

No 41. by the said intimation, before any step was, or could be taken upon the edict in the confirmation in favour of Garbet and Company; and, therefore, prefers Cust upon his interest produced.'

Act. *M'Queen.*

Alt. *D. Faculty, Lockhart.*

Clerk, *Ross.*

Fol. Dic. v. 3. p. 154. Fac. Col. No 169. p. 74.

S E C T. VIII.

General Assignees with Creditors.

No 42.

1663. July 3

GORDON *against* FRAZER.

A disposition by a husband to his wife, of his moveables upon a particular estate, was found sufficient to defend the relict in her possession of those moveables, against an executor-creditor pursuing for them.

GORDON having confirmed himself executor-creditor to Forbes of Auchinvil, pursues — Frazer, his relict, for delivery to him of the moveables, who *alleged* absolutor, because the moveables upon the Mains of Auchinvil were disposed to her by her umquhile husband.—It was *answered*, That the disposition was simulate, *inter conjunctas personas retenta possessione*, and therefore null.—It was *duplied*, That the disposition was upon an onerous cause without simulation, because it bears to be in respect that, by the defunct's contract of marriage, he is obliged to infest his wife in five chalders of victual out of Auchinvil, for the aliment and entertainment of his younger children, till the age of 14 years; and because he was necessitate to sell that land, therefore he disposed the moveables in lieu thereof, which is also instructed by the contract of marriage.—The pursuer *answered*, That this is but a provision to children, and could not be preferred to the defunct's creditors, especially being a provision before the children were existent; and if such were to be allowed, it were easy, upon such latent provisions in favours of children, to prejudge creditors.—The defender *answered*, That if the pursuer's debt had been anterior to the contract of marriage, he might have had ground upon the act of Parliament 1621; but this debt was posterior to the contract, and there was no reason to hinder a parent to provide his children, and dispone moveables to him in satisfaction thereof.—The pursuer *answered*, That both being yet but personal obligements, not having obtained effectual possession, the creditor, though posterior, must be preferred to the children, especially if the defunct have not sufficient estate to pay both; *2dly*, The disposition is upon a false narrative, because the lands of Auchinvil are yet undisposed.

THE LORDS found, That the childrens' disposition ought to be preferred, unless the father were *insolvendo*, at his death; in which case they preferred the

creditors, though posterior ; and likewise found the allegiance relevant, that the narrative was false, and so the disposition without a cause. See PROVISIONS TO HEIRS and CHILDREN.

Fol. Dic. v. I. p. 180. Stair, v. I. p. 195.

No 42.

1713. November 26.

MARY BORTHWICK against ELISABETH WOOD.

By contract of marriage betwixt Patrick Cunningham, cooper in Leith, and Elisabeth Wood, all moveable sums that should happen to be owing, and other goods and gear that should pertain to Patrick at his decease, were provided to belong to Elisabeth in the event of her surviving him without children of the marriage ; and that it should be lawful to her, after her husband's decease, to intromit and dispose thereon without confirmation ; which contract, Mary Borthwick, Patrick Cunningham's mother, did ratify, by a writ subscribed by her on the back thereof. The said Patrick Cunningham having died without children, and Mary Borthwick obtained a decret-dativè as creditrix to him, pursued Elisabeth Wood his relict to give up inventory of her husband's moveables, in order to expedite a confirmation ; who offered a bill of advocation to the Lords upon iniquity committed by the Commissaries, in finding that Elisabeth Wood ought to give up inventory of the whole goods and debts of the defunct ; albeit she was not only an onerous assignèe, in her contract of marriage, to all her husband's moveables, with power to intromit therewith immediately after his decease without confirmation, but also Marion Borthwick had consented to and ratified Elisabeth Wood's right in its full extent.

To which it being answered for Marion Borthwick, That a general disposition of all goods and gear the disponent should have the time of his decease, implying tacitly *deductis debitis*, can never give the receiver a preferable interest in her husband's effects, or take effect, after his decease, to exclude his lawful creditors from affecting the subject, which behoved to be confirmed as in *bonis ejus*, and might have been pointed in his lifetime ; nor can Marion Borthwick's ratification of the contract hinder her to affect the husband's moveables, for payment of a just debt contracted after the contract.

THE LORDS refused the bill of advocation from the Commissaries.

Fol. Dic. v. I. p. 180. Forbes, MS. p. 6.

No 43.

A general disposition by a husband to his wife, in their contract of marriage, with power to intromit after his death without confirmation, found to give the wife no preferable right to the creditors of the deceast, and not to hinder them from affecting the estate with diligence.

1724. July.

STIRLING against LAURIE.

In a general assignation to the wife, of heritable and moveable subjects, intimated, after the husband's decease, to a debtor, from whom she uplifted several years annualrents of an heritable bond ; the LORDS preferred an adjudication deduced after intimation, in respect the general assignation was not confirmed. See SERVICE and CONFIRMATION.

Fol. Dic. v. I. p. 180.

No 44.