

No 464. much less can it be extended to cousins german without any such concurring circumstances, or the least suspicion, except what arises from the relation.

THE LORDS preferred William Fullerton of that ilk, according to the dates of his sasines, and repelled the grounds of preference pleaded for M'Dowal of Freugh.

*Fol. Dic. v. 2. p. 254. Forbes, MS. p. 45.*

No 465.

Where a deed has been granted betwixt conjunct and confident persons, how far a proof is necessary of the onerous cause, otherwise than from the deed itself?

1728. February 15. SKENE of Pitlour *against* FORBES of Kincardine.

JOHN FORBES, a merchant of considerable stock and credit, obtained a disposition of the lands of Kincardine from his brother Sir Robert Forbes, bearing to be for a price truly paid; and he got possession and infestment above four years before Sir Robert's circumstances came any way to be suspected. Skene of Pitlour, who had an heritable bond from Sir Robert upon the same lands, anterior to the disposition, after Sir Robert's bankruptcy, in a competition with John Forbes the disponee, who had the first infestment, *objected* against the disposition, "That it was granted to a conjunct and confident person, the debtor's own brother, in prejudice of an anterior lawful creditor, and therefore void, unless the onerous cause be proved otherwise than by the narrative." And he *pleaded* it as a now established law, "That the narrative of a writing, in favour of a conjunct person, does not prove the onerous cause, but that the receiver must instruct it otherwise;" and that notwithstanding the words of the statute, laying the proof upon the creditors, which in so far is altered by practice. The disponee produced a retired cancelled bond, of the same date with the disposition for 23,000 merks, granted by John Forbes to Sir Robert, bearing to be for the price of the lands; and *contended*, That Sir Robert his brother being a man in good credit at the time, an advocate well employed, and possessed of beneficial offices, the cancelled bond subscribed by many famous witnesses, was a sufficient evidence of the onerous cause of the disposition.

Against this it was *pleaded*, That the cancelled bond is no manner of proof that any money was paid; for how does it appear, that the bond was not entirely simulate, signed with this very view, to give evidence of the onerosity of the disposition, and retired two hours thereafter? Nay, how does it appear, that ever it was out of the granter's hand, or ever a delivered evident? There would indeed be a presumption in an ordinary case, from the bond's being cancelled, and in the debtor's own hand; but this makes no presumption betwixt conjunct and confident persons, more than the narrative of the disposition does; and were this sustained, there would be an end of the act of Parliament, because every disponer to a conjunct person will take his bond bearing a price, give up the bond the next minute; and the disposition is thereby supported above objection, equally as granted to an utter stranger.

In *answer* to this, Mr Forbes distinguished the case where the fraud is simply and allenarly founded upon the conjunction and relation betwixt the parties,

the only case the statute 1721 takes notice of, from such where besides the statutory fraud founded on the relation, there appear other fraudulent grounds; for example, where the disposition quarrelled is *omnium bonorum*, or granted *re-tenta possessione*; or where it does not appear that the acquirer had means wherewithal to purchase the same; or perhaps where the granter of the right was at the time a notour bankrupt. In all these and the like cases, the Lords have been in use to ordain the acquirer of the right to prove the onerosity *aliunde* than from the narrative; because of the presumed fraud, arising not from the statute only, but from other pregnant circumstances; and because it for the most part happens, that in reductions upon the act 1621, some such circumstances as these concur; therefore in the course of the decisions, the proof of the onerous cause is ordinarily laid upon the purchaser or acquirer of the right. But on the other hand, where it plainly appears, that the reduction rests solely upon the statute, from the relation betwixt the parties, without any other circumstance; the Lords in that case did never burden the party-receiver of the right to prove the onerosity, providing the deed itself proceeds upon a narrative of onerous causes; and that because the statute itself so provides in these words, "And it shall be sufficient probation of the fraud intended against the creditors, if they shall be able to verify by writ or oath of the party-receiver, that the same was made without any true cause." And taking the matter in this view, practice has never deviated from this clause of the act. Thus then Mr Forbes is founded in the words of the statute, his disposition bears onerous causes, and there is not the least presumption of fraud, except what arises from his relation to the bankrupt. But to put his case still more beyond dispute, he has produced the cancelled bond given for the price, and which was signed before many famous witnesses; as strong an evidence as can be had from the nature of the transaction, since it is but seldom that witnesses are adhibited in the lending or paying of money; which if not sustained, the natural consequence must be, to destroy all commerce amongst relations; and were Mr Forbes even so lucky, that he could prove payment of his bond by witnesses, the same question would still recur, viz. How does it appear, that the money was not returned next moment? Which lands in a progress of proofs *in infinitum*. See a similar case, 4th July 1711, Gray *contra* Chiesly, No 461, p. 12568.

"THE LORDS found the onerosity of the disposition granted by Sir Robert to his brother, sufficiently instructed."

*Fol. Dic. v. 2. p. 251. Rem. Dec. v. 1. No 105. p. 204.*

1728. December. Dutchess of BUCCLEUGH *against* SINCLAIR and DOUAL.

No 466.

A FACTOR who had run in considerable arrears, granting a disposition to particular subjects for his constituent's security, and the same being challenged