children, whether the creditors' bonds be prior or posterior thereto; as in the cases of Street and Mason, 27th July 1669, No 111. p. 1003; Reid *contra* Reid, 4th December 1673, No 33. p. 4925; Graham *contra* Roome, 24th January 1677, *voce* PROVISION to HEIRS and CHILDREN; and Napier of Tayoch *contra* Irvine, 17th June 1697, IBIDEM. There was another allegeance for Daniel, That the contract of marriage providing 4000 merks, was fulfilled to the children *aliunde* without this disposition; and the clause of conquest could not sustain it, for that is always to be understood *deductis debitis*. THE LORDS, in this case, preferred the creditors to the children, without entering on that last allegeance. No 238.

Fol. Dic. v. 2. p. 155. Fountainhall, v. 1. p. 794.

1701. *July* 24. Sir ROBERT CHIESLY *against* THOMAS CHIESLY.

No 239.
Found in conformity to Inglis against Boswell, No 236. p. 11567.

PHILIPHAUGH reported Sir Robert Chiesly late Provost of Edinburgh against Thomas Chiesly now of Dalry. Walter Chiesly of Dalry, in John his eldest son's contract of marriage with Margaret Nicolson, disponing the lands of Dalry to him, reserves a faculty to burden the estate with the sum of 10,000 merks. In 1676, he exercises this faculty, and grants an heritable bond for that sum to Robert Chiesly his youngest son, and at the foot of it there is a note wrote, that he had given sasine to his son *propriis manibus*; but this was never extended nor registered, and so was null. In 1679, in a transaction betwixt him and his eldest son, the father gives him a full and ample discharge and renunciation of that faculty, and reserved power of burdening the lands with the said 10,000 merks, without taking the least notice of his having exercised the said power in favour of the said Robert. He now pursues Thomas, as representing his father, for payment of that sum with its annualrents. *Alleged*, I have raised reduction of the bond; 1*mo*, Because *debitor non præsumitur donare*; and Walter had given Sir Robert a disposition to all his moveables and executry after his decease, which was worth 100,000 merks; 2*do*, The bond does not dispense with its non-delivery; and Sir Robert was then a minor, and *in familia* with his father; and bonds granted to bairns are not presumed to have been delivered *ab initio* and from their date, as law does in writs granted to strangers; and therefore Walter, any time before delivery, might discharge that faculty; 3*tio*, Sir Robert being executor to his father, he is liable to warrant his father's discharge and so can never quarrel nor impugn it; for, quem de evictione tenet actio, eundem agentem repellit exceptio. *Answered* to the *first*, If the disposition of the moveables had been after the heritable bond, there might have been some pretence to have pleaded the brocard of *debitor non præsumitur*; but they were of one date and very compatible, and the one could neither be a revocation nor implement of the other; To the *second*, The bond is now in his hands, and presumes delivery, unless the defender will prove that he found it among his father's writs after his decease, or that he got it *viis et modis*, without any fair

No 239. delivery; and the minute of the sasine taken fortifies its having been originally delivered;—and the father having exhausted his faculty by granting that heritable bond to Robert, there was a *jus plene quæsitum* to him, which the father could not take away by a discharge elicited from him three years posterior; and though creditors may question deeds done by parents to children *in familia*, yet his heir may not; and provisions perfected by infeftment to children are no more revocable, and now Sir Robert has several years ago infeft himself on the precept contained in the bond given him by his father; To the *third*, John being heir to his father *præceptione hæreditatis*, the obligement of warrandice was heritable, being of a faculty to burden the lands by infeftment, that warrandice did only affect the heir; neither was Sir Robert executor, but *confusione tollitur*. The Lords repelled the first reason of reduction, on the maxim *Non præsumitur gravare hæredem*; and as to the second, found Sir Robert behoved to prove this bond was a delivered evident, either to himself or some other for his behoof, prior to the discharge; and that delivery *ab initio* is not presumed in this circumstantiate case; and that so long as Walter the father kept it in his own hands, he might revoke, alter, or discharge it; and that there was a great difference betwixt bonds granted to children that were minors and *in familia*, and writs to other extraneous persons. And as to the third reason, the Lords found the eldest son was here creditor by the warrandice; and that Sir Robert, as succeeding to his father's whole executry, was liable in the obligement to warrant the discharge, and consequently could not insist for the 10,000 merks, for that was to quarrel his father's subsequent discharge.

Fol. Dic. v. 2. p. 155. Fountainhall, v. 2. p. 121.

1707. *June* 26.

Mr Robert Sinclair, Writer in Edinburgh, *against* Mr George Purves of Yewford, and John Purves his Grandson.

No 240.
One executed an assignation in favour of his daughter, with warrandice from fact and deed, reserving his liferent. He deposited it in a third party's hand, to remain while he should have use for it, as security of his liferent.

Mr George Purves of Yewford, who is blind, having assigned to the deceast Jean Purves his only daughter, and the heirs of her body, a bond of 4000 merks, granted to him by William Purves, his only son, with the reservation of his own liferent, and the burden of L. 48 payable to his Lady during her lifetime, in case she survived him, with warrandice from fact and deed, and a declaration that the said assignation is by and attour what the assignee got in her contract of marriage, and a clause mentioning, that the bond and assignation were deposited in the hands of Mr Thomas Wood, minister in Dunbar, to remain there during Mr George's lifetime, or while he should have use for the said bond, for security of his reserved liferent, to be delivered after his decease to the said Jean Purves, to be disposed of by her and her foresaids at their pleasure, and that the same being then in the custody of the said Mr