

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,

and which are mentioned as the cause for granting the disposition ; and so it depending on an antecedent onerous cause, can never be quarrelled as gratuitous. *Replied*, If this method were once sustained, it would be a very short and compendious way to frustrate that excellent law ; for wherever a debtor designed to gratify his relations and cheat his creditors, he had no more to do but to grant bonds to his nearest friends, bearing the receipt of money, and then make a disposition, narrating that these prior bonds were the onerous cause of the disposition, by which artificial stratagem the said useful law would be rendered totally useless, and a door opened to infinite frauds and tricks. *Duplied*, There may be cases where violent presumptions may infer design of defrauding lawful creditors, as if the bond be granted but some weeks before the disposition, or the term of payment is made shorter than ordinary, or from its being kept latent ; there a creditor in such a bond may be required to prove the onerous cause ; but here no such thing can be pretended. And though Stair, B. 1. T. 9. § 11. & 15. and Sir George M'Kenzie in his Observations on the said act 1621, thinks it extends to bonds, yet the clause runs singly against dispositions ; and it would lay an embargo upon all commerce and trade betwixt relations, if it were not sufficient to support a disposition, that I produce bonds anterior thereto ; for, to necessitate me to prove the onerous cause of that bond, the production of one before it would be liable to the same exception, *quod eodem laborat vitio*, and so there should be an absurd *progressus in infinitum* ; for how can he *per rerum naturam* instruct otherwise than by bonds, unless it were to prove actual numeration and down-telling of money, which by our law is not probable by witnesses ? and a bond was found sufficient to adminiculate a disposition betwixt two brethren, in a case not so strongly circumstantiated as this, 8th January 1669, Newman *contra* the Tenants of Whitehill, N<sup>o</sup> 27. p. 897. Next, there might be some pretence to quarrel this disposition, if it were offered to be proved that Robison was bankrupt and insolvent at the time of the disposition, or became such by making it ; but it was so far from it, that he continued a trading merchant, and kept shop several years after ; and he being only cautioner for one Lockhart, he had his relief against him, which was *in ejus bonis*, and added to his solvency. THE LORDS found Robison's disposition sufficiently instructed as to its onerous cause by the production of the anterior bonds to which it relates, unless Rule will offer to prove he was insolvent, or holden and reputed bankrupt at the time he granted these bonds, which are the cause of the subsequent disposition. Some thought it hard that Robison's making a show of wealth in lands and goods, with conscience, credit and honesty, should ensnare a simple credulous neighbour, by drawing his money into his net, and then make a disposition of his lands to his own brother, depending on a bond which is itself posterior to Rule's debt, who was his lawful creditor before the contrivance made up betwixt the two brethren. THE LORDS saw evident inconveniencies on both sides ; but after balancing the arguments

No 460. *ab incommodo*, they sustained the foresaid disposition, with the quality of his solvency abovementioned at the time thereof.

*Fol. Dic. v. 2. p. 252. Fountainball, v. 2. p. 640.*

1711. July 4.

MR SAMUEL GRAY Writer in Edinburgh *against* WALTER CHIESLY  
Merchant there.

No 461.

A fitted account between an insolvent person and his brother-in-law, containing many articles for a long course of time, paid to a third party upon the insolvent person's account, was found to prove its onerous cause.

IN the competition for the mails and duties of the lands of Blackcastle, betwixt Mr Samuel Gray and Walter Chiesly, both adjudgers thereof from James Chiesly their common debtor by bonds;

*Alleged* for Walter Chiesly; Mr Samuel Gray being James Chiesly's brother-in-law, and the bond which was the ground of his adjudication, being posterior to that granted to Walter Chiesly; it was reducible upon the act of Parliament 1621, as fraudulent and gratuitous, and the adjudication led thereon must fall in consequence, unless Mr Gray instruct the onerous cause.

*Replied* for Mr Gray; The onerous cause of the bond granted to him is sufficiently instructed by a fitted account betwixt him and the common debtor, of many articles paid by the former for the latter to third parties, during a long tract of correspondence before, to which there is a docquet subjoined, signed by both before witnesses, wherein James Chiesly acknowledgeth himself to be resting to Mr Gray a certain balance, for which the bond in question bears to have been granted.

*Duplied* for Walter Chiesly; The common debtor being insolvent and a conjunct person to Mr Gray, the account which is of the same date with the bond, cannot prove the onerous cause thereof; otherwise it were easy for a bankrupt to elude the act of Parliament by granting a writ to some conjunct person, acknowledging that he owed him formerly what sums he pleaseth, and then grant bond for the same.

*Triplid* for Mr Gray; Bonds granted to conjunct persons are only presumed to be gratuitous and feigned, which presumption is sufficiently taken off in this case by the fitted account, relating to payments made for James Chiesly, long before adjusting and balancing the account. Yea, any probation of an onerous cause useth to be sustained to elide such a presumption of fraud; and sometimes the Lords are pleased to take the common debtor's oath.

THE LORDS found, that Mr Samuel Gray had sufficiently instructed the onerous cause of the bond granted to him, and ordained him and Walter Chiesly to come in *pari passu*, their adjudications being within year and day of one another.

*Fol. Dic. v. 2. p. 251. Forbes, p. 510.*