

1749. November 10. HENRY ELLIOT against WILLIAM ELLIOT.

JAMES SCOTT of Bristo, with consent of James his eldest son, disposed, 10th May 1692, in which month he died, to William his second son, on the narrative of the receipt of a certain sum of money, the lands of Borthwickbrae, Chisholm, and Woodburn, and the kirk-lands of Ancrum; and William, with consent of James, disposed in 1695, the kirk-lands to Thomas Porteous, who was infest in 1696; and both the brothers in 1697, disposed the lands of Chisholm and Woodburn to Sir James Stewart of Goodtrees; afterwards the Heirs of Thomas Porteous disposed the kirk-lands to William Elliot.

John Elliot of Thorleshop had been creditor to old James Scott by his obligation in 1684, on which right Henry Elliot, his grand-son, pursued a reduction of the disposition to William Scott, as gratuitous to a conjunct person in defraud of creditors.

Answered, Prescription.

Replied, Interruption by minority.

Duplied, Minority may interrupt the negative prescription of the pursuer's ground of reduction running in favour of Sir James Stewart, who made not his right real; but Thomas Porteous having taken infestment on the disposition to William Scott, and that by William Scott to him, there is a positive prescription run in favour of the defender, his successor, which is not interrupted by the minority of the pursuer, who had a right of reduction, but no real interest in the estate, having only adjudged after the course of the prescription.

The Lord Ordinary, in January 1749, "sustained the defence upon the positive prescription, proponed for William Elliot, as to the lands of Ancrum possessed by him, his predecessors and authors, upwards of 40 years, upon the charter and sasine 1696; and found, that the interruptions of the negative prescription, run against the bond, did not interrupt the positive prescription as to the foresaid lands of kirk-lands."

It was *argued* in the bills and answers, how far minority was an interruption of the positive prescription, especially when the party against whom it was pleaded, had no real right, but only a ground of reduction; but it occurred to some of the Lords, that it was unreasonable to oblige a singular successor of a disponee, after so long a time, to astruct the onerous cause of his author's right; that, by the words of the statute 1621, the proof of an alienation's being gratuitous, lay upon the reducer; and the obliging the disponee to astruct, was introduced by the practice of the Court, when the disposition was recently quarrelled, and it was supposed, if the transaction was fair, he could not fail to have it in his power to do it, but after so long a time it might be impossible; that besides this ground of reduction was personal, but did not lie against an onerous purchaser from the gratuitous disponee; and though Thomas Porteous

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Found that interruptions of the negative prescription running against a bond granted by a disponent of lands, did not interrupt the positive prescription as to the lands.

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might be said to have seen, in his author's right, the relation he stood in to the original disponent, which presumed gratuity, yet Henry Elliot was an onerous purchaser from him. To which it was *answered*, That Thomas Porteous purchased a right which had never been made real; and as there had no prescription run on his infestment before he disposed it, Elliot behoved to look into his progress, and would there see the defect; that there was, at this day, evidence of the gratuity, from the circumstances of the case: A disposition was made to a second son, said to be a young man *in familia*, on the narrative of a sum in general paid. After Bristo's death, a judicial sale was raised, by a creditor, of Borthwickbrae, Chisholm and Woodburn, part of the contents of this disposition, and Borthwickbrae sold, the others being dropt out of the sale; but in this process, no claim made for William Scott, who, with his brother James, sold these others to Sir James Stewart; and James, as apparent heir, in 1699 raised a judicial sale of them, to which William made no opposition; but John Elliot of Thorleshop, the pursuer's grand-father, having obtained decret on the passive titles against, and inhibited, both the brothers, produced his interest. All these transactions were under the observation, and doubtless carried on by the advice of Sir James Stewart, a near relation of the family, who, being conscious of the gratuity of the disposition to William, would not rest his right upon it; but it was not said any decret of sale was pronounced.

Observed further, that the disposition to William was with consent of the heir, whose interest it was the creditors' fund of payment should not be withdrawn; as also he was consenter to William's disposition to Porteous, at which time it was probable he saw the price applied to the creditors; but the matter could not be cleared up at this distance of time.

THE LORDS found, that William Elliot, the purchaser by progress, was not obliged to astruct the onerous cause of the disposition from Scott of Bristo, to William his son, after so long a time.

*Act Ferguson.**Alt. Lockhart.**Clerk, Forbes.**Fol. Dic. v. 4. p. 116. D. Falconer, v. 2. No 93. p. 103.*

. Kilkerran's report of this case is No 35. p. 905.; *voce* BANKRUPT.

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Inhibition does not interrupt prescription of a real right to teinds.

1765. February 20.

EARL of LAUDERDALE *against* GEORGE INGLIS of Reidhall.

THE EARL of Lauderdale standing infest in the patronage and tithes of the parish of Hailes, having brought a process of reduction and improbation against several of the heritors of that parish, Mr Inglis produced a progress to the lands