1704. *November* 30. JOHN LILLY *against* The SISTERS of WILLIAM GLADSTONES.

LORD Crocerigg reported the creditors and daughters of Halbert Gladstones, merchant in Edinburgh, and John Lilly, tailor in the Hague, competing. William Gladstones, son to the said Halbert, going to Flanders, as surgeon to Colonel Lauder's regiment, he dispones his whole estate to his sisters, in 1693, reserving his own liferent, and with the burden of his father's debts, and all debts already contracted by himself. And, because it wanted a procuratory, they assign it to one Douglas, who, upon their renunciation, obtains an adjudication for implement. William, in 1699, becomes debtor, to this Lilly in Holland, for £2000 by bond; who raises reduction of the foresaid disposition:—1*mo*, As being made for love and favour, without any onerous cause, to conjunct persons, his own sisters, and kept latent to ensnare the pursuer; and, at best, was only *donatio mortis causa*, and so of its own nature revocable, and, *de facto*, revoked by his contracting this posterior debt: and though he cannot quarrel it upon the Act of Parliament 1621, (that being only introduced in favour of anterior creditors,) yet law had not left this case destitute of a remedy; for, on the 12*th of February* 1669, *Pott* against *Pollock*, the Lords reduced a bond granted by a father to a son, even at the instance of posterior creditors with whom he continued to trade; and sicklike, 24*th January* 1677, *Blair* against *Bisset*: and that general dispositions of all that the granter shall have at the time of his decease, though made *inter vivos*, are always subject to the debts he shall have at his said decease, and affectable thereby. 2*do*, The disposition made by the sisters to Douglas clears this; for it bears an express clause, that their disposition from their brother shall neither prejudge nor be made use of against any of William their brother's creditors who shall be found to have right and interest therein; and, therefore, it can never be obtruded against Lilly, a lawful creditor of William, though his debt be contracted posterior to the disposition.

ANSWERED,—William's right to his sisters was not merely gratuitous, being burdened both with his own and his father's debts; neither is it revocable, except only in the precise case therein mentioned, of his return, or having heirs of his own body; none of which existed: neither can it be called fraudulent and latent, seeing no law obliges a man to publish, registrate, or propale his disposition, till he please. To the *second*;—ANSWERED,—That no clause, adjected by the sisters in their conveyance to Douglas, did invert and alter the first right, or take away the *jus quæsitum* introduced by the first disposition, in favour of the creditors.

REPLIED,—They opponed their reasons of reduction; and this *jus quæsitum* was a mere chimera: for, if the disposition was revocable, and *de facto* revoked; if it was latent, fraudulent, *et omnium bonorum quæ ei habere contingit tempore mortis*; then it is certainly burdened with all the debts he shall owe at the same period of his death; and so the *jus quæsitum* evanishes; especially, seeing the creditors have made use of that disposition to Douglas, bearing the foresaid quality, and accepted it, they cannot repudiate or divide their own right, but must take it with the provision as it stands, and not obtrude against Lilly's debt.

The Lords were all clear, that Mr Lilly, or any other posterior creditor to the son, would be preferable to the sisters, or any benefit they could claim by their brother's disposition, in case there should be any superplus more than paid

the anterior creditors. But the question was, If Lilly's debt could come in *pari passu* with the father's and son's creditors prior to William's disposition in 1693? And the Lords, by plurality, found, by the conception of the right, they were preferable; and Lilly could not come in equality, but only after they were paid, and before the sisters, if the subject disponed was able to pay them all.

Vol. II. Page 243.

1704. *December* 5. SIR PATRICK HOME, Advocate, *against* LIONEL TALMASH, Earl of Dysart, and his TENANTS at BRUNTSTANE.

THE late Duchess of Lauderdale, mother to the said Earl, dispones to Sir Patrick Home, for his services, the dwelling-house, yards, orchards, and braes above and below the bridge of Bruntstane; whereon Sir Patrick pursues a removing against the said Earl and his Tenants, from these grass-braes.

ALLEGED,—No process against the Earl of Dysart; because he is not legally warned, in so far as it is neither executed against him personally, nor at his dwelling-house, nor by letters of supplement at the market-cross of Edinburgh, pier and shore of Leith, he living out of the country; and so, the warning being null, the removing must fall in consequence.

ANSWERED,—The warning was due and legal, in so far as it was executed on the ground of the lands, and at the church-door of the parish wherein the lands lie, forty days preceding Whitsunday last; which was sufficient certioration to the Earl, especially seeing he is cited on 60 days in the process of removing, at Edinburgh and the shore of Leith: and this is all the law requires; for that excellent statute in 1555 anent removing tenants, makes no distinction whether the party warned be out of the kingdom or in it, but only appoints warning to be upon forty days preceding Whitsunday; and *ubi lex non distinguit, nec nos distinguere debemus.* And this is both the opinion of lawyers, the analogy of our law, and the current of decisions; as appears from Stair, *tit. Tacks, sec.* 40; and from Dury, 11*th January* 1622, *L. of Faldonside* against *Bymerside*; 17*th July* 1630, *Laird of Lee* against *Porteous*; and 20*th February* 1666, *Macbriar* against *Creighton*, where the Lords sustained the warning, without letters of supplement, against one out of the country.

REPLIED,—The decisions adduced did not meet the case in hand, but contained sundry diversifying circumstances, sufficient to alter the decision.

It was started among the Lords, that there was no necessity of warning the Earl of Dysart at all, because, he being heir served to the Duchess, Sir Patrick's author, there is no need, in removings, to call either the granter of the right or their representatives, but only the tenants, to give them time to provide another house, or singular successors: as Stair insinuates *ubi supra*, and cites the 26*th of March* 1622, and 18*th January* 1623, *the Earl of Lothian* against *Sir John Ker.*

Others thought all who mus tbe called in the process of removing, behoved also necessarily to be warned; therefore the Lords superseded to determine the first point till the parties were heard on this last allegeance, that Sir Patrick was not