

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 explications 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.

*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.

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

No 50.

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.

No 51.

Anna Dewar, was no better than a legacy, which takes only effect *deductis debitis*; and the simple contracting debts by one who reserved a faculty to burden the subject, or bequeath any sum, is, in the construction of law, a burdening or bequeathing, though it refer not expressly to the faculty, 26th January 1675 and 1676, Lawrie *contra* Drummond, Stair, v. 2. p. 309. *voce* FACULTY; 13th February 1705, Cochran against the Lady Balmile, *voce* FACULTY; so that it is needless to enquire whether Mr David Dewar was insolvent or not. Besides, the Lords are in use to prefer creditors to children competing on bonds of provision, though their diligence be even more timely, without enquiring into the debtor's condition when he granted such bonds, 10th February 1688, Creditors of William Robertson against his Children, Fount. v. I. p. 497. *voce* FRAUD; 23d December 1709, Creditors of Marshall against his Children, *voce* ADJUDICATION, p. 47. And Dirleton upon the decision 30th June 1675, Clerk against Stewart, No 46. p. 917. is of opinion, (and gives very solid reasons for it,) That the receiver of a gratuitous right, should never be allowed to compete with an anterior creditor, if the grantor's estate *ex eventu* be found insolvent. Sir George M'Kenzie also, in his Commentary upon the act of Parliament 1621, is of the same persuasion.

*Duplied* for Anna Dewar: True, the disposition of a particular subject, containing power to alter, is sufficiently revoked by a posterior disposition of the same subject to another, though making no mention of the power to revoke; because, the latter deed is plainly inconsistent with the former; and, for the same reason, a man contracting debt to the value of his estate, after his granting a revocable bond, is justly presumed to revoke it. But there is no ground to presume, That a man of entire credit, contracting a debt after his granting a revocable bond, when his estate is more than sufficient to satisfy both, doth revoke the first. Nor can this bond, granted in *liege pousie* to Anna Dewar, be compared to a legacy, which only affects the deed's part of the executry, and doth not oblige the heir; but it hath the same effect as a bond obliging one to pay if he do not revoke, which condition is purified by the grantor's death without revocation.

THE LORDS, in respect the bond granted by Mr David to Anna Dewar, bears to be for love and favour, and contains a power to revoke, found; That both his prior and posterior creditors are preferable to her, unless she prove that he left, at his decease, an estate sufficient to satisfy the bond and all his other debts.

*Forbes, p. 463.*

No 52.

A disposition to a sister and her husband, found not reducible on the act 1621, if the grantor had at the time an estate

1712. January 15.

M'KENZIE against FLETCHER.

JAMES FLETCHER of Cranston grants bond for L. 1000 Scots to Sir George Lockhart, in 1678. The very next day he gives his sister, Alison Fletcher, a bond for 8000 merks; and, in 1681, he disposes the lands of Gilkerston to the said Alison, and John Grahame her husband. On Sir George Lockhart's bond he is denounced and regilstrate in 1689; and the said bond, by progress, comes in the