

No 4.
was known to
the defender,
and therefore
presumed
gratuitous.

death, and so he could not prefer such a debt, which he knew was invalid, to the pursuer's contract of marriage, whereof he could not be ignorant, she being then his father's wife, and he in the family; for defuncts on death-bed can neither prejudge their heirs, nor creditors who may come in place of the heir by diligence. It was *replied*, That there is here no reduction *ex capite lecti*, and the defender being cautioner for his father, he might justly satisfy the debt out of the right disposed to him by his father, albeit his father subscribed *in lecto*.

THE LORDS found, that the defender could not prefer this bond subscribed by the father *in lecto*, to an anterior creditor of the father's; and the defender's oath of calumny being taken, whether he had reason to deny that his father was *in lecto*, when he subscribed this bond, and he having acknowledged the same; THE LORDS found him liable for the sum contained in the apprising; but he offering to prove, that the bond subscribed *in lecto*, was for an anterior necessary cause,

THE LORDS superded extract till he should produce evidences for instructing thereof.

Fol. Dic. v. 1. p. 66. Durie, p. 60.

1681. February 1.

FRAZER *against* MACKIE.

No 5.
Found, that
a party hold-
ing an assign-
ation bear-
ing to be for
causes oner-
ous, was
bound to ex-
plain the
cause parti-
cularly, that
it might be
known whe-
ther it was
adequate.

WILLIAM FYFE having given an assignation to a sum of 5000 merks, due to him by Inchbrakie, first to George Mackie, and thereafter to Frazer of Balbedie; it was *alleged* for Frazer, that albeit Mackie's assignation was prior, yet it was without a cause onerous by a bankrupt, in defraud of him and others the bankrupt's creditors, for whose use he had obtained assignation; which being found relevant, Mackie deponed that the assignation was for causes onerous; but refused to depone what the cause was, or whether it was equivalent; and *alleged* that his assignation does bear causes onerous as well as Frazer's; and it being referred to his oath, that it was without a cause onerous; and not in these terms, 'that it was without an *equivalent* cause onerous,' he was obliged to depone no further than to deny the allegiance referred to his oath.—It was *answered*, That the reason of preference for Frazer being, that the cedent was bankrupt, and had no other means but this sum assigned to him, whereby he became wholly insolvent, and therefore could not without a cause onerous, and legal diligence, assign the bond to Mackie, therefore he ought to depone what was the cause of the disposition particularly, that the Lords may determine, whether it was equivalent, or whether the assignation was fraudulent.—It was *replied*, That this was no way competent to Frazer, till he had first instructed his posterior assignation to be for debts prior to Mackie's assignation, otherwise if Mackie's assignation were in whole or in part gratuitous, it is not fraudulent, but preferable to any posterior assignation.

THE LORDS found, That if Frazer instructed the cause of his assignation to be the common author's debts, anterior to Mackie's assignation, that Mackie should

depone particularly what was the cause of his assignation, that the Lords might determine whether the cause was adequate.

Stair, v. 2. p. 848.

No 5.

1681. *November.*

Mr DAVID WATSON *against* ROBERT MALLOCH.

A DISPOSITION being quarrelled on the act of Parliament 1621, it was *alleged* for the defender, That the disposition was made *ante contractum debitum*.

Answered: The disposition was in trust for the behoof of the common debtor; and the defender having deponed, That it was not in trust, but that it was for an onerous cause;

THE LORDS ordained the defender to condescend on the onerous cause, to the effect that the disposition being applied that way, might extinguish that cause, so as it might not compete with the other creditors, the common debtor being bankrupt; although if it had been *ex dono*, it could not have been quarrelled by his posterior creditor; but the condescendence of the onerous cause was to be instructed only by the defender's own oath.

Harcarse, (ALIENATION.) No 126. p. 25.

No 6.
Found that the disponee must condescend on the onerous cause, to be instructed only by his oath.

1682. *January 14.*

DICKSON *against* DICKSON.

GEORGE DICKSON having disposed his lands to Mr Robert Dickson, for certain great sums of money paid to him by Mr Robert, whereof he grants the receipt, and discharges him, &c. Then follows, *Therefore, and for other good causes and considerations, &c.*

THE LORDS found the adjection in the distinct clause of 'good causes and considerations,' did not weaken the first, 'of sums of money;' but found the disposition did import onerous causes, and not love and favour.

Harcarse, (ALIENATION.) No 127. p. 25.

No 7.

1696. *November 25.*

CREDITORS of Mr George Campbell *against* LORD NEWBYTH,
and OTHERS.

PHILIPHAUGH reported the concurring creditors of Mr George Campbell in the Cannongate, against Lord Newbyth, Drummond of Calander, and Sir Francis Kinloch of Gilmerton. The action was a reduction of their rights on the act of Parliament 1621, being heritable bonds after he was bankrupt; the qualifications whereon they insisted for inferring it were, *imo*, The *fama clamosa* and general report that he was broke; and *de facto* he was then L. 20,000 more in debt, than

No 8.
Prior to the act 1696, regarding bankrupts, the Lords refused to reduce heritable rights granted by a