creditors. *3tio*, Decisions are strictly to be interpreted, being founded on specialities and matters of fact to which they are adapted; and there is a difference betwixt a single decision, and custom, or frequent decisions. Nay, have not the LORDS sometimes receded even from old customs, for preventing inconveniencies? *quia quod conjectura credebatur prodesse, postea invenitur inutile.*

THE LORDS, in respect the bond on which James Glen's adjudication was led.

was for a considerable sum, payable in five weeks time, and the adjudication was suddenly led, found Isobel M'Lierie's reason of reduction on the act 1621 relevant, unless Glen instruct the onerous cause of the bond.

No 459.

Fol. Dic. v. 2. p. 251. Forbes, p. 202.

* * * Fountainhall reports this case :

LORD POLLOCK reported poor Isobel Macleirie *contra* James Glen merchant in Edinburgh. Isobel being creditor by her contract of marriage to umquhile Thomas Glen, her husband, in the liferent of some lands, and having adjudged; in her pursuit for mails and duties, James Glen, her husband's brother, compares, and craves to be preferred on a prior adjudication led by him; against which she repeated a reduction on the act of Parliament 1621, that the ground of his debt being a bond for 3000 merks granted by her husband to the said James, his own brother, its narrative did not instruct the onerous cause, being *inter conjunctas personas*, unless it were fortified and adminiculated *aliunde*. *Answered*, This case fell not under the act of Parliament 1621, which extends only to alienations, dispositions and assignations, and made no mention of bonds; and being a correctory law, cannot be extended *de casu in casum*, though it were *ex majoritate rationis*, otherwise this would lay an embargo on all relations from commerce, dealing or trading with one another; and *esto* other bonds precepts or tickets were produced to astruct the anterior onerous cause of this bond, they might be still quarrelled as not probative, and a further adminiculation might be demanded for them, and there should be no period where to sist, but *daretur progressus in infinitum*; and the Lords have found such bonds probative by their own narrative, without farther, though betwixt brethren, 22d January 1630, Hope Pringle *contra* Ker, No 440. p. 12553.; and 28th June 1665, Monteith *contra* Anderson, No 444. p. 12555. *Replied*, This seems to be new doctrine, that one brother may grant bond to another, and it shall be probative by itself, to the prejudice of other creditors; and yet if he give him an assignation and disposition to his lands, that is confest on all hands will not be probative *per se*; whereas there is no imaginable disparity, seeing the bond becomes the foundation of an adjudication that carries away the lands, and is a judicial assignation falling as much under the very letter of the act of Parliament as voluntary assignations do. *2do*, This way of interpretation is fallacious and fraudulent; it is *verba legis captare, sed mentem animamque ejus non attendere*, for all our lawyers extend it to bonds, as Sir George M'Kenzie in his Observations on that act, where he obviates this very objection, that *in correctoriis non est locus extensioni*, and answers that *in materia favorabile* extensions are allowed from the principles of natural reason; and Stair, lib. 1. tit. 9, is of the same opinion; otherwise we should lay down a very compendious method to cheat creditors, if the narrative of bonds betwixt so near relations were simply probative without any further. It is true, if a

No 459.

tract of correspondence in merchandise be instructed betwixt two brethren, it might go far to sustain such bonds, as the result of their balance of trade; but here this bond is loaded with much ground of suspicion and collusion, for it is granted to one who never had 500 merks to lend, and made payable in a month after its date, and instantly an adjudication is led thereon; and he cannot instruct, that he had any such equivalent lying in other hands before; or acquired it by his industry, or by way of tocher, gift or succession, and lent it on this bond; in which case there had been some pretence to sustain it; but he being incapable to say any thing of this kind, the bond is most fraudulent and suspect; and the decisions adduced are altogether different from this case; and although they were *una hirundo non facit ver*; and Stair requires a frequent tract and current of uniform decisions; and Justinian expresses it well, *quod in initio credebatur prodesse id postea invenitur inutile*. THE LORDS thought there might be cases where bonds among relations might prove, if dealings in commerce appeared; but in this case found the narrative in James Glen's bond not probative, except it were by other evidences and documents astrusted and adminiculated. The said James objected against her right, that she could not enter to her jointure, because though her husband has been several years abroad, yet *non constat* that he is dead. *Answered*, She produced several letters, asserting that he was dead; and in such cases she could adduce no more; and this has often been sustained by the LORDS; as on the 18th February 1670, Laurie *contra* Sir John Drummond, Div. 5. *h. t.*; 25th July 1677, French *contra* The Earl of Wemyss, *IBIDEM*; and 7th December 1678, Sands *contra* Her Tenants, *IBIDEM*, where the being seven years in Barbadoes without any word from him, presumed him dead, having turned Buccanier. This second point not being fully debated, was not decided at this time.

Fountainball, v. 2. p. 400.

No 460.

A disposition by one brother to another, bearing, to be for security of certain sums due by bond, was found astructed by production of the bonds.

1711. February 22. JOHN RULE *against* ANDREW PURDIE.

JAMES ROBISON, merchant in Dumfries, grants a bond to John Rule there for L. 800 Scots, who thereon adjudges some houses belonging to Robison. After the bond, but prior to the adjudication, James disposes these houses to his brother, and he conveys them to Andrew Purdie, his nephew. A competition arises for the mails and duties of the tenements, betwixt Rule and Purdie. Rule repeats a reduction on the act of Parliament 1621, that Purdie's author's right is from a brother, and to a nephew, and so being *inter conjunctos* can never prove its onerous cause, to the prejudice of Rule, whose debt was contracted long before the said simulate disposition. *Answered*, The narrative of the disposition, it is confessed, cannot *per se* prove its onerous cause; but for astructing thereof, he produces bonds granted by James Robison to his brother John,