effects, the right of the fraudulent acquirer would still subsist, so far as it did not interfere with those persons who had obtained the decreet of reduction; and only such a part of the subjects in dispute, as corresponded to the extent of the debts due to them, could be brought to a judicial sale; a proceeding quite inconsistent with the established practice in cases of this sort. No 74.

Answered; Where a sale has been set aside, as injurious to the proprietor himself, the right of obtaining redress, as it is *in bonis* of him, must be available to his creditors in general. But where an agreement of this sort has been annulled, as hurtful merely to parties having a collateral or transitory interest, the effect of the decreet is and must be so confined, as to afford a proper reparation to them only. With regard to the seller himself, and with regard to those, who, becoming creditors to him at an after period, can only stand in his right, the transference is equally valid as if no objection had been competent. And where, as in the present case, the right of the persons, at whose instance alone the agreement was reducible, has been united with that of him against whom the action was competent, it is evident every possibility of a challenge must be precluded.

The pursuers farther *contended*, that as the defender's right was redeemable, they might still, on payment of the sums advanced, carry on the sale. This argument, however, was considered to be inadmissible. As adjudgers of the seller, they might pursue a declarator of redemption, if such an action was competent to him; but they could not immediately bring to a judicial sale lands which *ex facie* did not belong to their debtor.

THE LORDS dismissed the action.

Reporter, *Lord Dreghorn.* Act. *Wight.* Alt. *Cullen, Abercromby.*
Clerk, *Home.*

C. *Fac. Col. No* 30. *p.* 49.

1794. *February* 26. FRANCIS FRASER *against* DAVID MIDDLETON.

No 75.
Found in conformity with Livingston against Warrock, No 73. p. 7847.

THE late Mr Fraser of Findrack, in his son Francis's contract of marriage, disponed to him, and the children of the marriage, the estate of Findrack, which he had long possessed in apparency, reserving to himself the possession and liferent use of one half of it, and a power of burdening it with certain provisions to his widow and other children. The son, on the other hand, became bound to relieve him of a certain proportion of his debts; and his bride assigned her tocher of 7000 merks to her future husband. Francis, in 1772, took infeftment upon the precept in the contract.

His father, in 1785, granted a lease, for 57 years, of the farm on which he resided, part of which was in his natural possession, to David Middleton. The

No 75. money-rent stipulated was 200 merks Scots, during the lifetime of the granter, and L. 100 Scots after his death. The granter also reserved to himself the life-rent-use of the house in which he lived, with the offices belonging to it, and some ground adjoining. Middleton immediately entered into possession of the rest of the farm.

Upon the death of the father in 1791, Francis Fraser brought a reduction of this lease, as *ultra vires* of the granter, and *in fraudem* of the contract.

The defender refused to satisfy the production; contending, that the pursuer's disposition and infeftment, flowing from an heir apparent, did not give him a title to pursue in the action; but the Court (7th March 1793) 'sustained the pursuer's title, as sufficient *in hoc statu*, to force production of the deed under reduction.'

The reasons of reduction then came to be discussed, when the defender

Pleaded; An heir apparent cannot convey a real right to others. If he has been three years in possession, his onerous deeds are only so far effectual against the succeeding heir, in terms of the act 1695, as to give a personal claim against him. All his deeds come in *pari passu*. A creditor infeft on an heritable bond, has no preference to mere personal creditors. Even although, therefore, the defender had not had possession upon his lease, and the disposition in favour of the pursuer were onerous, their claims would only have been upon an equal footing.

But the defender's lease having been followed by possession, it has become a real right, in terms of the act 1449, c. 18. the benefit of this statute being equally competent to the lessee of an heir apparent, three years in possession, as of an heir who has made up titles.

2*do*, Although old Mr Fraser's title had been complete, the granting of the contract in question, which, at least in so as it regards that half of the estate of which he retained possession, is to be considered rather as a family-settlement, than as an onerous deed, could not so far alter the nature of his possession, as to make his subsequent onerous deeds ineffectual; 3d March 1784, Stewart against Vans Agnew, *voce* TAILZIE.

Answered; A tenant cannot challenge his landlord's title to remove him, when he himself has no other title of possession than that which he has derived from him; because he cannot do so, without acknowledging that his own title to possess is defective.

For the same reason, he cannot make such objection in a question with his heir or singular successor. Hence, it is a settled point, that a mere sasine in the property, without regard to its warrant, is, in such circumstances, a sufficient title to prosecute a removing; Stair, b. 2. tit. 9. § 41. In the present case, both parties derive right from the same person; and therefore they must set out with supposing his right to be unexceptionable. The only question then is, Which has the best right from him? Now, the pursuer's sasine must have

as strong effects as the defender's possession; and, being prior in date, must be preferred. No 75.

The act 1695 applies only where the succeeding heir makes up titles to a more remote ancestor, or adjudges on his own bond; 12th February 1736, Lady Rattar against The Apparent Heir of Rattar, *voce* PASSIVE TITLE. The pursuer has no occasion to do either. His disposition and infeftment are already a complete title in all questions with persons deriving right from his father, and afford a sufficient ground of prescription against third parties.

Even where the act applies, the creditors of an heir-apparent must, in questions among themselves, consider him as infeft. His deeds can be challenged only by the succeeding heir, and of that right the act 1695 deprives him. It never could be meant, that a disponee, with infeftment flowing from an heir apparent, should be in no better situation than one claiming on a mere personal debt long afterwards contracted.

The object of the act 1449 was to protect tenants against the posterior deeds of the landlord, but not to render valid a lease obtained from a person, who, before its date, had divested himself of the power of granting it.

2*do*, It may be true, that a person cannot by any deed, *intra familiam*, retain the fee in his own person, and yet prevent his onerous deeds from affecting it; but he may divest himself of the fee altogether. Contracts like the present are very common, and they are strictly onerous, as upon the faith of them the marriage is contracted.

Replied; When a person does not represent his author, he may challenge the existence of any powers in him which are not necessary to support his own right. To support the lease in question, it is sufficient that the granter was three years in possession.

THE LORD ORDINARY 'found, that as both the pursuer and defender derive their right from the same common author, it is not competent for the defender to object the want of title in the person of the common author, by way of defence against the pursuer; and in respect that the common author was divested of his right to the fee of the estate by the disposition contained in the pursuer's contract of marriage, and infeftment had followed in the pursuer's person long before the date of the lease under reduction, found, that the same cannot be effectual against the pursuer after the death of the granter thereof; and therefore reduced, decerned, and declared, in terms of the libel.'

At advising a reclaiming petition and answers, it was

Observed on the Bench: The act 1695 does not apply to this case. The pursuer has not made up titles to the estate passing by his father, and he has no occasion to do so, as he has already a title good against every person who does not shew a preferable right to that of his father. As both parties found upon the right of their common author, both must hold it to be complete. The

No 75. pursuer has the preferable right from him. If the tack had not been derived from old Frazer, it would have been incumbent on the pursuer to have produced a complete progress, but in the present circumstances the production of his sasine is sufficient.

THE LORDS, by a great majority, 'adhered.' See LIFERENTER.

Lord Ordinary, *Justice-Clerk.* Act. *Cha. Hay.* Alt. *Maconochie, Hutchison.*
Clerk, *Home.*

D. D. *Fac. Col. No* 110. *p.* 242.

See APPENDIX.