1762. *February* 26.

The CREDITORS of Sir ARCHIBALD COCKBURN, Elder of Langton, *against* The CREDITORS of Sir ARCHIBALD COCKBURN, Elder, and Sir ARCHIBALD COCKBURN, Younger of Langton.

No 49.
A disposition in security, and for relief of debts in general, sustained as to debts contracted prior to its date, though not particularly enumerated.

IN October 1688, Sir Archibald Cockburn of Langton, heritable proprietor of the lands of Borthwick and Simprim, *&c.* granted to his son, Sir Archibald, junior, a disposition of these lands, for security of all debts for which he and his son were mutually bound.

The family affairs having fallen into great disorder, Sir Archibald and his son became utterly insolvent in 1690. A process of ranking and sale was commenced in 1694; but, by many unforeseen accidents, and the attempts of the friends of the family to purchase up the creditors' claims, the estate was not brought to a sale till 1757; during which period, it remained under the sequestration of the Court. Those creditors who were secured by preferable infeftments of annualrent, had their claims fully discharged at the conclusion of the ranking and sale; and the estate, from change of time and improvement, having yielded a much greater price than was expected, there remained no less than L. 6000 Sterling, which became the subject of competition between the creditors of Sir Archibald, elder, singly, and those creditors to whom both father and son were mutually bound.

The proper creditors of Sir Archibald, elder, brought a reduction of the deed 1688, upon various grounds, which the Court confined to these three distinct questions: '*1mo*, Whether the disposition by Sir Archibald the father 'to his son, (being only for relief of debts contracted, without mentioning any 'particular debt,) with the charter and sasine following on it, vested any real 'right in Sir Archibald the younger? *2do*, Supposing Sir Archibald the elder 'insolvent at the date of the disposition 1688, Whether that disposition, not 'being *omnium bonorum*, was reducible as *in fraudem creditorum?* *3tio*, Whether, *post tantum temporis*, it was competent to the pursuers to insist in this 'ground of reduction, especially after the judicial proceedings in the former 'ranking, relative to the estate of Langton?'

On the *first* of these points, *pleaded* for the pursuers; A deed of this complexion is totally inconsistent with the security of the lieges, and repugnant to that confidence which, from the time of their constitution, has been afforded by the records in all transactions connected with heritable property.

In this matter, the Legislature has shown the greatest anxiety, by appointing particular registers, in which all the diligences, burdens, and limitations, affecting heritable rights, were to be specially and distinctly ingrossed and enumerated. A particular register was appointed for the abbreviates of all adjudications, in which the names of debtor and creditor, the debt for which they are led, the date of the executions, and the names of the witnesses, messenger,

and clerk, along with the superior's, must be inserted. In order to make this record productive of all the beneficial consequences for which it was intended, the precise sum and extent of the debt, for which the adjudication was brought, must appear; for, it is of little consequence to a creditor or purchaser to discover, that an estate is affected by legal diligence, if he is not, at the same time, informed with what consequences it must be attended, and what sums are real burdens upon the property of the person with whom he contracts; as, in proportion to their extent, his security in either of these two characters must be diminished or increased. The record of inhibitions requires the same accuracy and precision; and a diligence of this kind, without any particular mention of the sums for which it is led, has been found ineffectual, and no sufficient reason to bar others from dealing with the persons inhibited; see INHIBITION. Upon the same principles, a general deed of entail of all the maker's lands, however binding upon the maker and his representatives, is void and ineffectual as to third parties. In the same manner, a right of reversion, couched in general terms, as to the sums for which the lands should be redeemable, could never be sustained, though it had regularly been recorded in the register of reversions; and the greatest Lawyers, particularly Dirleton and Sir James Stewart, have given it as their opinion, that a right of redemption, upon payment of all sums that should be owing by the granter, would be altogether ineffectual against singular successors; as the security of the lieges demands, that the precise sum shall be mentioned for which the lands can be redeemed. A general heritable bond, also, without any particular mention of the sums for which it is granted, will confer no real burden or right of preference upon the lands; and yet such bond would not be attended with so many inconveniences, as the disposition in security under reduction; for a general discharge of this bond by the creditor, upon record, would be sufficient evidence that it was actually extinguished. But, if a deed granted in security of sums jointly contracted to a number of creditors, whose names do not appear upon record, can be made real by infeftment, no discharge or renunciation whatever can afford sufficient security against a number of claims, all of which are concealed, and most of which there is no possible way to discover. No 49.

But, without resting the determination of this point upon general observations, the positive resolutions of the Legislature itself may be urged in favour of the pursuer's plea. By the act 1696 it is provided, 'That all infeftments 'granted for relief of debts, not only presently due, but what should be after-'wards contracted, shall be of no force as to any such debts that shall be found 'to be contracted after the sasine or infeftment following upon said disposition.' Now, surely the provision of this statute, with regard to future contractions after the infeftment, is equally strong and applicable to debts contracted in general, though the period of their constitution was prior to the infeftment following upon the disposition; for it makes little difference, either in point of

No 49. security or intelligence, whether a deed is granted for relief of debts to be contracted, or for such as are really contracted, but not particularly mentioned and described; both are equally dangerous and fatal to that security which ought always to accompany every transaction relating to heritable property; both come equally under the prohibition and spirit of the statute, and both ought to be equally rejected. Vague and indefinite burdens are contrary to the spirit of law, and have always been discouraged. And this doctrine was thoroughly established, as far back as 1710, in a question between the Creditors of Sir Alexander Murray of Stanhope and Mr Douglas of Broughton, See APPENDIX.

*Pleaded* for the defenders, the Creditors of Sir Archibal elder and younger jointly; By the feudal law of this country, every debtor is empowered to give a pledge of his estate to his creditors, or to impose upon it real burdens, calculated for their security. It is altogether inconsistent with the spirit of our law to say, that a debtor should be so circumstanced, as only to have it in his power to grant dispositions in security of debts actually due, while, at the same time, he is deprived from making any provisions for the payment of his future contractions. The same liberty was allowed in both cases by the most antient constitutions of this country; and, though the method of granting dispositions, in security of debts to be contracted, in process of time was found to be attended with bad consequences; yet the restraints of the Legislature, imposed contrary to the original spirit of the feudal law, ought to be confined entirely within those bounds which it has particularly described. The statute 1696 can be of little service to the pursuers in this question: It only annuls securities for debts not actually contracted before the time of rendering the burden upon the lands real by infeftment: But there is not a word tending to show the invalidity of general securities, granted for debts not particularly mentioned, but actually contracted previous to infeftment. If, therefore, there is no prohibition in this statute, with regard to deeds of the same nature with the one now under challenge, it would be extremely hard to put such an extensive interpretation upon its words, especially when the disposition 1688 was granted for security of debts in general, that had been actually borrowed a great number of years before the statute 1696 had a being.

With regard to the *second* point, " Whether the disposition 1688, not being ' *omnium bonorum*, was reducible, as *in fraudem creditorum*;" the pursuers mentioned, That, if any deed of a debtor was ever determined to be fraudulent and collusive, the present, above all others, most justly merited those appellations. That the evident design of it was to cut out all the proper creditors of Sir Archibald the elder, while, at the same time, it was entirely impossible to protect any subject, belonging either to father or son, from the diligence of the son's creditors; because the father was always jointly bound with him: So that a surrender of all the son's estate to the father would have been entirely ineffectual; while, at the same time, this disposition by the father to the son was

an absolute and universal exclusion of the father's creditors, properly so called; and, by this means, there might have been a reversion out of both estates to the son, which the father's creditors could not reach. But further, this disposition appears not only fraudulent and unfair, from the suspicious circumstances with which it is attended, but it is expressly declared to be so by the statute 1621, the first clause of which provides, 'That all alienations made by a debtor to a 'conjunct or confident person, without true, just, and necessary causes, and 'without a just price really paid, are null and of none avail, at the instance of 'the true and just creditors.' According to the construction put upon this statute by practice, it is requisite that the onerous cause of the deed should be proved, otherwise than by its own narrative; but, in this case, there is no other evidence of the onerosity of the disposition; and it certainly can never be pretended that there was any necessary cause for granting it in disappointment of the father's own creditors. It is of little significancy, whether the just and lawful creditors had used any diligence or not, as it has been repeatedly determined, that no debtor or bankrupt has it in his power, by a palpable act of injustice, to gratify any creditor at the expense of another; and, in this case, there were the strongest presumptions of Sir Archibald's being insolvent at the date of the disposition, that he knew himself to be so, and granted this security to his son with the most fraudulent intention. No 49.

In *answer* to these arguments, the defenders *maintained*, That there was no proof of Sir Archibald's insolvency earlier than the year 1690: That, if dispositions, such as the present, at so great a distance of time, were to be reduced, in consequence of a nice scrutiny of people's circumstances, which were neither challenged nor suspected when such deeds were granted, it might be attended with the most fatal and dangerous consequences; and that, at any rate, such alienations as are mentioned in the statute, are only reducible when made in defraud of prior creditors.

With regard to the *last* point, "Whether, *post tantum temporis*, it was competent for the pursuers to insist in this ground of reduction, especially after the judicial proceedings in the former ranking;"—the pursuers *maintained*, That every consideration was clearly in their favour; that their rights had been produced as far back as 1694, when the first ranking commenced; and that this production necessarily reserved to them every plea competent in law against the rights of the other competing creditors: That, so long as these rights were in the field, and the process of ranking and sale in dependence, however many interruptions might have obstructed its completion, yet still their rights were preserved entire and absolutely secure against prescription: That, allowing the assertion of the defenders to be true, that the rights of the pursuers had not been produced in the ranking till 1738, after the years of prescription had run; yet it could not be denied that they were produced in 1695, in a process of poinding the ground, at the instance of Sinclair of Carlourie, and that the production of rights in a poinding of the ground must have the same effect to inter-

No 49. rupt the prescription as if they had been produced in a process of ranking, the only difference between the two being, that the subject of competition is greater in the one case than the other.

The defenders *answered*; That the weight put by the pursuer upon such a general of rights was altogether unprecedented: That an implied challenge or reduction could never operate further than an express summons of reduction, raised upon general grounds; and that it had been decided very lately, in the case of Arnot *contra* Paterson, (*see* PRESCRIPTION,) that a summons of reduction does not interrupt prescription, as to grounds not particularly libelled: That, in the present case, the implied reduction was only general; and, consequently, could be in no better situation than an express reduction conceived in the same terms: That every person must be informed upon what side he is to be attacked; and that a general challenge can never enable him to prepare for his defence: That a reduction *ex capite inhibitionis*, *ex capite lecti*, or upon any other particular ground, could never entitle the person, after forty years, to challenge the deed upon the act 1621, or any other ground, not particularly libelled: That the production in the process of poinding the ground could never have the effect contended for by the pursuers, as a competition about the rents of an estate differs widely from a competition about the price of it after it is sold: That, during the whole process of ranking, decreets of preference had been pronounced and extracted, upon the supposition that the disposition 1688 was a valid and effectual deed; and, therefore, it would be extremely severe to annul proceedings which were esteemed regular and formal, and which cannot be denied the force of a *res judicata* against the plea of the pursuers.

"THE LORDS found, That the disposition granted by Sir Archibald Cockburn the elder of Langton, to his son Sir Archibald, in the year 1688, for security and relief of all engagements the son had come under for the father, and specially declaring, That all bonds, wherein they stood jointly bound, were the proper debts of the father, upon which disposition infeftment followed, was a valid and legal security to the son upon the estate disponed, for his relief of all debts wherein he stood jointly bound with the father, preceding the date of the disposition, notwithstanding the particular debts were not specified; and that Sir Archibald the son was thereupon preferable to all the creditors of the father, whose rights were not made real by infeftment before the date of the infeftment taken by Sir Archibald the son, and that to the extent of the debts aforesaid, for which the infeftment for security and relief was granted; and, in respect the respondents, the creditors of Sir Archibald the father only, did not allege that the estate conveyed by the father to the son exceeded in value the extent of the debts for relief of which the son was infeft, found, That they could not draw any part of the price of that estate; and, in respect they had no interest to challenge the preference established by the decreet of ranking, upon the footing of the infeftments granted by Sir Archibald the younger, found, That the

said infeftments were valid and effectual rights to the creditors; and also found, That an enquiry into the situation of the circumstances of Sir Archibald Cockburn the elder of Langton, at the date of the disposition made by him to his son in 1688, was not competent *post tantum temporis*." No 49.

For the Creditors of Sir Archibald elder and Sir Archibald younger, *Ferguson*.
For the Creditors of Sir Archibald elder, *Garden*, *M'Queen*.

*A. W.* *Fol. Dic. v. 4. p. 65. Fac. Col. No 84. p. 184.*

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1765. *February* 15. M'KINNON *against* Sir JAMES M'DONALD.

No 50.
The deeds of the actual heir affect the estate, altho' he be afterwards obliged to denude.

THE estate of Mackinnon stood disponed to John Mackinnon younger, and the heirs-male of his body; whom failing, to any other son of the body of John Mackinnon elder; whom failing, to John Mackinnon tacksman of Mishinish. Upon the death of John Mackinnon younger without issue-male, Mishinish served as nearest and lawful heir-male of provision, and was infeft. Some years after, a son, Charles, was born to old Mackinnon. Charles having insisted against Mishinish to denude, the LORDS found, That the pursuer had right to the estate of Mackinnon from the time of his birth, and that the defender was obliged to denude in his favour. Afterwards, Charles having obtained himself served heir of provision in special to his brother deceased, brought a reduction for setting aside the sale of the lands of Strath, a part of the estate of Mackinnon, which Mishinish, during his possession, had sold to Sir James Macdonald, who was already infeft. *Pleaded* in defence, 1*mo*, That as Mishinish was rightly served, so all his onerous acts and deeds must be effectual against the estate; 2*do*, That the obligation to denude was merely personal, and could not affect the right of a third party, who purchased *bona fide* upon the faith of the records, while the right of Mishinish subsisted. *Answered* to the *first*, That Mishinish's right was merely conditional, and defeasible in a certain event, in the same manner as rights to lands given in a donation *inter virum et uxorem*, which, though indefeasible, *ex facie*, are affected by an implied condition, upon the existence of which they become void, as if they had never existed. A putative heir possesses under a similar condition; and the consequence is, that as soon as the true heir appears, his infeftment becomes void, and every burden flies off, which he has imposed upon the estate. *Answered* to the *second* defence, That the obligation of Mishinish to denude was not personal, but was an inherent condition in his right. Nor has this doctrine any tendency to weaken the security of the records; for unless in the case of an entail, the law promises no security to a purchaser from looking into the last infeftment, whether it proceeded on a charter or a retour. If it proceeded on a retour, as in this case, it is incumbent on him to look into the destination in the charter; and he cannot be secure, if the service be not agreeable to that destination, or