No 60. only L. 6000 to his numerous children, and provided not the ſhare of the deceaſing to accreſce to the ſurviving, but to return to the heir; ſo that ſeveral of the bairns being now dead, there remains but 5000 merks of the 18,000 merks contained in the faculty, which is but a mean aliment to the children.

THE LORDS found this clauſe, as it was conceived, could not be exhauſted by the father's anterior debts, notwithſtanding of the clauſe of warrandice aforeſaid. *See* WARRANDICE. *See* PROVISIONS to HEIRS and CHILDREN.

Fol. Dic. v. 1. *p.* 69. *Stair, v.* 2. *p.* 720.

*** *See* This caſe from Fountainhall, MS. *voce* FACULTY.

1682. *December* 20.

No 61. LORD QUEENSBERRY and CREDITORS of MOUSWELL *againſt* the CHILDREN of MOUSWELL.

The above judgment afterwards altered; and it was found, that the liferents ſhould be reckoned according to the full time they had to run; and if ſubſiſting at the time of challenge, ſome additional conſideration ought to be made for the probable future duration.

See No 58. p. 932. where the liferents having expired, while the cauſe was ſtill in dependence, they were computed according to the full time they had ſubſiſted.

IN the competition betwixt the children and the creditors of Mouſwell, December 11. 1679, *ſupra*, the Lords having ſuſtained it relevant to elide a reduction, upon the act of Parliament 1621, of bonds of proviſion granted by a father to his children, that he, at the time of granting theſe bonds, had an eſtate ſufficient for theſe bonds, and all his other debts; and having ordained the creditors to condeſcend upon, and inſtruct what debt the father then had, and the children to inſtruct what eſtate he then had, there was a probation adduced as to both; and particularly it was found proven, that the lands of Mouſwell were worth L. 2300, by the computation whereof at ſixteen years purchaſe, it appeared, that the father had then a ſufficient eſtate; of which decreet, reduction was raiſed upon this reaſon, that the fee of the lands being, at the granting of the bond of proviſion, in the perſon of the granter's ſon, theſe lands could not be reckoned any part of the granter's eſtate; and ſeeing this reaſon did not concern the juſtice of the Lords decreet, but an error in fact, as to the explication in the probation, the Lords ought to turn the decreet into a libel, and to conſider only that part of the probation relating to the father's eſtate; and if the fee, which in the ſon's perſon before the bond of proviſion, be ſubduced, the father's eſtate will not anſwer anywiſe to his debt; ſo that the children's right ought to be reduced. And in the like caſes between the Lord Bargeny and Pinkel, and alſo between Stark of Killermonth, and one Heriot, where the probation led and adviſed was found, after extracting, to have been adviſed upon a miſtake, as not directly concerning the point to have been proven by the act, the Lords turned theſe decreets into libels. *See* PROCESS.

Anſwered for the children:—Decreets of ſeſſion *in foro* are the great ſecurities of people, and cannot be taken away by any pretence of miſtake or iniquity. *2do*, 'Tis probable, though the decreet did not expreſs ſo much, the Lords found the fee's being in the ſon's perſon did not alter the caſe, ſeeing it was liable to the creditors reduction, as being *poſt contractum debitum*, and ſo no impediment to hinder the father to grant bonds of proviſion.

Replied: If such mistakes were not remedied, it were in the power of the clerk and the party to obtrude impertinent probations, which meet not the act, which would be a dangerous preparative. 2*do*, The estate could not be reckoned the father's, who was denuded of the fee; and although the disposition to the son might be reducible, at the instance of the granter's anterior creditors, yet the father was thereby truly denuded, and they were not obliged to run the hazard or expence of a tedious process of reduction: For the father doing *omne quod poterat* to denude himself, must be considered as an effectual denuding *quoad* him and his children; and are not gratuitous bonds, though reducible as lucrative deeds *post contractum debitum*, at the instance of anterior creditors for onerous causes, computed always as a part of the granter's debt? No 61.

The Lords turned the decreet into a libel.

In the first process, there having been two liferents condescended on, as a part of the debt upon the father's estate, the Lords did formerly modify the old Ladies to five years annuity, and the young Ladies to seven, although, at the time of the advising, in *anno* 1679, these liferents had run for twenty-six years, and the liferenters were then alive; but now they were of opinion, that all liferents in this case should be reckoned according to the full extent of the burden upon the estate at the time of advising; and some consideration for the time to run after advising; for although, at the time of granting bonds of provision, it had been rational to have considered liferents according to the age of the party, seeing long life and a sudden death were equally contingent; but now, when the thing is certain, it ought to be considered as it fell out; and if the liferenter had lived but one year after the bond of provision, it ought now to be considered but as the debt of one year's annuity, and not five or seven. But this was not voted.

In this process, it was *alleged*, That although persons having some debt, and a considerable estate, might dispone or grant bonds *lucrative*, yet they ought not to dispose upon the secure, conspicuous, and accessible part of their estates *lucrative*, and leave anterior creditors to expiscate and find out the remaining part, which may be much more inconvenient for the creditors than what is disponed, and upon the credit whereof they lent their money; besides, there ought not to be an exact compensation betwixt a debtor's estate and his debt, the time of his disponing *lucrative*, or granting such bonds; but there ought to be a large reserve to answer the hazards and charges that creditors are frequently put to, in recovering their debts after such fraudulent deeds, and the estate ought likewise to be conspicuous and accessible by the anterior creditors. But there was no occasion for pronouncing interlocutor upon this point.

Thereafter the children *alleged*, That their father could not be said to be bankrupt, seeing he must be repute to have had the fee of the estate of Mouswell at the date of their bonds of provision, seeing the creditors were not prejudged by the disposition to the son, which was reducible at their instance upon the act 1621. 2*do*, That he had a liferent by reservation, of a wood worth 1000 merks.

No 61.

3*tio*, That he died infeft, and in poſſeſſion of an eſtate about Dumfries, worth 12,000 merks *per annum*. 4*to*, That he had a debt due to him by Hampsfield, and another by my Lord Herries, which were good debts in the year 1654, at the time of the granting the bond of proviſion, though now they be grown worſe by the creditors neglect.

THE LORDS found, That the father having diſponed the fee, it could not be looked upon as part of his eſtate. 2*do*, That the father's liferent, though by reſervation, gave him only right to uſe the wood for neceſſary uſes, and repairing of houſes, but not to ſell the ſame, unleſs the wood had been in uſe to be diſpoſed of, and divided by yearly haggs. 3*tio*, That the lands about Dumfries, which belonged to one Rome of Dalſwinton, and were appriſed from him by his own creditors, and peaceably poſſeſſed by them for many years, were not a clear and acceſſible eſtate, and ſo not to be conſidered as a part of the condeſcendence. Here there was a great preſumption that old Mouſwell's right to theſe lands was but a truſt in his perſon. 4*to*, That the debtor having been a man of conſiderable fortune when his debts were contracted, he ought not to have ſecured his younger children's proviſions upon his lands, by a reſervation in the eldeſt ſon's infeftment of fee, and left his creditors to ſeek after moveable debts due to him, moſt part whereof are now deſperate, without any neglect of the creditors, who having only the benefit of a clauſe of relief as cautioners, could not do diligence againſt any part of the debtor's eſtate, till they were diſtreſſed ſeveral years after his deceaſe; beſides, ſome of theſe debts are confirmed by the children in their father's teſtament, and uplifted; and theſe bonds not being a viſible and acceſſible eſtate, the Lords preferred the creditors, and reduced the children's right, in ſo far as it did prejudge anterior creditors. *See* PROCESS. *See* REDUCTION of DECREETS.

Harcarſe, (DECREETS.) *No* 402. *p.* 107.

SECT. VIII.

Of Second Gratuitous Alienations of the ſame Subject.

1662. *July* 23. LORD FRAZER *againſt* PHILLORTH.

No 62.
A firſt diſpoſition with laſt infeftment, for onerous cauſes, preferred to a ſecond diſpo-

IN the declarator of property of the barony of Cairnbulg, at the inſtance of the Lord Frazer, againſt the Laird of Phillorth *, it was *alleged* for the defender abſolvitor, becauſe the purſuer's father and grandfather's infeftment is upon the reſignation of Frazer of Doors, *ita eſt*, Frazer of Doors had no real right in his perſon, never having been ſeaſed, at leaſt there is certification granted againſt Doors's laſine, in the improbation at the inſtance of the defender,

* Stair, v. 1. p. 128. *vide* JUS TERTII.