

## S E C T. IX.

## Of Fraudulent Preferences and Alienations.

1666. November 15.

BINNING *against* FAROUHAR.

## No 68.

A father disposed to his son. The son disposed again to his brother-in-law. In so far as the father was bound in the son's contract of marriage, his disposition was good to the son; but the son's disposition, in prejudice of creditors, if not proven to be onerous, would be deemed fraudulent.

A DISPOSITION being made by a father in favours of a son; and thereafter the same lands being disposed by the son in favours of his brother-in-law: The said rights were questioned by a creditor, as being fraudulent; being disposed by the son's contract of marriage; which, though onerous as to provisions in favours of the wife, is not so as to the son, whom the father could not advance, or provide in prejudice of the creditors: But it was *alleged*, that the disposition made by the son, was for an onerous cause; and, by the act of Parliament, though a right should be found fraudulent, yet a third party acquiring *bona fide*, by the act of Parliament is secured; and his right cannot be questioned, unless he be *particeps fraudis*, or acquire the same without an onerous cause, which, by the act of Parliament, is only probable *scripto vel juramento*.

Yet the LORDS inclined to reduce the right granted by the son, unless it were offered to be proven, that it was for an onerous cause; in respect of several presumptions alleged and informed by the pursuer: And, before answer, as to the relevancy, ordained both parties to condescend upon their presumptions *hinc inde*, of fraud, or the cause onerous for the granting of the said right, and to prove the condescendence. I have ever thought, that the practice of the Lords to ordain parties to prove before answer, as it is late, is accompanied with many inconveniencies; seeing by such acts, which are not of litiscontestation, processes are still kept loose; and after that irregular way of probation, the debate of relevancy is again resumed, to the great vexation both of parties and Lords; and after the Lords interlocutor of relevancy, there may be again litiscontestation: So that upon the matter there are two litiscontestations in one cause.

It being again debated, What the certification should be in such acts, *viz.* whether the allegiance should be holden as not proponed; or that the Lords should advise: Which in effect is no certification.

THE LORDS were not clear to determine; which is a great informality, and a pressing reason against that anomalous way.

Reporter, *Newbyth*.*Dirleton, No 48. p. 19.*