

No 56.

onerous cause.—The pursuer *answered*, That the disponer was neither bankrupt nor *insolvendo*; and the defender can have no interest, unless there were fraud or prejudice, which the defender cannot allege; because the pursuer is content that the defender have access by his apprising to the jointure lands, in so far as will satisfy his annualrents; and by the act betwixt debtor and creditor, the Lords are impowered to restrict apprisings to their annualrent; and so he cannot pretend no prejudice, providing he assign the lady to his apprising, in so far as he satisfies his annualrent out of her additional jointure.

THE LORDS found the answer to the reduction relevant, upon purging of the appriser's prejudice, not only by admitting him to have access to the apprised lands upon assignation, as said is, during the legal, but with declaration, that if the lady redeemed not within the legal, the lands should be irredeemable, and the lady totally excluded.

*Stair, v. I. p. 266.*

1680. November 10.

No 57.

The Lords required a visible estate in heritable rights, not in personal bonds or money. This afterwards altered, and a visible estate *quomodocunque* only required.

LUDOVICK CALLANDER and his SPOUSE *against* GILBERT M'KELL.

THE LORDS reduced the disposition to the daughter on the act of Parliament 1621, unless they proved that the father disponer, left a visible estate, not in personal bonds or money, (for that may be daily altered,) but in heritable rights, sufficient for payment of the pursuer's debt libelled, which was before found betwixt Mouswell and his Creditors, No 69. p. 934.—But the LORDS altered this afterwards, and only required a visible estate *quomodocunque*. See the MS. 4to A. 2. p. 59.

*Fol. Dic. v. I. p. 69. Fountainball, MS.*

No 58.

Where a person had exhausted his land estate by gratuitous infeftments, it was not sustained to bar reduction, that the granter had a sufficient personal estate at the time of granting. Creditors were found not obliged to explicate a latent moveable estate.

1688. July 20.

CHILDREN OF MOUSWELL *against* DUKE OF QUEENSBERRY.

THE Laird of Mouswell, who was owing several debts, disposed the fee of his estate to his son, in his contract of marriage, reserving power to burden the same with 18,000 merks, for providing the rest of his children, and doing his other affairs; and thereafter gave bonds of provision relative to the reservation in favours of eight children, extending in the whole to 10,000 merks, with a precept of sasine, whereupon the children were infeft safe. After the father's death, the eldest son granted bonds of corroboration to the father's anterior creditors, who thereupon comprised and were infeft, but not on the father's bond; and having raised reduction of the children's bonds of provision upon the act of Parliament 1621:

*Alleged* for the children:—That the pursuers were only creditors by a clause of relief of cautionry for the father, and *actio* was not *nata* till distress in the year

1666, whereas the children's bond and infestment was in the 1654; and there being two liferent infestments of annualrent in favours of two ladies, preferable to the creditors, which, with two appraisings for bygones thereof, did near exhaust the fee, and was not quarrellable upon the 1621.

1. THE LORDS, in respect the cautioners before distres had not interest to secure themselves in the estate, found the fee should only come *in computo, in quantum* it exceeded the liferent and appraisings in the year 1664; and found that the liferents ought to be computed according to the whole time they lasted.

*Alleged* for the children: That the father had a sufficient estate the time of granting their provisions, *viz.* a wood worth 10,000 merks, and several personal bonds and securities, the time of his granting the bonds of provision; and also an estate in land about Dumfries. It was *answered* for the creditors, That it was not in the father's power to secure children's provisions, or posterior gratuitous debts to strangers upon his lands, and leave his anterior creditors, for onerous causes, to seek their payment off the personal estate, which is subject to many accidents by irresponsal debtors, in the bonds, or the father's own escheat, which are not obvious to the notice of creditors, as the case of lands, which is discoverable from the registers; and for that same reason creditors ought not to be left to the cutting of woods, or to discuss controverted titles of lands; and though Mouswell was in possession of lands about Dumfries, his right was but a trust for the behoof of Mr Rome his brother-in-law, whose creditors had appraised it, and were in possession before the 1664; and 'tis just that creditors, in a competition with children, be placed upon the best and surest part of the estate.

*Replied* for the children:—The father having a sufficient personal estate or goods, the time of granting their provisions, cannot be said to be bankrupt; and they are bound to say no more in defence of their rights.

2. THE LORDS found, That the father could not secure the children's provisions by infestment upon the land estate, and leave the creditors to expiscate and seek for the moveable estate; and found, that the pursuer ought to allege and prove, that Mouswell the debtor, had a valid right to the lands about Dumfries, and was in possession thereof the time of granting the provisions; and that possession alone was not sufficient.

*Fol. Dic. v. 1. p. 69. Harcarse, (BONDS.) No 226. p. 53.*

1712. July 20.

KER against SCOT.

No 59.

In the computation of a separate estate, the LORDS refused to reckon any heritage which was tailzied with clauses irritant, and which the common debtor could not dispose of for payment of his debts. See the particulars *voce* TAILZIE.

*Fol. Dic. v. 1. p. 69.*