Pleaded for Lochbuy; The allegation, That it was *actum et tractatum* at the time of the sale, that the estate sold should entitle to a vote, was neither relevant to resolve the sale, nor abate the price; in respect Collonsay could not qualify any damage he sustained by the want of a vote; and that to say a vote had a value in money, was an allegation in itself indecent, and contrary to the spirit of the British constitution. No 8.

Answered for Collonsay; The privilege of electing, and the capacity of being elected into Parliament, are the privileges that distinguish the subjects of Great Britain from those of almost all other nations. By them a man may become a part of the Legislature, to guard the honour and property of himself and his fellow-citizens; and accordingly, in advertisements of estates to be sold, this privilege, when it attends the subject offered to sale, is always mentioned as a circumstance to enhance the estimation of it.

"THE LORDS found it relevant to diminish the price of the lands, that it was intended by the parties, that the lands should entitle the purchaser to a qualification as a freeholder having right to vote at elections.

N. B. An averment was afterwards made by Lochbuy, that the lands at the time of the sale did entitle to a vote.

Act. *Wedderburn, Craigie, Ferguson.* Alt. *Jo. Dalrymple, Hamilton-Gordon, Lockhart.*
J. D. *Fol. Dic. v.* 4. *p.* 255. *Fac. Col. No* 28. *p.* 49.

1760. *January* 9.

Mr MICHAEL MENZIES, Advocate, Trustee for Charles Renton, *against* JAMES MACHARG of Kiers, and the CREDITORS of the deceased John Gillespie of Greenhill.

No 9.
Challenge of a sale upon the head of fraud and circumvention, found good against singular successors of the buyer, who had contracted with him during the dependence, though there was an alleged *mora* on the part of the pursuer.

MARY YOUNG, proprietor of the lands of Greenhill, was married to Alexander Renton, who went to America in the year 1725 or 1726, leaving a factory with his wife, empowering her to manage his affairs, to grant provisions to their younger children, to contract debts, and to sell his land in Edinburgh, or in the country.

John Gillespie having advanced considerable sums to Renton before his departure for America, for which he obtained security over the wife's lands of Greenhill, did thereafter advance other sums to her, for which she granted heritable bonds over the same lands.

Upon the 15th of December 1732, Mrs Renton granted a disposition to Gillespie, of these lands of Greenhill, for the price of 19,600 merks; and upon this disposition Gillespie was immediately infeft.

Gillespie continued in the quiet possession until the year 1742; when Renton having returned from America, concurred with his wife in a reduction of the sale, upon the head of fraud and circumvention; but he having died soon

No 9. thereafter, she conveyed her right to Mr Michael Menzies, advocate, in trust for Charles Renton, her grandson, an infant of eleven years of age.

Little procedure was had in this process before the year 1748, when it was allowed to sleep till the year 1756; during which period Gillespie had contracted sundry debts, had granted heritable securities upon the lands, and at last executed a disposition in favour of a trustee, for the behoof of his whole creditors, from whom the lands were purchased in 1753, by James Macharg.

The process having been wakened by Mr Menzies in 1756, Macharg, the purchaser, and the creditors of Gillespie, endeavoured to maintain the fairness of the transaction in 1732; but a proof being allowed, and advised, the Lords, by their interlocutor of the 29th June 1759, found the reasons of reduction of fraud and circumvention relevant and proved; and therefore reduced the disposition granted by Mary Young to John Gillespie, and the infeftment following thereon.

Pleaded in a reclaiming bill for the purchaser and Creditors of Gillespie, 1*mo*, Supposing the transaction in 1732 to have been improperly or unduly conducted, yet the disposition ought not to be reduced *in toto*, but only in so far as to give the pursuer access to recover the difference betwixt the price agreed upon, and what the lands might have been sold for at the time. The Roman law, so famous for its equity in cases of this kind, when there was no fraud in the bargain itself, when *dolus non dedit causam*, but only an inequality appeared in the price, gave the proper remedy by the *actio quanti minoris*; and it never can be equitable to carry the remedy further than to redress the wrong, which here consisted only in the lowness of the price.

2*do*, It is a principle of the law of this country, as well as of the Roman law, That *dolus auctoris non nocet successori*; and in consequence of this rule, the purchaser from Gillespie and his Creditors, some of whom had received heritable security from him at the time they lent their money, and the whole of whom were infeft in the person of their trustee, cannot be affected by his fraud. The only foundation for giving a preference to the pursuer which can possibly be conjectured, is this, that the subject became a *res litigiosa*, by the process of reduction. But to this the following answers obviously occur; 1*mo*, As the records are the boasted security of this nation, upon which creditors and purchasers are to rely, so when a person appears upon the record to be infeft, and when, from the other records, there appears no legal diligence, nor any other bar to his disposing of the property, a creditor, or even a purchaser, is *in optima fide* to deal with him, and cannot be affected by the consequences of any personal challenge against him. Supposing a summons executed against him, or some steps taken in a process, yet, as this challenge does not appear from the records, purchasers and creditor cannot be hurt by it. They are not bound to rummage the clerks' offices, in order to search for personal challenges of this kind, which it is often difficult, and sometimes impossible to discover; as daily experience shews, that processes cannot be found which it is certain once de-

No 9.

pended. Nor does this doctrine in the least affect the rights of any party who acts in a regular manner; for the law has given the remedy of an inhibition, by which those who have rights competent upon a personal challenge, may provide against alienations to their prejudice; 2*do*, When the defence of *res litigiosa* is pleaded, it must be a sufficient answer, That the person pleading it has been *in mora*, and has not conducted his process in a regular manner, and with becoming dispatch. For where such *mora* occurs, there is no *mala fides* upon the part of the creditors, or purchaser from the defender, in the action; the law turns the tables, and presumes a *mala fides* in the negligent pursuer; and will not permit him to argue from his own *culpa*, to distress a fair creditor. Many decisions have been pronounced upon these principles. Thus, though the denunciation of apprising makes the subject litigious, after which the debtor cannot make any voluntary alienation to the prejudice of the apprising, yet, if the appriser does not proceed in his diligence, the effect of the litigiousness ceases; 23d July 1674, Johnston, No 81. p. 8386. So, in the same manner, where a debtor had disponed his lands after leading the apprising, but before infeftment, the Court refused to reduce the disposition, in respect that six years had intervened betwixt the apprising and infeftment; 21st July 1627, Macculloch, No 78. p. 8383. Now, in the present case, the process was allowed to sleep for nine years, and it was during this period that one of the heritable creditors lent his money, that the disposition to the whole of the creditors was executed by Gillespie, and the estate again sold by their trustee to Macharg, at a public roup, without any challenge whatever.

Answered for the pursuer, to the *first* defence, Besides that it is believed the *actio quanti minoris* does not take place in this country, nor in the law of any modern nation, it could not apply to this case, though it were to be judged by the Roman law; for that action was only competent against the seller, who had, without fraud, sold a defective subject at a higher price than the buyer would have given if he had known the defect. But where fraud intervened, there was no place for this action. And as, in the present case, the seller was fraudulently induced to sell at an undervalue, she and her representatives are entitled to be put in the same case as if she had not fallen into the snare that was laid for her; and it would be against justice, to allow the deceiver to take any profit arising from this fraud, whether it lies in the difference of the value of the subject at the time, or in a higher value that may afterwards accrue to it.

To the *second*; 1*mo*, The first heritable bond was granted by Gillespie before the process was allowed to sleep, and at a time when he was granting tacks, with this exception from the warrandice, That if the lands were evicted, then the tacks should be void and null. The other heritable creditor also advanced his money before the process slept; for it was lent at Candlemas 1749, and the cause had been called upon the 2d February 1748; and the purchaser was fully certiorated of the pursuer's claim to the lands, not only by the process of

No 9. reduction, but also by the above-mentioned exception from the warrandice in the tacks. There is no pretence therefore for making him a *bona fide* purchaser upon the faith of the records. 2*do*, By the laws of all countries, a real action which concludes that the defender's right be reduced and the pursuer's declared, interpels the defender from making an alienation *judicii mutandi causa*, and third parties from dealing with him. The decree declares the right as it stood at the commencement of the action; and no intermediate act of the defender can prejudice it. Nor is this any infringement upon the security intended to be given by the records. They give a rational security to purchasers; but the law does not intend that purchasers should keep their eyes shut against every thing else that passes before them. Neither can any argument be drawn in favour of the defenders in this case, from the two decisions quoted by them. For, not to mention, that, by a later decision, viz. 8th December 1736, Wallace *contra* Barclay, No 85. p. 8388. adjudications have been found to have the privilege of litigiosity, though they have lain over for nine years without infeftment; the cases referred to proceed upon principles not applicable to the present. A denunciation of apprising, or summons of adjudication, is only a temporary bar or interpellation against dealing with the debtor, because the decreet itself is no more; and the reason of both is, that being only steps of diligence intended for recovering payment of a debt, though the debtor cannot *in cursu* disappoint them, yet if the creditor desert his diligence for a considerable tract of time, the debtor is released from the fetter, as it is naturally to be presumed that the creditor has operated his payment some other way. But this will not apply to a real action, or reduction of a real right. The decree obtained upon such action is perpetual, though the obtainer of it should not insist for possession till the approach of the long prescription; and, as the decree is perpetual, so the action must have its full effect as long as it depends in Court; and though the dependence should be intermitted for years, yet as the process is still in Court, and may be wakened by either party *ad libitum*, the decree which passes upon it being declaratory, will have effect from the summons, and will exclude any intermediate deeds of the defender.

"The Lords refused the desire of the petition, and adhered."

Act. *Menzies, Jo. Craigie, Ferguson.* Alt. *Wight, Advocatus, Lockhart.* Clerk, *Justice.*

I. C. *Fol. Dic. v.* 4. *p.* 255. *Fac. Col. No* 210. *p.* 378.

1781. *July* 4.

Hepburn and Sommerville *against* Campbell of Blythswood.

No 10. Error *in substantialibus.*

Upon the death of James Campbell of Blythswood, his apparent heirs of line were advised to bring the unentailed estate to sale, under the act 1695,