1694. *February* 2. CHARLES MACKEUEN *against* COLIN CAMPBELL, Sheriff-Clerk of Argylshire.

THE Lords found, where one had made two dispositions, he who had the second, could not reduce the first on the Act of Parliament 1621 ; alleging that he was preferable, being a stranger, and the first was *inter conjunctas personas*, and so presumed to be without an onerous cause, unless it were *aliunde* proven than by the narrative of the disposition ; seeing the first could not be said to be done in defraud of the second right, which was not then in being, and the Act of Parliament is only competent to an anterior, and not to a posterior creditor. And the decisions, *12th February* 1669, *Pot ; 2d July* 1673, *Street ; 4th December* 1673, *Ried ;* and *24th January* 1677, *Blair*,—were in the case of fraud, simulation, and latency: which could not be so qualified here.

Vol. I. Page 601.

1694. *February* 8. JOHN MAITLAND *against* SIR ROBERT MILN, and SIR GEORGE HAMILTON of BARNTON.

IN the *cessio bonorum* pursued by John Maitland against Sir Robert Miln, and Sir George Hamilton of Barnton ; after the Lords had advised his oath, and were liberating him, the pursuers offered to aliment him. The Lords refused their offer :—1*mo*. Because it should have been proponed at the litiscontestation. But of this many doubted. 2*do*. That it did not appear he had made any fraudulent conveyances, and all the dispositions he had given were only to thir pursuers themselves ; and in Murray of Keilor's case, and some others, the Lords admitted the offer of alimenting only for a time, till they could discover what rights and conveyances the bankrupt had made to his creditors' prejudice.

Vol. I. Page 601.

1682, 1683, 1684, 1688, *and* 1694. The MARQUIS of QUEENSBERRY, and Others, Creditors of DOUGLAS of MONSUAL or MOUSWELL, *against* MRS ELIZABETH DOUGLAS and the CHILDREN, &c.

1682. *December* 20.—THE Marquis of Queensberry, Treasurer, and the other creditors of Douglas of Monsual, their reduction against the children of Monsual, and Mrs Currier, was this day advised.—The Lords reduced and loosed their own decreet *in foro*, dated the ———— day of December 1679, preferring the children, after a most solemn and contentious debate ; and turned it to a libel: because the probation was disconform, and not applicable to the interlocutory terms in the act of litiscontestation ; which bore, That it was found relevant for the children to prove that their father had a sufficient visible estate standing in his person, the time of his granting their bond of provision ; whereas the probation run only upon an estate, which both their father, the son, and his father, the children's goodsire, had betwixt them ; and that not so much at the

time of exercising the faculty, by granting the said bond of provision, which was the time principally to be considered for his solvency, but more at the time of the reservation, *viz.*—his son's contract of marriage, in which it was reserved: and, therefore, found that it was not proven that the son had a competent and opulent estate the time of granting the bond of provision; and so reduced their former decreet, and the bond of provision, on the Act of Parliament 1621, as done in defraud of creditors: and thought, albeit it were unjust to hinder parents, not inhibited or at the horn, who had fortunes, to provide their children in moderate provisions, (else all commerce would be stopped,) yet when eventually it happened, that either his creditors or children behoved to want, it were much more reasonable the children should be losers; and here, in such a case, there needed not be *fraus in consilio*, but only *in eventu, ubi titulus erat mere lucrativus;* as even was found in the *actio Pauliana revocatoria*, introduced by the Roman law; where, in donations, the receiver, though not *particeps fraudis*, was put to restore to creditors; but, *in casu onerosa*, they required expressly *animum fraudandi*, and that the receiver should be *doli conscius.*—See Durie, *6th March* 1632, *Garthland, et Bouritii advocat.* cap. 34, where, both from the civil law, and the customs of Friezland, the reviewing of decreets is allowed, *vel per modum revisionis vel supplicationis, intra biennium;*—Though this renders the sentences of the Lords of Session very ambulatory, and an uncertain security to the people; and derogates much from their sovereign authority, which should terminate somewhere, and not review their own sentences after they have decided fully both on relevancy and probation; especially it being prohibited to quarrel their sentences upon iniquity, or *super eisdem deductis*, or *super competentibus et omissis;* and *publicatio testimoniorum* being refused by our custom, otherwise *immortales erunt lites et nullus erit jurgiorum finis.—Vide supra, 8th December, Paton;* and Durie, *20th January* 1631, *Gordon;* where the Lords religiously adhered to decreets *in foro.* And, on the *30th June* 1675, in a question betwixt *Stewart* and *Clark*, the donation to a wife, otherwise provided, was sustained, because the husband had then an opulent estate, and was not *obæratus.*

As to the wood of Monsual, valued to 10,000 merks, "The Lords found it could not be reckoned the father's estate; because, he being only liferenter, *omnis usus fructus est salva rei substantia*, and *silva cædua est pars fundi*, and belongs to the fiar; and the most the father could claim of it, would only be *ad usum necessarium prædii et familiæ suæ et colonorum;* or if it was divided into haggs, such a proportion of it as was cut down in his lifetime."—*L.* 30. *D. de V. S.*——Some imagined a difference betwixt a relict liferentrix, and a father, *in peculio profectitio*, disponing the fee with reservation of his own liferent, *cujus usufructus debet esse pinguior.* Sir George Lockhart hectored that doctrine of visible and invisible estates, and of estates accessible to creditors for the subject of their discussion, and estates inaccessible by liferents and other incumbrances; and that creditors ought not to be put to the expiscation of their debtors' conditions, on precise arithmetical proportions, and on such fantastical airy distinctions, else their condition should be miserable. And Sir George further affirmed, it was against all law and the customs of other sovereign judicatories abroad, that the Lords of Session should tie up themselves not to review their own decreets upon iniquity, or mistakes and errors in advising relevancies or probations, or in misapplying them, or in wrong extracting; and that it was no

reproach to them so to do; seeing *humanum est errare, et satius est id corrigere quam in eo perseverare:* and some made a subtile distinction, of committing iniquity, or falling by inadvertency into an error; and that the Lords' sentences might be reviewed on this last head, though not on the first. Sir George further moved and proposed, that the Lords, by an act of sederunt, might bring back the stream of their fluctuating decisions to the current of the Act of Parliament 1621, that creditors might not be left arbitrarily loose. *Vol. I. Page* 202.

1683. *March* 28.—Mrs Douglass, and the bairns of Monsuall, against the Marquis of Queensberry, and the other creditors, (*vid.* 20th December 1682,) reported by Castlehill. The Lords admitted to their probation what estate old Monsuall had the time of the bond of provision; but found the condescendence on the houses in Dumfries not sufficient; seeing they are presumed to be only in his person in trust, and that they were possessed by another's creditors.

Vol. I. Page 230.

1684. *March* 14 *and* 15.—The Lords, having advised the probation led in the cause of the Marquis of Queensberry, and the creditors of Monsual, against the bairns of Monsual, mentioned 20th December 1682,—they found no visible affectable estate in the father's person, at the time of his granting the bond of provision to his bairns, proven; and therefore preferred the creditors.

Vol. I. Page 281.

March 20.—The High Treasurer, and other Creditors of Monsuall, against Mrs Douglas and the children, mentioned 14th current, was again debated and decided;—preferring the creditors; and finding there was no such visible and accessible estate proven to be in the father's person, at the time of his granting the bond of provision to his bairns, as might sustain this bond; and, if there were any, it was juster that his children should be put to affect it and seek it in than his creditors, who did not know his condition so well.

Vol. I. Page 283.

1688. *July* 4.—The Children of Mouswall's reduction, against the Duke of Queensberry, of his decreet *reductivè*, mentioned 20th March 1684, was advised. The Lords had ordained the pursuers yet to condescend and prove a clear visible estate which the father had at the time of the faculty; and Queensberry to condescend on the debts he has paid, and the eases he got: And, accordingly, they having repeated the probation formerly adduced, the Lords, on the 20th July, found it was all one whether the visible estate was in the father's person or the son's; because the son, *præceptione hæreditatis*, was liable: but found the wood, the personal estate and debts, and the lands about Dumfries, were not such a clear and accessible estate, or such a subject of discussion, as that creditors were obliged to rely on; and that the value and existence of the estate must not be considered as it was at the time of the contract of marriage or bond of provision, but as it stood when they who were only cautioners were distressed, and made payment; they not being so immediately concerned till then. Thus Mrs Douglas gained the first point, and lost the rest.—And, to clear this point for the future, the President was resolved to make an act of sederunt. *Vol. I. Page* 509.

1694. *February* 6.—The Lords advised the last point of the debate between Elizabeth Douglas, and the other Children of Monswal, and the Duke of Queensberry,—Whether the payment of the price of the lands made by him to the several creditors was *bona fide*, and ought so to exoner him as that she must recur against them;—or if the Duke should be personally liable to her, and have

repetition against them upon the warrandice of their several dispositions to him. And the Lords now altered their former interlocutor, finding she had immediate access against the Duke for that part of the price whereto she was preferred; and found the Duke was *in bona fide* to pay: seeing he had raised a multiplepoinding, and was preferred for his own debt; and the rest of the creditors were ranked, and he had paid them conform to their ranking, and this decreet was not quarrelled for some time. And the case of *Montgomery* contra *William Wallace*, 19*th July* 1662, was cited: and the Lords remembered, that last winter, in *James Reddoch's* pursuit *contra* the *Lady Rothes*, the Lords sustained voluntary payments, in the terms of their back-bond, as *bona fide* made.

Vol. I. Page 601.

1694. *February* 6. THOMAS OGILVIE of CORDAUCH *against* JAMES OGILVIE of NEWTON of BELLERTY and ALEXANDER OGILVIE of POOL.

THIS was a reduction of a disposition, on this ground, That it was only conditional, by one brother to another, without adequate onerous causes, and only to take effect if the disponer should die without children; and so the conception of the clause was alleged to be suspensive; that the dominion and property was not conveyed till it appeared that the condition did not exist; and being only of the nature of a tailyie, and destination of a substitution, it did not so divest the disponer but he might contract debt, and thereafter do other rational deeds to affect these lands. But the Lords, having read and considered the disposition, they found it conceived in resolutive terms, *viz.* that if the disponer should have children of his own body, then the disposition should be void and null; and found any debt he contracted afterwards could not affect that land; and therefore reduced the adjudications led thereon for the same: though sundry thought it was not the disponer's meaning so to incapacitate himself, but only the ignorance of the writer, who strained it in that manner, not knowing the difference betwixt the two clauses. *Vol. I. Page* 602.

1694. *February* 6. BLAIR and ISOBEL MITCHELL *against* PATRICK ANDERSON.

THE case between Blair and Isobel Mitchell, his assignee, against Patrick Anderson in Perth, was reported. The Lords found the clause in the contract of marriage, providing all goods, moveable and immoveable, to the longest liver, comprehended the heritable bond of £100 Scots, whereupon infeftment had followed; seeing, with us, sums heritably secured were reputed *inter immobilia;* and we had not received that distinction made in the common law, of three species, *bona mobilia et immobilia, et nomina debitorum.* And as to the *second* defence, That she behoved to be served heir of provision to her husband ere she could have right to the sum,—the Lords found she needed not; because the words ran that it should fall and be disposed of by the survivor. But, seeing the debtor was the defunct's nephew, and nearest of kin, the Lords allowed him either to give her a precept of *clare constat,* whereon she might be infeft,