

upon the head of fraud and circumvention, was competent against the adjudger from the buyer; and Lord Coalston said, he remembered a later case, *Michael Menzies* against *Gillespie*, where the like was found. But, in regard that, in this case, the action was against the adjudger, and on account of the long delay and other circumstances of the cause, they found that the *onus probandi* of the insolvency, and the gratuitousness of the deed, was incumbent upon the pursuer.

25th July 1766.—This day they found that the pursuer might prove by writ or oath of party, and, consequently, that the defender was still to be considered as a conjunct or confident person, not as a stranger; for, in the case of a stranger, the narrative of the deed, bearing the money received, would have been *probatio probata*. See *Fac. Coll.* IV. p. 78.

See, in relation to this point, Home, 23d November 1725, *Nairn*, where the general point is very well argued; and a decision in Falconer, 21st June, 1737, *Gartshore* against *Bell*, where this point was overlooked, and an adjudger considered in the same light as a purchaser.

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1764. February 3. BARBOUR and COOPER against M'GOWAN.

THE question here was concerning the property of certain goods, Whether they belonged to one Thomson, a living man, or one Gardner, a dead man? They were pointed by M'Gowan, a creditor of both Thomson and Gardner, as the property of Thomson, and they were confirmed by Barbour, as the property of Gardner the defunct. A competition about these goods, betwixt those two creditors, came before the Court, and at that time Barbour was only decerned executor to Gardner, so that any other creditor might have come and been joined with him in the confirmation.

The Lords found the goods to be the property of Gardner, after which Barbour completed his diligence by confirmation, by which, no doubt, according to the ordinary rules of law, he got a preference to all the other creditors; but, in respect of the uncertainty of the property, and that M'Gowan had appeared and disputed for a preference in the competition, the Lords unanimously found, that this had the same effect as if he had been confirmed with Barbour, and therefore brought him in *pari passu*.

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1764. June 14.

GALA against ———.

IN this case the Lords found, that a debtor having left, by his testament, a legacy of a particular sum to his creditor, different from the sum in which he was indebted, the brocard of *debitor non præsumitur donare* does not apply, and the legacy is due over and above the debt.