

No 119.

gainst the creditors, whereby they could be obliged to instruct either his solvency, or the onerosity of their several rights; and therefore adhered to their former interlocutor. See PRESCRIPTION.

November 28. 1694.—In the cause mentioned 9th current, between Elizabeth Spence and Andrew Martin her husband, *contra* the Heirs of Sir Andrew Dick of Craighoufe, and his Creditors; it was now *alleged* that Martin had a decret of certification against severals of the writs now founded on, and so they could not be made use of.—*Answered*, The creditors stood publicly infest under the Great Seal before the raising of the improbation; and yet they are not called, and so it is null *quoad* them.—*Replied*, These creditors are now dead, and their successors are not infest, and so cannot propone this.—THE LORDS found apparent heirs could defend themselves on their author's infestment; and that standing, then the certification could not meet them, because neither their predecessor last infest, nor they, are called thereto. See HEIR APPARENT.

Fol. Dic. v. 1. p. 75. 76. Fountainball, v. 1. p. 526. 537. 572. 590. 641. 645.

1710. June 15.

CATHARINE LESLIE, Daughter to the deceased JAMES LESLIE, Younger of Tarrie, against the CREDITORS of LAUCLAN LESLIE.

No 120.

A disposition by one to a person, described in it his brother-in-law, and bearing to be for onerous causes, was found not to instruct its onerous cause; and the receiver's creditors having adjudged it, were found to be in no better condition than the receiver himself; the conjunction being expressed in the disposition.

OLD Robert Leslie of Tarrie, in his son James's contract of marriage with Mrs Jean Ramsay, daughter to the Laird of Balmain, obliged himself to pay 8500 merks to James and his spouse, in conjunct-fee and liferent, and to the heirs and bairns to be procreated of the marriage, in fee; which failing, to the said James, his heirs and assignees whatsoever: And in security thereof, did infest them in his lands. James Leslie having, after [his wife's decease, disposed the sum aforesaid to Lauchlan Leslie, (who married his sister,) designed in the disposition his brother-in-law: And the said right being adjudged by Lauchlan's creditors, Catharine Leslie, only child of the marriage, raised reduction thereof upon the act of Parliament 1621, as being presumed a gratuitous deed in favours of a conjunct person, to the prejudice of her, a creditor to the granter, by the provision in her mother's contract of marriage.

Alleged for Lauchlan Leslie's Creditors, *imo*, As James Leslie, being undoubtedly fiar, could have uplifted the money and discharged his father, without re-employing, (the contract containing no clause to re-employ,) so he could freely dispone the same; for Catharine is to be considered only as a substitute to her father, and not as his creditor or heir of provision; the grand-father, and not the father, being obliged to pay the money. Yea, suppose her faint interest by the substitution might have hindered the father to provide the same to children of a posterior marriage, it could never hinder or tie up his hands from disposing on it to others. The act of Parliament was not intended to restrain all commerce be-

tween relations, but only to obviate fraudulent deeds in their favours, to the hurt of extraneous creditors; or such deeds in favours of children of one marriage, to the prejudice of those of another; which is not to be presumed in this case, where Catharine Leslie, who quarrels the disposition, is a nearer relation to the granter than the receiver is. *2do*, The disposition bearing to be granted to Lauchlan Leslie, for certain sums of money received, cannot be quarrelled by Catharine as gratuitous, unless she prove, that it was granted without any onerous cause; seeing it is not to be supposed, that a father would convey his estate by his daughter, an infant who never offended him, to a brother-in-law for pure love and favour. *3tio*, *Actio pauliana* being founded on fraud, is personal, and cannot afford exception or reduction against Lauchlan Leslie's creditors, that were noways partakers thereof; and by the act of Parliament 1621, real purchasers *bona fide*, or in satisfaction of their lawful debts, are not to be prejudiced.

Answered for the pursuer, *1mo*, If heirs or bairns of a marriage could not, as creditors, quarrel their Father's gratuitous deeds in prejudice of their provision; the most solemn marriage settlements might easily be overturned, and contracts of marriage were of no use. Though James Leslie, as fiar, had a power to uplift, and dispose for onerous causes; he was fiar *sub modo*, and could not dispose gratuitously, in prejudice of the substitution in the contract of marriage, which is as effectual, as if he had been obliged to re-employ the money when uplifted; especially in this case, where the money is still extant unuplifted. Law makes no distinction betwixt deeds granted to conjunct persons in prejudice of strangers, and such as are made in prejudice of children; as is clear from the case of Donald Fuller;* and the practise betwixt Drummond and Drummond, 31st January 1679, Stair, v. 2. p. 686. *voce* FIAR ABSOLUTE, LIMITED. Yea, the reason of the law ought to operate more in favours of heirs of provision in contracts of marriage, as being mostly incapable *sibi vigilare*, to prevent fraudulent conveyances, which other creditors may do by diligence; so that heirs of provision are creditors with respect to gratuitous deeds, though sometimes reckoned heirs as to onerous transactions. Whence it necessarily follows, *2do*, That the disposition granted to Lauchlan Leslie the granter's brother-in-law, doth not prove its onerous cause; it being only in favours of mere strangers that the narrative of a writ proves, till it be disproved. No man that considers the design of the act, which supposeth that deeds may be easily made up betwixt conjunct persons, in prejudice of creditors, with what narratives they please, will ever imagine that a general narrative of onerous causes, will prove necessary causes, and a just price really paid; which the statute expressly requires. Besides, such general terms of onerous causes depend much upon the apprehension of parties; and a trifle may pass betwixt conjunct persons for an onerous cause. *3tio*, There is a great difference between reductions upon the statute 1621, and the *actio pauliana*; for in some cases, the interposed person is obliged to make forthcoming the lands, goods and gear disposed, and the creditor will be preferred to the subject; which in

* *Examine General List of Names.*

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certainly more than a personal action. Again, though reduction upon the statute were not real, fraud in a transaction betwixt conjunct persons in prejudice of creditors, is *vitium reale*, which makes posterior transactions fall in consequence with the first; especially where the second acquirer could not be ignorant of his author's relation to the first disponent, as here where the relation is expressly mentioned in the father's disposition to Lauchlan Leslie, 24th January 1680, Crawford *contra* Ker, No 118. p. 1012. Nor is there any difference betwixt voluntary purchasers and creditors using diligence; seeing the latter could only adjudge *omne jus quod erat in debitore, tantum et tale*. Dirleton, Doubts and Questions, p. 21 and 175. And adjudgers cannot be understood lawful purchasers by true bargains, for just and competent prices, in the terms of the act, M'Kenzie, Observ. p. 32.

THE LORDS found, That Catharine Leslie is in the common case of an heir of provision, and has thereby interest to quarrel any gratuitous deed done by her father to her prejudice; and that the disposition granted by James Leslie to Lauchlan his brother-in-law, doth not prove the onerous cause thereof; and that the same bearing the relation betwixt the disponent and Lauchlan Leslie, that they are brethren in law, Lauchlan's creditors are in no better condition than he, and therefore must instruct the onerous cause of the disposition, otherways than by the narrative of the writ itself. See PROVISION TO HEIRS AND CHILDREN.

Fal. Dic. v. 1. p. 75. Forbes, p. 400.

1711. February 2.

MR DAVID GUTHRIE and ALEXANDER WILLIAMSON *against* MR WILLIAM GORDON, Advocate.

No 121.
A disposition to a conjunct person, bearing to be for security of a sum owing to him, by the granter, solvent at the time, not having been quarrelled for 58 years; found that a singular successor to the receiver of the disposition was not, in competition with anterior creditors of the granter, obliged to

In the process at the instance of Mr David Guthrie and Alexander Williamson, who stand infest in annualrents out of the teinds of Balcomy, against Sir William Hope the purchaser, for payment of the price: Mr William Gordon craved to be preferred upon a disposition of these teinds granted by Sir James Lermonth in anno 1654 to Sir William Gordon of Lesmore his son-in-law, bearing for security of 4000 merks owing by Sir James to Sir William; and also upon two expired apprisings of these teinds in the same year 1654; to which disposition and apprisings Mr William Gordon hath right by progress. Mr David Guthrie and Alexander Williamson *alleged*, by way of reduction upon the act of Parliament 1621, That the disposition, being *inter conjunctas personas*, could not prejudice them anterior onerous creditors, unless the onerous cause thereof were instructed *aliunde* than by writ itself. *2dly*, Albeit that were instructed, the pursuers offer to prove that Mr William Gordon and his authors were more than satisfied of the 4000 merks, by their intromission with the teinds.

Answered for Mr William Gordon. *Esto* the disposition had been gratuitous, it cannot be quarrelled, because Sir James Lermonth was solvent in the 1654