not reducible by anterior creditors, becauſe their father had a ſufficient fortune for theſe portions, and all his debts.—It was *replied*, That bairns proviſions were *debitum naturale*; but this was an oye whoſe mother was provided; and that bonds or debts were no viſible eſtate; and it were more juſt that the acquirers by gratuitous diſpoſitions ſhould be put to ſeek the diſponers upon their warrandice, than that creditors ſhould be frauſtrate. No 47.

THE LORDS found the defence againſt the reduction relevant, That Houſton, the firſt diſponer, had a viſible eſtate, ſufficient for all his debts the time he diſponed, whether by infeftments, moveables, or bonds.

Fol. Dic. v. 1. *p.* 68. *Stair, v.* 2. *p.* 795.

1681. *December.* M'KELL *againſt* CALLENDER. No 48. Found as above.

IN an action of reduction at the inſtance of Lodovick Callender againſt Gilbert M'Kell, of a diſpoſition of a tenement of land in Leith, made by John Houſton merchant in Leith, to ——— Houſton his oye; the right whereof came in the perſon of Gibert M'Kell: And the reaſon of reduction being founded on the act of Parliament 1621, as being fraudulent and *interconjunctas perſonas*, without an onerous cauſe, in prejudice of Callender, who was a lawful creditor to Houſton, granter of the diſpoſition:——THE LORDS found theſe allegeances relevant to elid the reaſon of reduction, That Houſton the grandfather had ſufficient eſtate ever and above the tenement diſponed, able to pay his debt, or that the diſpoſition to the oye, of the tenement, was for an equivalent onerous cauſe.

Sir P. Home, MS. v. 1. *No* 62.

1687. *February.* SHEWEL *againſt* AUCHTERLONY. No 49.

DEBATED, if gratification by a debtor not bankrupt, but *oberatus*, and under diligence by horning at a creditor's inſtance, could be ſuſtained, where the debtor had a ſufficient eſtate, to pay all his debts, after the gratification, as is ſuſtained againſt the reaſon, founded on the firſt part of the act 1621. In Lanton's caſe, (*ſee* No 9. p. 884. *et infra* in Div. 2. Sec. 5.) *oberatus* was found ſufficient.

Harcarſe, (ALIENATION.) *No* 149. *p.* 32.

1710. *December* 7. DEAS *againſt* FULLERTON. No 50. A gratuitous aſſignation to a conjuct perſon, a few days before the granter's death, was reduced at the inſtance of a

THE deceaſed Captain Fullerton having ſome arrears owing him in the commiſſioners of the equivalent's hands, and being debtor to Mr James Deas writer, in L. 30 Sterling, he confirms himſelf executor-creditor to him for affecting that ſum; and purſuing for payment, they ſuſpend on double poinding, that they are likewiſe diſtreſſed by John Fullerton of Auchinhall, claiming right to the ſame debt by virtue of an aſſignation he had thereto from the Captain, and duly

No 50. creditor of the defunct, though proof was offered that he was solvent at the time.

intimated. Whereupon a competition arising, it was *contended* for Deas (who repeated a reduction of the said assignation) that he behoved to be preferred, because the assignation was a gratuitous deed betwixt near relations, after the contracting of his debt, and was condemned by its own narrative expressly bearing for love and favour, which can never be otherwise considered, than as a mere donation and a testamentary legacy, being only a few days before his death, and can never compete with a lawful creditor confirming the subject.—*Answered*, The act of Parliament 1621 annuls only deeds done without a just, true, and necessary cause; whereas here it bore not only for love and favour, but also for other causes and considerations moving him, which words must import something; and in fortification thereof, he offered to prove onerous causes for supporting the said assignation; and that this has been sustained, appears from Sir George M'Kenzie's observations on that act, where he cites January 1669, Lady Brae *contra* Chisholm*, and the case of Napier *contra* Ardmoir †, whence he infers, that *verba narrativa probant tantum præsumptive contra proferentem*, and may be further astructed and adminiculated; and for his relation, the cedent was only his cousin-german, and there is no decision finding that remote degree of blood to fall under the act of Parliament.—*Replied*, No law ever allowed a man to impugn the verity of his own writ, and to adduce an extrinsic probation to canvel the faith of its own narrative; for that were *probatio contraria scripto*; and who would either give or receive a deed, bearing expressly love and favour, if there were truly any onerous cause at bottom to support it; and as to the decisions, where they related to onerous causes in the general, there the Lords permitted them to condescend particularly what they were; but here there is neither shadow nor pretence, to compete with an anterior lawful creditor, who has duly affected the subject.——THE LORDS preferred the executor-creditor, and reduced the assignation not simply, but in so far as prejudged him.—Then he *insisted* on a second ground of preference, that his cedent had, at the time of his making that assignation, estate either heritable or moveable, more than sufficient to pay all his debts; and therefore his assignation, though gratuitous, can never be quarrelled, unless you prove the granter was insolvent at the time of his making thereof; for no law hinders a man to gratify his friends and relations, if he have a clear visible accessible estate to pay all his creditors; and it were a great embargo on the freedom of property, if a small debt hindered a man of an opulent fortune to grant voluntary rights, where there is no diligence to interrupt him; and the creditor *sibi imputet*, if he has been *in mora* to affect his estate, and by negligence has suffered his circumstances to turn worse; for *sibi debuit vigilare*; and thus the Lords found, 30th June 1675, Clerk *contra* Stewart, No 46. p. 917.; 11th December 1679, the Creditors of Douglas of Mousewell *contra* the Children, (*infra h. t.*); 22d July 1680, Grant †; and 10th November 1680, Mitchel *contra* Jamieson and Wilkie †.—*Answered*, That Mr Deas has discussed the Captain's sister, his heir of line, and could recover nothing; and Auchinhall the competitor is his heir-male, and has right to any estate the defunct

* Stair, v. 1. p. 591. *voce* HUSBAND & WIFE. † Examine General List of Names.

left; and it is more juſt he ſhould be at the trouble and expence of ſeeking out his hidden deſperate debts, than to put creditors to expiſcations of ſearching out his effects *per omnes regni angulos;* and if it be a viſible acceſſible eſtate, he is willing, on payment, to aſſign him to his debt, for his readier affecting thereof; and he knows better where to find it than Mr Deas, a ſtranger, can. And the caſes cited were where the parties were in poſſeſſion, or had uplifted the ſubject in controverſy; but here the arrears are ſtill extant unuplifted, and in the equivalent's hand; and the debate is *in acquirendo*, where the executor-creditor is undoubtedly preferable to a gratuitous aſſignee, it being more reaſonable he ſhould want his legacy, than Mr Deas loſe his juſt debt.——THE LORDS likewiſe repelled this ſecond ground and preferred the executor-creditor. *See* PROOF. No 50.

Fol. Dic. v. 1. p. 68. Fountainhall, v. 2. p. 604.

1710. *December* 22.

Competition the CREDITORS of the deceaſed Mr DAVID and JAMES DEWARS of Reidhouſe.

No 51.
A bond, granted for love and favour, and containing a power to revoke, is found good againſt prior creditors, *if* the granter had a ſufficient eſtate at the time.

IN the competition of the creditors of the deceaſed Mr David and James Dewars, Mr John Blair miniſter at Scoonie and Mr Henry Scrimzeor, and other onerous creditors, craved to be preferred to Anna Dewar the common debtor's ſiſter, upon this ground, That her debt of 3000 merks was only a bond granted to her for love and favour, and other onerous cauſes and conſiderations, payable at his deceaſe, and not then, unleſs ſhe ſurvived him, and reſerved power to him to revoke or alter the ſame; and Mr David's contracting debts after his granting the bond, was a virtual revocation thereof.

Alleged for Anna Dewar: She muſt be preferred to any creditors whoſe debts were contracted after the date of her bond, which not being revoked by the granter, became a valid and effectual debt at his death; eſpecially conſidering, that it rendered him not inſolvent, but he had at his death an eſtate unaffected by legal diligence, exceeding all his debts. And if, through the addition of James Dewar's debts, who was heir to Mr David, his brother, and the negligence of Mr David's creditors in not uſing timely diligence for their payment, Mr David's eſtate be now inſufficient to pay all, they have themſelves to blame; for *actio pauliana* in the civil law, and the act of Parliament 1621, do reduce gratuitous rights at the inſtance of anterior creditors only, where the granter hath not, at the date or delivery thereof, an eſtate ſufficient for theſe and his other debts, Stair, Inſtit. lib. 1. tit. 9, § 15.; and if it were otherwiſe, no man, after contracting debt, could provide children, or make donations, though he be never ſo opulent at the time; if, many years after, through ſupervening accidents, he ſhould turn inſolvent.

Replied for Blair and Scrimzeor: The gratuitous revocable bond in favours of