

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 dispoise 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 interpret 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.*

No 47.

A gratuitous alienation was sustained, and found not reducible by onerous creditors, if the dispoisee had then a visible estate sufficient for all his debts, whether by inheritments, moveables, or bonds, tho' *ex eventu* he might prove insolvent.

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

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 dispoised 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 dispoised 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 dispoised, 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 dispoised of at the dispoiser'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 Moufwell, (*infra h. t.*) were

not reducible by anterior creditors, because their father had a sufficient fortune for these portions, and all his debts.—It was *replied*, That bairns provisions were *debitum naturale*; but this was an oye whose mother was provided; and that bonds or debts were no visible estate; and it were more just that the acquirers by gratuitous dispositions should be put to seek the disponers upon their warrandice, than that creditors should be frustrate.

THE LORDS found the defence against the reduction relevant, That Houston, the first disponer, had a visible estate, sufficient for all his debts the time he disposed, whether by investments, moveables, or bonds.

*Fol. Dic. v. 1. p. 68. Stair, v. 2. p. 795.*

No 47.

1681. December. M'KELL against CALLENDER.

IN an action of reduction at the instance of Lodovick Callender against Gilbert M'Kell, of a disposition of a tenement of land in Leith, made by John Houston merchant in Leith, to ——— Houston his oye; the right whereof came in the person of Gibert M'Kell: And the reason of reduction being founded on the act of Parliament 1621, as being fraudulent and *interconjunctas personas*, without an onerous cause, in prejudice of Callender, who was a lawful creditor to Houston, granter of the disposition:—THE LORDS found these allegiances relevant to elid the reason of reduction, That Houston the grandfather had sufficient estate ever and above the tenement disposed, able to pay his debt, or that the disposition to the oye, of the tenement, was for an equivalent onerous cause.

*Sir P. Home, MS. v. 1. No 62.*

No 48.  
Found as  
above.

1687. February. SNEWEL against AUCHTERLONY.

DEBATED, if gratification by a debtor not bankrupt, but *oberatus*, and under diligence by horning at a creditor's instance, could be sustained, where the debtor had a sufficient estate, to pay all his debts, after the gratification, as is sustained against the reason, founded on the first part of the act 1621. In Lanton's case, (see No 9. p. 884. *et infra* in Div. 2. Sec. 5.) *oberatus* was found sufficient.

*Harcarse, (ALIENATION.) No 149. p. 32.*

No 49.

1710. December 7. DEAS against FULLERTON.

THE deceased Captain Fullerton having some arrears owing him in the commission of the equivalent's hands, and being debtor to Mr James Deas writer, in L. 30 Sterling, he confirms himself executor-creditor to him for affecting that sum; and pursuing for payment, they suspend on double pointing, that they are likewise distressed by John Fullerton of Auchinhall, claiming right to the same debt by virtue of an assignation he had thereto from the Captain, and duly

No 50.  
A gratuitous assignation to a conjunct person, a few days before the granter's death, was reduced at the instance of a