

probable way, by the which he might have acquired means or monies to have acquired this right, neither can he condescend upon any person who was debtor to him in monies; and in the dispositions, the father's and mother's liferents are reserved, which all discovers a manifest fraud. THE LORDS repelled the allegiance, except the defender should qualify and prove some onerous lawful cause for the which this disposition was made, otherwise than by the confession contained in the writ or by his own oath, neither whereof the LORDS found sufficient in this case, except that beside the same the defender might make it appear that he had acquired it for true sums debursed by him, and show to whom the sums were paid, and where and by what means he had acquired these sums.

No 443.

Fol. Dic. v. 2. p. 251. Durie, p. 882.

* * A similar decision was pronounced, 12th February 1670, Napier against Gordon, No 95. p. 3755. *voce* EXECUTION.

1665. June 28.

Mr JOHN ANDERSON *against* WILLIAM MONTIETH in Orkney.

IN an improbation and reduction of a comprising of certain tenements of lands come in the person of William Montieth in Orkney, pursued against him by Mr John Anderson, who had obtained adjudication of the foresaid tenements *in anno* 1659 from Sir Harry Nisbet, as lawfully charged to enter heir to James Nisbet his father, from whom the foresaid tenements were appraised *in anno* 1619, the LORDS repelled the first reason of reduction proponed for Anderson against Montieth's comprising, viz. that the rebel, James Nisbet, could not grant a bond of borrowed money after he was denounced a rebel at Anderson's author's instance; and likewise repelled the second reason, viz. that there being three principals bound conjunctly and severally, the bond was assigned and transferred with this quality, that execution was not to pass upon the bond, but only against James Nisbet, one of the three principals, notwithstanding whereof, the comprising led upon the said bond against James Nisbet's land was sustained, and the reason repelled.

No 444.

It appears from Stair's report of this case, No 133. p. 1044. *voce* BANKRUPT, that a bond, bearing borrowed money granted to one not conjunct or confident, after the granter was rebel, was found probative of its onerous cause, against a reduction upon the first clause of act 1621.

Fol. Dic. v. 2. p. 253. Newbyth, MS. p. 30.

* * Stair's report of this case is No 133. p. 1044. *voce* BANKRUPT.

1670. July 15. Lady LUCIE HAMILTON *against* BOYD of Pitcon.

LADY LUCIE HAMILTON insists in her reduction, (*See* No 114. p. 7046. *voce* INHIBITION.) against Pitcon, on this ground, That albeit the disposition granted to him by George Hay, the common debtor, be anterior to the pursuer's inhibition, yet it must be reduced on this ground, That it is without any equiva-

No 445.

The onerous cause of a disposition between conjunct persons, found not to

No 445.

be instructed
by its own
narrative or
the acquirer's
oath.

lent onerous cause, and that albeit it bear an onerous cause, yet that will not instruct the same, but it must be instructed otherwise than by Pitcon's own oath, because it is betwixt conjunct persons, two good-brothers; and because it bears not only to be in favour of Pitcon himself, but for the use and behoof of the creditors, whose names were then blank, and thereupon are now excluded, as being filled up after the pursuer's inhibition, so that the disposition being in so far fraudulent, and not totally granted to Pitcon for himself, the proportion of his interest cannot be known but by instructing the debts due to him, and for which he was engaged the time of the disposition. It was *answered* for Pitcon, That he was ready to instruct the debts *scripto*, and for some few to whom he had undertaken payment at the time of the disposition he offered to produce their bonds, and to depone that he undertook payment of them, as said is, which is all that is required by the act of Parliament anent fraudulent dispositions, whereby the defect of an onerous cause is to be proved by the party's oath who gets the disposition.

THE LORDS repelled the allegiance, and found that Pitcon behoved to instruct the cause of the disposition, otherwise than by the said bonds and his own oath.

It was *alleged* for Kelburn, another of the creditors, That he had right by an apprising, proceeding upon sums anterior to the inhibition. It was *replied*, That the apprising was null; *1st*, Because the denunciation whereon it proceeded was not at the market-cross of the shire, but at the market-cross of the regality in the English time when regalities were suppressed; *2dly*, That the apprising was led at Glasgow, and neither within the shire of Ayr, where the lands lie, nor by dispensation at Edinburgh; and, albeit the letters bear a dispensation to apprise at Glasgow, and that the denunciation was made accordingly for the parties to appear at Glasgow, yet there was neither law nor custom for such a dispensation, and parties are not obliged to attend but at the head burgh of the shire, or *in communia patria*, at Edinburgh; *3dly*, The pursuer has also an apprising, though posterior, yet preferable, because solemn and orderly according to the custom then being. It was *answered*, That albeit the custom under the Usurper might excuse the want of denunciations at the head burghs of regalities, which were then suppressed, where they were used at the head burgh of the shire according to the custom then, and so validates such apprisings; yet this defender having, according to the standing law of the land, denounced at the head burgh of the regality, the contrary unwarrantable custom cannot annul his apprising, proceeding according to law; and as to the dispensation at Glasgow, which was nearer the lands than Edinburgh, whatsoever might have been said to the inconveniency of granting such a dispensation, yet being granted, it is valid, and it was then frequent to grant such dispensations.

THE LORDS found that the pursuer's apprising being according to the ordinary custom for the time, at the head burgh of the shire upon denunciation, that it was more solemn and preferable as to the manner of denunciation, than that

which was upon denunciation at the head burgh of the regality at that time. But the Lords did not determine whether such an apprising would have been valid if there had not been a more formal one; nor whether the dispensation being granted at Glasgow was valid.

Fol. Dic. v. 2. p. 252. Stair, v. 1. p. 697.

No 445-

1671. November 29. WHITEHEAD against LIDDERDALE.

WILLIAM WHITEHEAD being vassal to Lidderdale of Isle, obtained from him a disposition of the superiority to be held of the King, but Isle dying before he was infest, Robert Lidderdale, his son and heir, disposes that same superiority to Thomas Lidderdale, his brother. Whitehead pursues Robert to fulfil the disposition, and obtains decret, and now pursues a reduction of Thomas Lidderdale's right, as fraudulent betwixt conjunct persons, without a cause onerous, in prejudice of him who had a prior disposition. The defender *alleged*, Absolvitor, because his disposition bore to be for onerous causes. The pursuer *answered*, *Non relevat*, to prove the onerous cause by the narrative of the disposition, being an assertion of one brother in favour of another, unless it were otherways instructed. The defender *answered*, That though the Lords have not sustained the narratives of dispositions to prove in favour of descendants, yet they have not extended the same to collaterals, but the most that can be done is, to condescend upon the cause, and to depone thereupon.

THE LORDS sustained the reason of reduction and reply, and found that the cause onerous in the disposition behoved to be proved by the defender.

The defender further *alleged*, Absolvitor, because the defender hath other sufficient rights flowing from Sir Robert Maxwell and Sir David Dunbar, which will altogether exclude the pursuer's right. It was *answered*, That this reduction upon the act of Parliament being only declaratory, and having no possessory conclusion, no other right the defender has can impede the same, but they ought only to be reserved as accords, when the pursuer insists for possession. It was *answered*, That the defender might defend himself upon all his rights in what order he pleased, and it is in vain for the pursuer to crave declarator, seeing it could have no effect.

THE LORDS repelled the defence, and sustained the reason of reduction, reserving the defender's other rights, as accords.

December 14.—WHITEHEAD pursues a reduction against Thomas Lidderdale of a disposition granted to him by his brother, after contracting of the pursuer's debt, as done betwixt conjunct persons, *in fraudem creditorum*; and that albeit it bore an onerous cause in the narrative, yet being betwixt two brothers, it cannot prove, but must be otherways instructed.

No 446.

A disposition of lands by a bankrupt to his brother, bearing onerous causes, was not sustained as probative of its narrative.