

No 33. merchant in Dundee, in favours of his nephew, son-in-law, and other relations, as in defraud of his lawful creditors. *Alleged*, He was not notourly bankrupt nor insolvent at the time of his granting this disposition, seeing he had neither retired, nor were there diligences by horning, &c. against him; and so he fell under none of the heads of the act of Parliament 1621, for though it was to conjunct persons, yet they offered to prove the antecedent onerous causes by their contracts of marriage, &c. and he did not gratify and prefer one creditor to the prejudice of another's diligence, for there was no diligence then against him. *Answered*, That excellent statute obviated the frauds then discovered; but the *actio Pauliana*, *et de dolo malo* in the common law were much larger; and this was as plain and palpable a fraud as any; the man was *obseratus*, and resolving to fly immediately, prefers all his nearer relations, and ranks his true and onerous creditors in the last place; but if the order in which he places them stand, all is exhausted, *usque ad peram* before the creditors get a sixpence; and so here is fraud both *in consilio et eventu*; and the LORDS have oft proceeded on the grounds of the common law, as in the famous case of Street and Jackson against Mason, (*infra b. t.*;) and Reid against Daldilling, 4th December 1673, Stair, v. 2. p. 234. *voce FRAUD.* —THE LORDS found the disposition fraudulent, and reduced it. There was a separate allegiance, that one of them ranked in the disposition was no conjunct person but a stranger, and so *utile per inutile non vitiatur*; the disposition must *subist quoad* his sum. This was not decided.

*Fol. Dic. v. 1. p. 67. Fountainhall, v. 1. p. 635. & 705.*

1749. January 18.

BLACKWOOD of Pittreavie *against* The other CREDITORS of SIR GEORGE HAMILTON.

No 34.

The narrative of a deed *inter conjunctas* requires no astruction, after a long lapse of time.

IN the reduction at Mr Blackwood's instance of the decree of ranking of the creditors of Sir George Hamilton, the grounds whereof, *Vide* 4th January 1749, *voce* Process; it was *inter alia* found, 'That a bond of relief *inter conjunctas* not having been objected to till after forty-five years from the date, the user of it was not, after so long time, bound to bring any other astruction of the onerous cause than the narrative of the deed.'

The like is observed by Fountainhall to have been found, 23d December 1692, Spence against the Creditors of Dick, (*infra b. t.*) where it was above forty years, and that not upon the score of prescription, there being some traces of interruption, but, because after so long time the objection was incompetent; and the like where it was fifty-eight years, 2d February 1711, Guthrie against Gordon, Forbes, p. 492. (*infra b. t.*)

*Fol. Dic. v. 3. p. 49. Kilkerran, (BANKRUPT.) No 10. p. 56.*

\* \* \* D. Falconer mentions the following particulars relative to the same case:

No 34

BLACKWOOD of Pitreavie being reponed against the decret of ranking, as mentioned in the decision of the 3d instant, (*voce* PROCESS.) infisted for preference on the heritable bond, upon the estate of Dudhope, granted to Miln of Barnton, disposed by him to Sir George Hamilton, and by him disposed first to certain creditors, with whom the pursuer was now competing; and after to Fleming of Farm, who was first infest, and whose interests the pursuer had adjudged, upon a bond for 9500l. Scots, granted in 1705 to Pitreavie, by Sir George Hamilton and Sir Archibald Fleming of Farm.

*Objected*, The disposition to Farm, in relief of certain supposed debts, wherein he was bound for Sir George Hamilton, does not instruct its onerosity, being from a father to his son-in-law, and therefore cannot be effectual against the disponent's prior onerous creditors; especially as by the tenor of some of the bonds, in relief of which it is granted, Farm is bound as principal, and Sir George as cautioner: At least, Farm having bound himself, without being induced by the disposition, which is dated at a distance of time from the bonds, supposing it founded on a true, it had no necessary cause, and is therefore reducible.

THE LORDS, in regard that there was no evidence that any part of Mr Blackwood's debt was paid, found that the objection was not competent.

N. B. They further found the onerous cause of the disposition to Farm sufficiently instructed; but that case being involved in facts, is not observed.

*D. Falconer, No 45. v. 2. p. 43.*

1749. November 10.

ELLIOT against ELLIOT.

HENRY ELLIOT, in Flat, had right, by progress, to a bond granted by James Scot of Bristo in 1684, on which his author had, after James Scot's death, which happened in 1692, obtained decree of constitution against James and William Scots his sons, and thereon led an adjudication in 1745 against Bristo's heirs, of the lands of Chifholm and Wandburn, and lands of Ancrum.

In the action of mails and duties pursued on this adjudication, compearance was made for Sir James Stewart of Goodtrees, who produced a disposition from James Scot of Bristo, in 1692, of the lands of Chifholm and Wandburn, and lands of Ancrum, to William Scot his second son, with a conveyance from him to the late Sir James Stewart, of the lands of Chifholm and Wandburn, in 1697; and for William Elliot of Kirklands, who produced a conveyance, from the said William Scot, of the lands of Ancrum, to Thomas Porteous in 1695, from whose heirs he derived right.

Of these dispositions from Bristo, to William Scot his second son, the pursuer repeated a reduction on the act 1621; against which the defence for both was

No 35.

The singular successor of a conjunct person found not to be bound to prove the onerous cause of his disposition after forty years.