

father, and a minor, and these deeds never being delivered or out of the father's custody, the father notwithstanding of the deed to the son, was *vest and seised* in the property of the estate, and the son's right vanished, and consequently the daughter was in the right to serve heir to her father and take no notice of the son. The Court of Session decreed the same in a case *Rose Fincham*, against *Muirhead of Bradisholm*, which was affirmed upon appeal by the House of Lords. Indeed she could not do otherwise than she did, for she could not know of the disposition to the son, or the sasine thereon, for neither of them were recorded, nor was the son ever in possession, but died under age, and by the act of parliament 1617. c. 16., all sasines are declared void as against third parties, if not registered within sixty days after they are taken. But this sasine never was registered and consequently neither the daughter nor the creditors could know any thing of it; and as she was served heir to her father who died seised and possessed thereof, Mr. Paterfon and the other creditors were *in bona fide* to lend money to Mr. Douglas, who claimed under the said daughter, and stood publicly infest by virtue of a charter under the great seal.

No. 2. of this Collection.

1617, c. 16.

(The respondents also traverse or deny the facts stated by the appellants, with regard to the payment by receipt of rents and as to the proof of the rental.)

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the several interlocutors or decrees therein complained of be affirmed.*

Judgment, 18 June 1714.

For Appellants, *P. King. N. Lechmere.*
 For Respondents, *Rob. Raymond, John Pratt.*

Sir Robert Home, Bart. - - - *Appellant*; Case 28.
 Sir Patrick Home, Bart. - - - *Respondent.*

1st July 1714.

Sequestration.—A sequestration, granted of an estate, where a person was in possession by virtue of a tack from his father for payment of debts, adjudications in his person with expired legals, and a disposition from an elder brother, which, though reduced for fraud and circumvention, was still to stand as a security for the onerous cause thereof.

Presumption.—From circumstances of presumption a person is made to count and reckon for property, which with his content had formerly been conveyed by a weak elder brother to another person.

AFTER the judgment was given in the former appeal (No. 15. of this collection) the parties returned to the Court of Session, and fundry proceedings were had in the action of count and reckoning. On the 24th of February 1713, the Lord Ordinary found Sir Patrick the respondent liable both for the real and personal estate contained in the disposition, and discharge granted to him
 in

Act of Sederunt.
22 Nov.
1711.

in terms of the judgment of the House of Lords, and ordered him, in terms of an interlocutor of the 18th of November 1691, to account from Martinmas 1671, and to give in a charge against himself, with his discharge and vouchers according to the late act of Sederunt. The respondent having reclaimed, the Court on the 2d of July 1713, adhered to the former interlocutor with an addition in these words, viz. "in so far as concerns the whole subject disposed by Sir John Home to Sir Alexander his son, and by Sir Alexander with consent of the respondent to George Home of Kaims."

The appellant thereupon petitioned the Court to have the estate sequestrated, and a factor appointed to receive the rents and profits; but after answers for the respondent, the Court on the 7th of July 1713, unanimously "refused a sequestration in this state of the process."

The respondent having also reclaimed against the said interlocutor of the 2d of July, and particularly against that part of it which found him liable for what had been disposed to George Home of Kaims; after answers thereto the Court on the 16th of July 1713, "found the respondent not accountable for the contents of the disposition made by Sir John Home to Sir Alexander, which were disposed by Sir Alexander with the respondent's consent to George Home of Kaims."

Entered,
4 May,
1714.

The appeal was brought from "two decrees or interlocutors of the Lords of Council and Session of the 7th and 16th days of July 1713."

On the Sequestration.—Heads of the Appellant's Argument.

The lease granted by the late Sir John Home, was absolutely a deed of trust for payment of debts, and to disburthen the entailed estate in favour of the appellant's father and his heirs; and the respondent having so grossly broken his trust, and so long avoided to come to an account, it was in law and equity just, that the rents should be sequestrated; for so long as the respondent continued to possess, it was his interest never to make a fair account.

The respondent cannot claim the benefit of the lease, as he has during the course of 43 years failed in the performance of every condition and clause to which he was bound, and indeed observed nothing save his entering to possess: and since in equity and by the law of Scotland, a tenant or lessee may be removed before the term of his lease expires, *si male versatus est in re conducta*, the appellant might well insist that the respondent should be removed, and that the appellant should have access to possess. All that the appellant, however, insisted for was, that after so long a time during which no account had been made, the estate might be sequestrated till it should appear in the event who had best right.

But the respondent having entered by the lease must possess by it, and must answer according to it, *nec potuit sibi mutare causam possessionis*. If he have other titles, being once removed, he may make use of them to recover possession, but he must first be
judged

judged by the lease by which he entered. The pretended expired adjudications in his person are no titles to keep possession for they are led for debts which ought to have been paid by the trusts he undertook. As to the disposition of 1694, it is found to have been gained by fraud and circumvention, and therefore can be no title to continue to possess, and though it be not absolutely set aside, but so as still to remain as a security for a debt, it lies on the respondent to make out that debt, or valuable consideration before he can have the benefit of it; for the deed being obtained by fraud it presumes not, and proves not in law. If there be any valuable consideration or just title, the respondent's right will be entire, and in the event of the cause, he will have what belongs to him. It is most usual by the practice of Scotland to sequester estates, where there is a controversy concerning the titles, and more especially where there is manifest delay in coming to an account as there has been in this case for 40 years.

Heads of the Respondent's Argument thereon.

The appellant and his mother have all along been in possession of two thirds of the estate. The respondent being in possession by the lease which is to endure till all the debts be paid, he cannot be removed till it appear if the debts are or ought to have been paid, which cannot be done till the count and reckoning be closed. The respondent has also two other titles in his person sufficient to exclude the sequestration, namely, adjudications with expired legals, and secondly, the disposition granted by Sir Alexander Home, which by the judgment in the former appeal is not reduced wholly, but is ordered to stand as a security for any onerous cause or valuable consideration paid or made good by the respondent for the same. The respondent has given in his accounts signed by him, with the vouchers thereof conform to the late act of Sederunt, whereby, if the same shall be disproved, he will be subject to be decerned in double of what should be omitted out of the charge. By these accounts it appears, that not only the debts due to the respondent, and which he has paid, and the valuable consideration, which was allowed him by the said judgment, doth far exceed not only that part of the estate which the respondent possesses, but also the value of the whole estate: and no sequestration has ever been allowed in a similar case. The interlocutor appealed from, being the undoubted law of Scotland, the Court unanimously pronounced the same without a contrary vote; and the appellant did not offer to reclaim therefrom.

On the Interlocutor 16th July 1713.—Heads of the Appellant's Argument.

At pronouncing this interlocutor the Court were divided in opinion; but they had no power to do otherwise than to appoint the respondent to account for the contents of the said disposition; for the judgment of the House of Lords does expressly order, that
the

the respondent do account, not only “ for the rents and profits of
 “ the trust-estate granted to him by Sir John Home by lease 16th
 “ May 1671, but for all other sums of money, debts, or move-
 “ ables contained in the aforesaid discharge and disposition, which
 “ belonged to the said Sir John Home, and were received by Sir
 “ Patrick Home, and which ought to have been applied for the
 “ debts charged on Sir John’s estate.” Now a considerable
 branch of the subjects in question is specially contained in the
 disposition reduced by the former judgment, *viz.* an apprising
 over the estate of Lammerton, which, though it had formerly
 been conveyed to George Home of Kaimes, is again therein ex-
 pressly conveyed to the respondent. And the whole other subjects
 in the disposition in question were contained generally in the
 aforesaid discharge and disposition set aside by the judgment of the
 House of Lords; for the respondent was liable to apply the subjects
 in question to the payment of debts within one year after his father’s
 decease in case his brother Sir Alexander did not. And the re-
 spondent did by fraud and circumvention obtain the fore-
 said discharge (now set aside), whereby he is not only acquitted of any
 account for the rents and profits of the trust-estate, granted to
 him by lease, but of his intromission with all debts, sums of mo-
 ney, goods, &c. intromitted with by him, which belonged to the
 deceased Sir John Home.

It was proved in the action below, that although the disposition
 was made by Sir Alexander, with consent of the respondent, to
 the said George Home, yet in fact the respondent had the posses-
 sion, and accounted with the servants entrusted with the move-
 ables, and otherwise applied considerable parts thereof to his
 own use.

Respondent’s Argument thereon.

It would be against all reason to make the respondent liable to
 account for Sir John Home’s personal estate, which had been
 actually disposed of by the appellant’s father to George Home of
 Kaimes, for payment of some part of Sir John’s debt; and the
 said George Home, as appeared by the evidence of several wit-
 nesses adduced by the appellant in the action of count and reckon-
 ing, had intermeddled with and disposed of the same; and par-
 ticularly, it appeared that the said George Home having afterwards
 assigned the said personal estate to Henry Home his nephew, with
 a clause that he should be accountable to the appellant’s father,
 he the said Henry Home, after his uncle’s decease, by his bond
 dated the 21st of January 1681, obliged himself to account with
 and pay to the appellant’s father what should appear to be due to
 him from the said George Home. Upon this bond the appellant’s
 father afterwards brought an action, before the Court of Session,
 against the said Henry Home; and in a count and reckoning held
 thereupon, the appellant’s father gave in a charge, containing a
 particular account of all the personal estate which had been dis-
 posed by his father to him, and by him assigned to the said George
 Home;

Home; and the said Henry Home gave in a discharge, mentioning the several debts that were due by Sir John to the said George Home, and which he had paid for him with the vouchers thereof, far exceeding in value the personal estate which the said George Home had intermeddled with. Several articles having been debated, and a time limited to the appellant's father for proving his charge, and he having failed therein, Henry Home, on the 6th of November 1684, obtained a decree whereby he was freed and discharged.

After hearing counsel, *It is ordered and adjudged that the said interlocutor of the 16th of July 1713, be reversed; and that the receipt of George Home of Kaimes, of the contents of the disposition made by Sir John Home to Sir Alexander, which were disposed of by Sir Alexander with the respondent's consent to the said George Home, be taken to be the receipt of the respondent; and that the respondent do therefore account for the contents of the disposition made by the said Sir John Home to the said Sir Alexander, which were disposed of by the said Sir Alexander, with the respondent's consent, to the said George Home: And it is further ordered, that the Lords of Session do appoint a receiver of the profits of the trust estate in question until such time as the accounts shall be taken, in pursuance of this order and the former order of this house of the 27th May 1712; and do likewise order that the tenants of the trust estate do pay the rents now in arrear, and the rents which shall grow due for the future, to such receiver; and that such arrears of rent and growing rents as shall be paid to such receiver be duly accounted for and placed forth at interest, with approbation of the Lords of Session, as soon as conveniently may be, for the benefit of such of the said parties as shall appear to be entitled thereunto upon the event of the said account.*

Judgment,
1 July,
1714.

For Appellant,
For Respondent,

Rob. Raymond. Tho. Lutwycke.
P. King. Sam. Mead.