1675. *June* 30. CLERK *against* STEWART and WATSON.

No 46.
In ſupport of a gratuitous alienation, made by a debtor, who, at the time of reduction, was bankrupt; it was found relevant, that, when he made the alienation, he had a ſufficient viſible eſtate to pay the purſuer and all his other creditors.

A HUSBAND, by his contract of marriage, having got the right of the fee of a tenement of land ſettled upon him; his wife having reſigned the ſame for infeftment to him and her, and the heirs of the marriage, which failing, his heirs: He and his wife did thereafter enter in a contract with another ſiſter of his wife's, who had right to the equal half of the ſaid tenement, as heir portioner with her ſiſter; by which contract there was a mutual tailzie with conſent of the huſband; and the right of fee, that, by the former contract, was ſettled upon her huſband, as ſaid is, was diſponed to the wife; in ſo far as both the ſiſters, with conſent of their huſbands, were obliged to reſign their reſpective parts, in favours of their huſbands and themſelves in liferent, and the heirs of the marriage in fee; which failing, in favours of the wife's heirs: Which contract was queſtioned by a reduction at the inſtance of a creditor of the huſband's; upon that reaſon, that the ſaid right of fee, granted by the ſaid contract betwixt the huſband and the wife, and her ſiſter, was in defraud of the huſband's creditors, and null by the act of Parliament 1621; in ſo far as the huſband had a fee of the ſaid tenement, by the contract of marriage betwixt him and his wife; which might have been affected with execution at the inſtance of his creditors; and the ſaid fee was given, by the ſaid late contract, to the wife, ſo that the huſband had only a liferent.

In this proceſs, it was *alleged*, 1*ſt*, That the act of Parliament did militate only in the caſe of dyvors, and diſpoſitions granted by them. And, 2*dly*, That the ſaid act of Parliament doth only reſcind alienations that are made without true, juſt, and neceſſary cauſes; and that the ſaid contract betwixt the huſband and his wife, and her ſiſter, was made for a true and juſt cauſe; and the fee of the ſaid tenement, which the debtor had, was given away in reſpect of the obligements of the ſaid contract in favours of the huſband, the purſuer's debtor, which was as equal, as to advantages, for the purſuer's debtor, as they were for the other party; ſeeing both the ſiſters, their parts of the tenement, were provided in the ſame manner to the reſpective wives and their huſbands, and the heirs of the marriage, which failing, the wife's heirs; and that the purſuer's debtor was a perſon opulent for the time, according to his quality; and had ſufficiency of eſtate and moveables otherways, that might have ſatisfied the purſuer's debt the time of the ſaid laſt contract, and thereafter; ſo that the ſaid contract being valid *ab initio*, it could not be taken away upon pretence, that thereafter the huſband became inſolvent; ſeeing it cannot be ſaid, that the huſband did intend to defraud his creditor, or that there were any fraud upon his part.

It was *replied*, That though the caſe of bankrupts, and their fraudful practices, mentioned in the ſaid act, being ſo frequent, did give occaſion and alſo riſe to the ſame; yet it appears evidently by the ſaid act, that it was intended that debtors ſhould not be in a capacity to give away any part of their eſtate, in prejudice of their creditors, to any perſon: In ſo far as the diſpoſitive words of the act are in

No 46. theſe terms, that in all cauſes at the inſtance of a true creditor, the LORDS will decern all alienations and rights made by the debtor, to any conjunct perſon, without true, juſt, and neceſſary cauſes, and without a juſt price really paid, the ſame being done after contracting of lawful debts from true creditors, to be null without further declarator; and the ſaid act does not bear, that all rights made by bankrupts ſhould be null, it being hard to give a character and definition of a bankrupt; ſo that diverſe queſtions may ariſe anent the notion of bankrupt; and what debtors ſhould be eſteemed bankrupt; and therefore for cutting off the ſame, the act is conceived in the terms foreſaid, and annulls diſpoſitions made by debtors without an onerous cauſe: And the LORDS, by the ſtatute ratified by the ſaid act, do declare, that they intend to follow and practiſe the laws civil and canon made againſt fraudful alienations in prejudice of creditors: And, by the civil law, all rights and deeds made and done in prejudice of creditors without an onerous cauſe, are null, and may be reſcinded *actione Pauliana*: And the law doth preſume, *præsumptione juris*, that they are fraudulent, being prejudicial to creditors *ex eventu & re*; who are not obliged to ſay, that they are fraudful *eonsilio*, which is *in animo* and hardly can be proven.

As to that point, viz. That the ſaid contract was upon valuable conſiderations, it is *replied*, That the taking of the fee from the huſband, and giving the ſame to the wife, it is a donation as to the wife in prejudice of the creditor; ſo that there is no onerous cauſe as to the huſband.

THE LORDS, upon debate at the bar and among themſelves, did find, that debtors might diſpoſe of a part of their eſtate by way of gift, and without an onerous cauſe, if they retain as much and more than would ſatisfy their creditors; and therefore they found the defence relevant, that the debtor had as much eſtate, beſides the fee of the ſaid tenement, as would ſatisfy the purſuers debt.

Some of the LORDS were of the opinion, That the caſe, being of ſo great conſequence as to the preparative, it was fit to be thought upon; and urged theſe reaſons, *1ſt*, That the words and letter of the law appear to be clear, againſt deeds done by debtors without an onerous cauſe. *2dly*, Though our law were not clear, yet in caſes of that nature, when we have not a municipal law, nor cuſtom to the contrary, we ought to follow, though not the authority, yet the equity of the civil law, which is received every where, where there is no cuſtom to the contrary: Specially, ſeeing it is declared by the ſaid ſtatute mentioned in the act of Parliament 1621, That the LORDS are to follow the civil and canon law made againſt deeds and alienations in prejudice of creditors. *3dly*, It is hard to put creditors to diſpute the condition of their debtors, the time of making donations; and whether they had effects and ſufficiency of eſtate to ſatisfy their debt, notwithſtanding the ſaid deeds; which may be unknown to the creditors; it being ſufficient to ſay, that the deed was without an onerous cauſe, and that the debtor became inſolvent. *4thly*, If a debtor ſhould become inſolvent *ex post facto*, though the time of the donation, the reſidue of his eſtate might have ſatisfied the

debt, it is more juſt and reaſonable that a donatar, who has a lucrative title, No 46.
ſhould rather ſuffer *ex eventu* than a creditor. ——————— did argue to the contrary.

Act. *Falconer.* Alt. *Steuart.* Clerk, *Monro.* *Præſentia.*

Dirleton, No 287. p. 139.

*** Stair reports the ſame caſe thus:

THE two daughters and heirs-portioners of —— Stuart, in Glaſgow, ſucceeding to their father in a tenement there, one of them was married to a maſon in Glaſgow, and, by the contract of marriage, ſhe did reſign her half of the tenement, in favours of her future ſpouſe and herſelf, the longeſt liver of them two, and the heirs to be procreate betwixt them; which failing, to the huſband's heirs; but thereafter, by contract betwixt the two ſiſters and their huſbands, there is a mutual tailzie, whereby in caſe of failzie of heirs of their body, each of them are ſubſtitute to others. Clerk being creditor to the maſon in L. 100 Scots, purſues reduction of the ſecond contract, on this reaſon, that the maſon, his debtor, had, after the debt contracted, diſponed the half of the tenement, which, by the contract, belonged to him in fee, and, by the ſecond contract, had conſtitute himſelf only liferenter, and ſtated the fee in his wife and the heirs of the marriage; which failing, to her ſiſter and her heirs, in defraud and prejudice of the purſuer and his lawful creditors, contrary to the act of Parliament 1621 againſt fraudulent diſpoſitions in prejudice of creditors. The defender *alleged* abſolvitor, Becauſe he offered him to prove, that at the time of this ſecond contract of tailzie, the maſon debtor was in a good condition, and had much more than would pay all his debt, and was not by that tailzie rendered inſolvent, or put in any difficulty to pay this purſuer and all his creditors, not only being a daily gainer as a maſon, but having moveables five times above the ſum; ſo that there was no fraud, either by the intent or event of this tailzie; and therefore, albeit it had been merely gratuitous, it neither was againſt that act of Parliament, or any law whatſoever, for even the *actio pauliana* behoved to have fraud in prejudice of creditors; but it were very unjuſt and inconvenient to hinder perſons that were in an opulent condition, to grant donations, either upon charity or kindneſs, to children or relations; but, if this reaſon were relevant, then none ſuch could be granted by any that had debt; for any creditor might not only reduce, but might lie by till the diſponer, or his heir, became in worſe condition, and then reduce the diſpoſition, which was gratuitous; but creditors ought *invigilare ſibi*, and to obtain and affect their debtors other eſtate, ſo that ſuch donations were oftimes pious and virtuous, and neither fraudulent nor faulty.—The purſuer *anſwered*, That he opponed the act of Parliament, though in the narrative it mentions bankrupts and fraudulent diſpoſitions, as the extremeſt caſes, to be motives for paſſing of the act; yet the ſtatutory part bears, 'All alienations made 'by debtors, of any of their lands or goods, to any conjunct or confident per-

No 46.

'ſon, without true, juſt, and neceſſary cauſes, or juſt price really paid, the ſame 'to be null at the inſtance of true creditors, being anterior;' which hath been ordinarily extended againſt gratuitous diſpoſitions, though not to conjunct perſons; and this tailzie is among conjunct perſons, and is gratuitous; for albeit the mutual tailzie, and the hope of iſſue thereby in the whole tenement be advantageous to the children of the marriage, yet not to the huſband himſelf, who quits the fee for the liferent; and if onerosity might be ſo interpreted, that a debtor might diſpone his lands for equivalent cauſes to be done to his children or others, the effect of this excellent ſtatute might be evacuate, but the onerous cauſe muſt return to the debtor, that it may be affected in place of what is alienate.—The defender *replied*, That the narrative of the ſtatute may very well inprete the intent and meaning of it, to be only againſt fraudulent diſpoſitions of perſons inſolvent, or who became by the ſaids diſpoſition inſolvent.

THE LORDS found the defence relevant, that the debtor, the time of this tailzie, had a ſufficient viſible eſtate to pay this and all his debts, and admitted to the defender to prove the condition of his eſtate, and to the purſuer to prove what was his debt.

Fol. Dic. v. 1. p. 68. Stair, v. 2. p. 336.

1680. *November* 10. M'KELL *againſt* JAMIESON and WILSON.

No 47.
A gratuitous alienation was ſuſtained, and found not reducible by onerous creditors, if the diſponee had then a viſible eſtate ſufficient for all his debts, whether by infeftments, moveables, or bonds, tho' *ex eventu* he might prove inſolvent.

M'KELL purſues a declarator of expiring of an appriſing of a tenement in Leith, deduced againſt Edward Jamieſon. Compearance is made for Jean Wilſon and Lodovick Callender, her huſband, who repeat by way of defence, a reduction of the right of this tenement, before Jamieſon's right againſt Kier his author, to whom it was diſponed by Houſton, upon this reaſon, that Kier was Houſton's oye by his daughter Magdalen, and he having only four daughter who are all *foriſfamiliate*, and provided, he diſponed this tenement to his oye, without an equivalent cauſe onerous, after contracting of 1000 merks due to Wilſon; and though Jamieſon did acquire right from Kier, and M'Kell from Jamieſon, yet the matter became litigious before their rights.—It was *answered* for M'Kell, That the reaſon was not relevant, unleſs Houſton, when he diſponed, had been bankrupt, at leaſt had become inſolvent by the diſpoſition. But it is offered to be proven, that the diſpoſition was burdened with 3000 merks, to be diſponed of at the diſponer's pleaſure, and with his own liferent, for which he got 2000 merks; ſo that he had then a viſible eſtate remaining, ſufficient for this and all his other debts, and had bonds and moveables, which by his teſtament came to L. 200 Sterling, and therefore was in full capacity to gift to his oye, or any other perſon; ſo that no creditor of his, after not inſiſting upon diligence for ſo long a time, can quarrel his diſpoſition as fraudulent; or otherwiſe all gratuitous diſpoſitions, by the moſt ſolvent perſons, would become ineffectual, and the power of diſpoſal would be bound up, as if they were inhibit, and therefore the Lords did lately find, That bonds of proviſion to the daughters of Mouſwell, (*infra h. t.*) were