

allege, that they, or their predecessors, were infeft in ward lands, not mentioned in the saids retours : and appointed the President to go to the place where the charter chest is, receive the keys from the tutor, open the same, and show the saids evidents to the Earl of Rothes.

*In presentia.*

*Fol. Dic. v. 1. p. 281. Gilmour, No 10. p. 8.*

No 4.

\* \* \* Stair reports the same case :

THE Earl of Rothes, as donatar to the ward of the Countess of Buccleugh, and the said Countess for herself, pursued the Tutors of Buccleugh, for exhibition of the charter-chest, and whole evidences and writs therein, that the donatar may have inspection thereof, to the effect he may know what lands are ward. The tutors compeared, and disclaimed the pursuit, at the pupil's instance, and *alleged, 1mo*, No process, till the countess were called. *2do*, The libel is not relevant to conclude inspection of all writs whereunto the donatar can pretend no interest. *3tio*, *Non relevat* for any writs ; because no body is obliged *edere instrumenta contra se.* *4to*, If there were any ground for this pursuit, the lands holden in ward behoved to be particularly libelled.

THE LORDS repelled the first defence, in respect the countess was in *processu*, and found the second defence to restrict the inspection only to the countess and her sister and father, their retours, and warrants thereof, and no more ; unless the pursuer condescend particularly of other ward lands, and appointed one of their number to have inspection of the charter-chest, who should shew the procurators of either party such of the writs as they found were ward.

*Stair, v. 1. p. 71.*

1707. November 25. KINALDY against PATON.

JANET FORBES Lady Kinaldy, and Isobel Paton her daughter, pursue an exhibition and declarator against John Paton of Kinaldy, her husband's son of the first marriage, and Paton of Grandholm, &c. on this ground, that by her contract-matrimonial her husband provided her to a liferent-annuity, and her daughter to ten thousand merks ; but some while before his death, he was prevailed on by Paton of Grandholm, and others, to make fraudulent conveyances of his whole sums of money and other effects, in favours of his apparent heir, or to others, without onerous causes, for his behoof, whereby the provisions to her and her daughter, in her contract of marriage, were wholly evacuated and disappointed, leaving nothing to implement or fulfil the same ; and therefore craved they might depone upon these interrogators : What writs they have, granted by Kinaldy, either to themselves, or third persons in trust for the apparent heir's behoof ? *2do*, If they were witnesses to any such papers, or suspect where

No 5.

A wife and children of a marriage craved exhibition of all writs in the defender's hands granted by the defunct husband, in prejudice of their contract of marriage. The Lords found, that the pursuers being personal creditors, who had not affected the subject, could

No 5.  
call for no  
writs but  
those made in  
their own fa-  
vour.

they are? *3<sup>tie</sup>*, If they know any writs granted by him, conveying his estate either heritable or moveable, without adequate onerous causes, and where they are? *Alleged*, The pursuers being only personal creditors on the contract of marriage, they had no interest by exhibition, to call for any writs but what were conceived in their favour, or for their behoof; but to call for writs granted to third parties who are not in the field, nor cited in this process to defend their own right, was a most exorbitant demand, contrary to all form, and the known stile of exhibitions, which by the title *Dig. ad exhibendum*, is defined to be an action preparatory to a real right in the subject acclaimed, and accession thereto, and which the very etymology of the word, from *ex et habeo*, implies; and *Stair lib. 1. tit. 7.* observes, that it arises from a right of restitution and delivery, and so necessarily presupposes a *jus ad rem* in the subject. *2<sup>do</sup>*, They have no interest to call for writs conceived in favours of third persons, unless they had affected the subject alleged to be in their hands *habili modo et in terminis juris*; that is by confirming it, if moveable, and adjudging, if heritable. *Answered*, These conveyances now sought to be concealed and kept in the dark are manifestly in defraud of her contract, and no nation in the world has more cautiously provided against such tricks and machinations than we have; for if it be a deed in defraud of anterior creditors, then the *actio rescissoria pauliana* on the act of parliament 1621 takes place; if it be in favours of apparent heirs to the prejudice of creditors, then the act 1661 and 1695 obviate such contrivances; and here the apparent heir has renounced in a process against him on the passive titles, and so has no more interest to defend; and among the Romans, when actions wanted a proper name, and arose *ex facto*, the Pretor gave them a formula, called *actio præscriptis verbis*; and it is impossible they can make a title to affect them by a suitable diligence till they be exhibited, and they know what they are; and this action is preparatory thereto. *Replied*, Inquiries and expiscations to discover fraudulent conveyances, why not; but it must be done in terms of law, and not by a Spanish inquisition, confounding our stiles and bringing the rights of third parties *in campo*, who are not called to defend themselves. This is a charge *super inquirendis* with a witness, and the pretence of favour is not *nomen juris*, to subvert our known established form of law; but it is a strange conclusion to call for rights whereto you have no right, and to seek them declared to belong to you, and to pay in the sums they have uplifted by virtue thereof. THE LORDS were divided on this point, and the plurality thought, that albeit all methods should be taken to detect and punish fraud, yet it must be done in a regular way, without subverting our known stiles and forms, and therefore found, in this case of a personal creditor not having affected the subject, that the interrogators could not debord from what is asked in a common process of exhibition, viz. to depone on the having of writs conceived in their own favours, or others for their behoof, and no further.

*Fol. Dic. v. 1. p. 281. Fountainball, v. 2. p. 396.*