

No 52. or creditor taking security out of it, is bound to know, and contracts with his hazard: But no second creditor, though gratuitous, is bound to consider any thing, but that his debtor at the time, has sufficiency of means to pay all former debts. 3<sup>to</sup>, All commentators upon the *actio pauliana* allow *consilium fraudandi*, that is where the debtor was insolvent when he made the deed, to be a ground of restitution in all cases, and *fraudem in eventu absque consilio*, that is when he became insolvent by the deed, to take place in *causis lucrativis*, § 3. *Inst. qui et ex quib. caus. man. non poss.* So an *fraudentur* in the L. 6. § 11. ff. *quæ in Fraud. Cred.* imports only, That either the debtor is actually insolvent when he does the deed, or becomes so by doing it. 4<sup>to</sup>, Inhibitions are legal remedies striking against all posterior voluntary alienations, according to the express will of the letters issued out from sovereign authority, whatever be the debtor's circumstances: Whereas the act of Parliament is calculated only against alienations of persons in certain circumstances, which therefore must be subsumed. See Ker against Scot, p. 690.

*Forbes, p. 573.*

1717. December 11.

The EXECUTORS CREDITORS of JANET MELDRUM against KATHARINE KINNIER.

No 53.  
Found in conformity with  
Borthwick  
against  
Goldilands,  
No 44. p. 914.  
and Garthland  
against  
Ker, No 45.  
p. 915.

JOHN CUNNINGHAM of Enterkin, being debtor to Janet Meldrum in L. 1000 Scots, she, some time before her death, gave him up his bond; which was immediately renewed in name of her daughter Katharine Kinnier. Her creditors, after her death, getting notice of this transaction, raised a reduction against the daughter, upon the act of Parliament 1621; with a conclusion of declarator, That the money was the mother's, and that she could not take the bond in her daughter's name, in defraud of the pursuers, her lawful creditors.

The daughter's *defence* was, That this transaction was forbid by no law, the mother being solvent at the time of granting the bond; and though *ex eventu* her debtors became insolvent, it is sufficient to exclude a reduction upon the act 1621, that the mother had sufficient effects to pay all her debt, over and above the money for which the bond was granted to her daughter.

*Answered* for the creditors:—That however this defence might be pleaded against a prior gratuitous creditor, it were apparently unjust to sustain such deeds in prejudice of prior onerous debts: Onerous creditors ought not to be put to dispute what their debtor's condition was the time he made the alienation, it being sufficient for them to say in competition with posterior gratuitous creditors, That the debtor is insolvent; since, upon the eventual bankruptcy of the debtor, the donatar ought rather to suffer than the onerous creditor, according to the principle *Potior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro acquirendo*. And the reasoning is the stronger in this case, in which the creditors are more defrauded, than if the mother had only granted a bond of provision to her daughter; for, at any rate, they would have come in

*pari passu* with such a bond : Whereas if the defender be afforced, they shall thereby be entirely cut out of the most valuable share of their debtor's means.

Replied for the defender Katharine Kinnier :—She is much better founded in her present situation, than if she had only a bond of provision from her mother. When one accepts a personal bond, he agrees to trust his debtor, and to run the hazard of his insolvency : Personal creditors therefore are in this view all embarked as on one bottom ; if their debtor's funds prove shortcoming, the loss falls upon them ; first indeed upon the gratuitous creditor : For if there is not sufficient for all, it is but equitable that the onerous creditors draw first ; according to the maxim, *That in competitions, Potior debet esse conditio ejus qui certat de damno evitando, quam ejus qui certat de lucro acquirendo* ; or, which comes to the same, *Nemo debet locupletari aliena jactura*. And in this case the maxim is directly applicable : For whatever is given to the gratuitous creditor, who is *certans de lucro acquirendo*, is virtually taken from the onerous creditor, who is *certans de damno evitando*. But where one entirely solvent, and thereby at an absolute liberty of alienation, gives away any of his effects, still leaving sufficient for all his creditors ; if such an alienation, whether gratuitous or onerous, cannot be secured against posterior deeds of the alienator ; it will follow, there is no such thing as an absolute power of disposal of any thing in the world. Here the maxim does in no shape apply ; for the creditors suffer nothing by the alienation : If they continued to trust their debtor afterwards, *sibi imputent* ; at the time of the alienation there was a sufficient fund for all ; at that time they might have disengaged themselves from their debtor, by doing diligence for payment ; and if they chose to give longer trust, the hazard of that ought not to lie upon a third party, who is not in a competition with them about their debtor's effects, and who is no way connected with them or the debtor, except that he now stands possessed of some effects which were legally given him by the debtor, while he had the absolute disposal thereof.

THE LORDS sustained the defence, That the mother had effects, either *in specie* or obligations by responal persons, the time of granting the bond, sufficient to satisfy the debts then resting.

*Fol. Dic. v. l. p. 68. Rem. Dec. v. l. No 9. p. 17.*

1742. July 21.

Competition, WILLIAM BRUCE, &c. Creditors of Bailie Hay, with Mrs MARGARET SCOT, Relict of William Hay.

BAILIE HAY's affairs having gone into disorder, he disposed his heritable and moveable estate to a trustee, who having sold his heritable subjects, his onerous creditors craved to be preferred on the price to Margaret Scot, who had been married to the bailie's son, to whom the bailie granted a life rent annuity of 12,00

No 53.

No 54.

A gratuitous bond to a conjunct person, ranked *pari passu* with onerous creditors, the