

suspender, if he were not an idiot, fancy, that the pinning of other papers upon the receipt in the book, might hide it, than the first or second leaf of a book could hide the third; *Lastly*, The reason why the suspender did not insert other business in that book, was to conceal from his younger children the transactions betwixt him and his eldest son.

THE LORDS found the receipt in the book founded on null, and not probative, and therefore repelled the reason of suspension; and decerned the suspender to pay all the expenses of the process, and the charger's damages to be given up in an account by her upon oath; and for his tampering to vitiate the account-book, he was fined in 500 merks, and sent to prison till he paid it, and applied to the Lords for his liberation.

*Forbes, p. 48.*

1709. *January 28.*

WILLIAM M'GUFFOCK of Rusco, and his Lady, *against* DAVID and JAMES BLAIRS, Sons of the second marriage to Hugh M'Guffock, the said William's Father.

HUGH BLAIR, *alias* M'Guffock of Rusco, in his contract of marriage with Mrs Margaret Dumbar, daughter to Sir David Dumbar of Baldoon, his second Lady, provided her to a life rent annuity of L. 1,000 Scots, and the children of the marriage to 50,000 merks. Thereafter in *anno* 1695, in a contract of marriage betwixt William M'Guffock, his eldest son of the first marriage, and Mrs Elizabeth Stuart, daughter to the Laird of Ravenston, he disposed the estate of Rusco in favours of William and the heirs-male of the marriage, with the burden of 45,000 merks of debt, and obliged himself to warrant the lands disposed to be worth 8,000 merks of yearly rent, and burdened his other estate with making the same good and effectual, in case the rent of the lands disposed fell short. Hugh M'Guffock, after his eldest son's contract, before his marriage, entered into a transaction with him; whereby the father gave him some land and moveables not contained in the contract; and the son obliged himself to pay all his father's just and lawful debts, and discharged the obligation to make the lands disposed to him worth 8,000 merks yearly; and the father, with consent of his son the bridegroom, disposed to David and James Blairs, two sons of the second marriage under pupillarity at the time, some lands out of which the father stood obliged to make those disposed to the eldest son worth 8,000 merks of rent. William M'Guffock, now of Rusco, raised reduction of the dispositions to David and James Blairs, as granted *contra fidem tabularum nuptialium*.

*Answered* for the defenders; They were creditors by their mother's contract of marriage in 50,000 merks, in prejudice of which provision the father could do no voluntary gratuitous deed in favours of his eldest son of the first marriage, but what not only they might quarrel upon the act of Parliament 1621,

No 29.

No 30.

A person disposed an estate to his eldest son, in his son's contract of marriage, warranting it to be worth a certain yearly value, and he burdened another estate with making the same good. Before the marriage, he took a discharge from the son of this obligation. In a reduction of the discharge against the father's other representatives, to whom the separate estate was disposed, the pursuer's estate falling short of the rent at which it was warranted, the Lords reduced the discharge as *contra fidem*.

No 30.

but did subject him, who was *alioqui successurus passive*, to the payment of their previous debt; for, by our law and practice, a disposition of heritage to an eldest son even in his contract of marriage is reckoned *præceptio hæreditatis*, and infers the passive title of *successor titulo lucrativo post contractum debitum*; seeing, though such a contract of marriage be onerous *quoad* the wife's liferent, it is lucrative and for love and favour, in so far as concerns the eldest son, Stair, Book 3. Title 7. § 3. *2do*, Though any deed in favours of the father might be reduced as *contra fidem tabularum nuptialium*, the deeds quarrelled must stand; because, made to the defenders who had no accession to the fraud, which is personal in the father, and no *vitium reale*. A ground of reduction upon fraud cannot militate against innocent third parties acquiring for onerous causes, July 16th 1672, Duff *contra* Fowler, *voce* PERSONAL and REAL; and the defenders (who were noways partakers of their father's fraud, yea by reason of their non-age, incapable to know any thing of the transaction) have the dispositions in implement of the provision in their mother's contract of marriage, which is a most onerous cause.

*Replied* for the pursuers; It is irregular and incongruous *in hoc statu*, to argue concerning the pursuer's being liable personally for the debt claimed by the defenders; because, the present question is not about the cause of the deed, for which the defenders may pursue as accords, but the reduction of the deed itself made fraudulently *contra fidem tabularum nuptialium*, which was reducible in his father's lifetime, when the pursuer could neither really, nor by fiction, be his heir; 'Et quod ab initio non valuit, tractu temporis non conualescit.' *2do*, Albeit the defenders are not presumed to have been conscious of their father's deed in their eldest brother's contract of marriage; his knowledge and deed are to be reputed theirs, who were pupils under his legal administration; because, *Nemo debet ex alieno dolo lucrari*. And albeit a tutor's fraud cannot be a ground to take from his pupil what is already his property; yet 'Dolos tutoris nocet pupillo in eo negotio in quo jus acquirit pupillo, L. 10. § 5. D. Quæ in fraudem creditorum.' By the same analogy of law, the oath of a wife *præposita negotiis* proves against and prejudiceth her husband, December 7th 1675, Dalting *contra* M'Kenzie, No 212. p. 6005. Yea, Paton *contra* Paton, No 26. p. 9475; it being communed at a contract of marriage, that the son should not be subject to debts or children's provisions, the LORDS reduced a bond taken from him betwixt the contract and marriage by the father, in favours of creditors or other children, as depending upon the father's deed, *contra fidem tabularum nuptialium*. So that there is an evident distinction betwixt directly acquiring to a third party, by one who *in ipso negotio* is *in mala fide*; and a third party's purchasing *bona fide* for an onerous cause, from a person, what he *mala fide* had formerly acquired to himself.

*Duplied* for the defenders; The right to them for onerous causes cannot be taken from them by the fraud of their administrator in law, who was debtor in the very deed, and obliged to implement their mother's contract; which is

not like a fraudulent deed done by a tutor in favours of his pupil, to whom he was not debtor. And the decision, Paton *contra* Paton is not to the purpose, for there the bond was taken by the father from his son without a preceding onerous cause.

*Triplied* for the pursuers; A tutor who is debtor to his pupil, acquiring to him fraudulently in satisfaction of that debt, puts his pupil in a worse case, than if the tutor were not debtor; because, a tutor who is debtor is under stronger temptation to do so, than one who is disinterested; and a tutor bankrupt cannot by partiality prefer his pupil to other creditors. A tutor who is also debtor to his pupil, *duplicem personam gerit, et ego non sum ego*; and though he cannot authorise his pupil *in rem suam*, yet when he *qua* debtor *mala fide* disposes to his pupil, *perinde est*, as if he did *mala fide* acquire from another for his pupil, which acquisition would be reducible upon the tutor's fraud.

THE LORDS repelled the defence, that the disposition in favours of the children of the second marriage, was made by the father with the pursuer's consent, for an anterior onerous cause in their mother's contract of marriage; in so far as would extend to the sums provided by the said contract; in respect of the obligation in the pursuer's contract of marriage, to make up the estate disposed to be worth 8,000 merks of yearly rent out of the father's other lands and estate; and therefore sustained the reason of reduction.

*Fol. Dic. v. 2. p. 21. Forbes, p. 313.*

1716. July 20. GORDON'S *against* SIR WILLIAM GORDON of Lesmore.

DUFF of Drummuire having contracted his daughter with the eldest son of Sir James Gordon of Lesmore, the whole estate of Lesmore, without reserving any thing, saving a yearly aliment to Sir James, was disposed in the contract, and Drummuire paid a suitable tocher; but the day before the marriage, there was a private paper granted by the son to his father Sir James, wherein he obliges himself to grant bonds of provision to his younger brethren and sisters, for such a sum of money as his said father should think fit to bestow upon them, payable at what terms the father should determine. The son having died without making these bonds, Sir James himself, in supplement thereof, granted bonds of provision to his said younger children: And now Sir William the grandchild, being pursued upon the said bonds, repeats a reduction upon this head, that they were granted 'contra fidem tabularum nuptialium et pacta dotalia,' both in relation to Drummuire the father, who paid the tocher, and Sir William the heir of the marriage.

*Answered* for the pursuer; That the obligation granted by the son is no ways derogatory to the contract, it not being provided in the contract, that the estate shall not be burdened with the children's provisions; for, though it be not expressed that it shall be, yet there is a great difference betwixt doing

No 30.

No 31.

A father disposed his whole estate in his son's contract of marriage, reserving an annuity to himself; but before the marriage, the son became bound to grant suitable provisions to the other children. The Lords found that, in regard there was no obligation in the contract of marriage to relieve the son of the younger children's provisions, the bonds libelled.