

the following particulars, which are, his burial, paying his debts, &c.; then he goes on to bequeath certain legacies, after which follows this contraverted clause: 'Whatever money may be yet remaining, over and above the forementioned bequeathments, let it be put out upon provision, either here or in Scotland, as shall be thought most convenient, and the yearly provision of that money be given to my sister during her life, and after her death let the stock be divided equally amongst my brother's children.' The question occurred upon this, whether the money was to be split and divided among the children existing at the testator's death, to be taken up by their nearest of kin upon their decease, or if it fell only to be split and divided among the children existing at the life-renter's death, at which time the division is appointed to take place by the testament.—THE LORDS found, that only the children, who shall exist at the decease of the testator's sister, have right to the legacy in question, See APPENDIX.

No 62.

*Fol. Dic. v. 1. p. 303.*

## S E C T. VI.

Settlements importing a Liferent only.—Fiar's power of uplifting without consent of the Liferenter.

1677. November 16.

COBBS against WEMYSS.

ANDREW TORY a bastard having no children of his own body, disposes some tenements and sums to Wemyss of Fingask, under a back bond from Fingask, obliging him to re-dispose to Andrew and the heirs of his body allenary, and reserving the said Andrew's liferent. Thereafter Andrew makes a second right to this Cobbs, who pursues Fingask to denude and re-dispose. *Alledged*, the back bond implicitly excluded assignees as the word 'allenary' bore. THE LORDS found a bastard in his *leige poustie*, might lawfully prefer any to the King, and dispose his estate, and that the design here seemed to make the bastard a mere liferenter, in case he had no children, and therefore assoilzied.

*Fol. Dic. v. 1. p. 303. Fountainball, MS.*

No 63.

A bastard having no children, disposed his estate under a backbond obliging the disponee to re-dispose to him and the heirs of his body, reserving his liferent. Found that the effect was to make the bastard a mere liferenter, if he had no children.

1680. January 21.

CADDEL against REATH.

By contract of marriage betwixt Alexander Reath and Isobel Caddel, John Reath is obliged to pay 3000 merks to the said Alexander his son, and his future spouse, to be employed by them, by advice of their parents, to them in

No 64.

A sum being payable by contract of marriage to husband and

No 64.  
 wife, his discharge without her consent was found ineffectual as to her liferent.

liferent, and the bairns of the marriage in fee, and Andrew Caddel is obliged to pay in name of tocher 4000 merks, of the which 3000 merks the said Alexander Reath gave a discharge after the marriage. John Reath being charged upon the contract of marriage to pay this 3000 merks to be employed as said is, he suspends, and produces his son's discharge. And it was *alleged* for Isabel Caddel and Alexander Reath's Creditors, that John Reath ought to pay the sum to be employed as aforesaid, notwithstanding of the discharge, because, though it had proceeded upon true payment, yet not being subscribed by the wife, it cannot prejudice her, but must be employed to her in liferent; because, by the clause in the contract, 'the sum is payable to the husband and wife.' THE LORDS found the discharge not being subscribed by the wife, had no effect against payment of the sum to be employed for her use. It was also *alleged* for the Creditors, that this discharge could not militate against them, albeit they were creditors to the son after the discharge, because they offered to prove by the father's oath, that there was a fraudulent contrivance betwixt him and his son, that the father should contract this sum, but that it should never be demanded, but discharged by the son, and that accordingly it was discharged after the contract, and before the marriage, and that that discharge was suppressed, and in place of it this discharge after the marriage was granted, which was a gross fraud, to ensnare parties who might contract with the son, who was a trafficking merchant, and who by the contract had a visible estate, commonly known; but the discharge was kept close betwixt the father and the son. It was *answered*, That the act of Parliament having determined the manner of reducing of fraudulent deeds, only in favours of anterior creditors, it can be extended no further; but all posterior creditors contract at their hazard, *nam scire debent cum quo contrahunt*. It was *replied*, That the act of Parliament is not exclusive of other acts of fraud, even against posterior creditors; as was found in the case of Mason, No III. p. 1003.; and the case of Pollock, No IIO. p. 1002. Yea, it was found, 'that one brother engaging for another in a sum, whereof the brother gave discharge of the same debt, the said discharge was 'fraudulent and null.'

THE LORDS found it relevant to be proven by John Reath's oath, that at the time of the contract of marriage, his son promised to discharge this sum of 3000 merks without satisfaction; and that accordingly a discharge was granted before the marriage, and after the contract, and renewed after the marriage, without any satisfaction; and that the son being a trafficking merchant, his creditors had contracted with him *bona fide* upon their knowledge of the contract of marriage.—See FRAUD.

*Fol. Dic. v. 1. p. 304. Stair, v. 2. p. 743.*