1710. *February* 9. CATHARINE LESLIE *against* LAUCHLAN LESLIE and his CREDITORS.

ROBERT Leslie of Southtarry, in his son's contract of marriage with Jean Ramsay, daughter to Balmain, provides them to the sum of 8500 merks, by infeftment in his lands. The husband afterwards disponed this sum to Lauchlan Leslie his brother-in-law, bearing onerous causes; and Lauchlan's creditors adjudge this right from him. Catharine Leslie, being the only child of the marriage, raises a reduction of this disposition on the Act of Parliament 1621, as *inter conjunctas personas*, to the prejudice of her, an anterior creditor by the provision in her mother's contract of marriage; and though it bore onerous causes, yet that could never prove, the very writ designing the relation as brother-in-law, and so it must be *aliunde* proven.

ALLEGED, 1*mo*,—You are the granter's heir, and so can never quarrel, being obliged to warrant. 2*do*,—He was undoubted fiar of the sum, and her right was only a mere substitution and destination, which never hinders disposal. 3*tio*, We are singular successors; and, *esto* there had been any fraud betwixt the two good-brothers, we are not partakers in the fraud, but were true, lawful, and onerous creditors to Lauchlan, the receiver of the disposition, and so are plainly in the exception of the Act of Parliament, and have affected his right by adjudication.

ANSWERED,—*Esto* she were heir of provision, yet she is likewise a creditor; and it is certain a father can do no voluntary gratuitous deed, to defraud or evacuate his provisions-matrimonial; which this must be presumed to be, having turned riotous and debauched, and so easily imposed upon by Lauchlan, his brother-in-law, to dispone this right to him without any onerous cause. And though the Act of Parliament secures purchasers, who, by lawful bargains, on payment of a price, acquire the lands; yet that is not the present case; for they did not lend money to him in contemplation of this right, neither are they purchasers for a price, but adjudgers of his right; and so *utuntur jure authoris*, and can have the right neither better nor worse than it was in his person; and so the presumptive fraud affects them as much as it did him. And on this ground the Lords have reduced such rights: 23*d December* 1679, *Gordon* against *Ferguson*; and 24*th January* 1680, *Crawfurd* against *Ker*.

REPLIED,—The right, coming to them by a legal diligence, is far less subject to any participation of fraud than if they had been voluntary purchasers. And Sir George Mackenzie, in his observations upon that Act of Parliament, instances the case of one brother's disponing to another; yet, if a third party acquire this right for an adequate onerous cause, it will not be reducible on the Act of Parliament, fraud being only personal, and no vice or *labes realis*.

The Lords preferred the creditors, the father being fiar, and assoilyied from the reduction,—the process being at the heir of provision the daughter's instance, who is bound to warrant her father's deed. If it had been a stranger creditor who quarrelled this right, he would have had more to say for himself; or if it had been a competition betwixt children of two several marriages, then the heir of the first contract would have been a creditor to impugn the provisions in a second, if excessive and immoderate; and so a tack was reduced at a bairn's instance, as *contra fidem tabularum nuptialium*, in the *case of Donald*

Fouler, recorded by Stair, 16*th July* 1672; but where it was betwixt an heir of provision and singular successors, the Lords preferred the creditors, unless it were instructed that they were *participes fraudis*.

The creditors were afterwards put to prove the onerous cause of their author's disposition. *Vol. II. Page 565.*

1710. *February* 10. COLIN SIMPSON and HENRIETTA PHIN *against* DUNCAN WHITE.

MR Colin Simpson having married Henrietta Phin, he pursues Mr Duncan White, who had married her mother, and was her tutor, to count for her estate and his intromissions therewith: And, after many communings, they enter into a written agreement, whereby Mr Colin accepts of 27,000 merks in full of his wife's claim; and obliges him to give Mr Duncan a general discharge; and being charged thereon, he suspends on thir reasons, That he was grossly circumvened and over-reached, in so far as the foundation of the communing and bargain was an account given in by the said Mr Duncan; which he affirmed to be the true and full state of the affair: And yet Mr Colin has discovered 14,000 merks of Mr Phin's means, which White, her tutor, had most fraudulently concealed; and, if White will add that to his charge, and count for it, he is ready immediately to give him a discharge: for *nemo debet lucrari ex suo dolo*, and, least of all, a tutor, in whom it is theft and robbery.

ANSWERED,—Of all contracts, transactions are the most sacred, where parties, to shun the expense and hazard of law processes in matters doubtful and debateable, remit something of their own right, and tacitly renounce all future questions upon any thing that may accidentally emerge and appear afterwards. So all transactions are *aliquo dato et remisso;* and, if there had not been something quit to Mr Duncan, it had not been a transaction. But, least any should think he has taken undue advantage, he is willing to repone Mr Colin to his former claim, the agreement being dissolved.

REPLIED,—Transactions are indeed the firmest of all pactions, *ut tandem sit aliquis finis litium;* yet they are not so firm as to exclude fraud, which is a general exception in all human actions, *cum dolus suus nemini debeat prodesse:* And he is not to reduce and annul the transaction, to which he adheres, but only craves Mr White may add these omitted articles to his charge; and that this may be done without ranversing the transaction, is evident from *l.* 19 *and* 42, *C. de Transact.* where it is said, *Si, de pluribus causis et capitulis, transactiones initæ sunt, illa tantum pars retractetur quæ ex falso instrumento conficta est, aliis capitulis firmis manentibus.*

DUPLIED,—He cannot approbate and reprobate the same writ: he must either accept it *in totum*, or repudiate it; *l.* 14, *de Transact. et tot. tit. C. si adversus transact.;* and though an account was given in, yet it was not the foundation of the agreement, which was made by slump, and *per aversionem;* and no man enters into a submission but in contemplation of some ease.

The Lords sustained the agreement, especially considering that Mr Colin was unwilling to let the restitution be *in integrum* on both sides.

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