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. 1. 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 granter'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 pouſtie* 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 granter'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 granter 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 diſpones the lands of Gilkerſton to the ſaid Aliſon, and John Grahame her huſband. On Sir George Lockhart's bond he is denounced and regiſtrate in 1689; and the ſaid bond, by progreſs, comes in the

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equal to payment of his debts. There was here a *mora* on the part of the purſuer of the reduction.

perſon of my Lord Preſtonhall, who leads an adjudication for it in 1699: And purſuing for mails and duties, Jean Fletcher and Captain Hary Straiton, her huſband, as come in her ſiſter Aliſon's right, crave preference as firſt infeft, which neceſſitated Preſtonhall to raiſe a reduction of James Fletcher's right to his ſiſter and brother-in-law, upon both the branches of the act of Parliament 1621, as being an anterior creditor, and the deed being *inter conjunctas perſonas* and gratuitous: Next it impinges on the ſecond clauſe of that act, declaring all diſpoſitions null, granted by debtors, after they are denounced and regiſtrate to the horn, in ſo far as concerns the creditor-uſer of that diligence; but ſo it is James Fletcher was at the horn before he gave that diſpoſition to his ſiſter and her huſband. *Alleged* for Jean, *1mo*, It is not yet clearly decided, if a brother-in-law be a conjunct perſon in the eye, ſenſe, and conſtruction of that act. *2do*, This deed is not wholly gratuitous, for it is in ſatisfaction of a bond of proviſion given her by Sir John her father. *3tio*, That act annuls only rights made by dyvours and bankrupts; ſo that if the man had a clear viſible acceſſible eſtate at the time, ſufficient for paying all his debts, the right cannot be quarrelled, though by a ſupervenient inſolvency he come to be *obæratus*. How many does every age produce, who, by miſmanagement and prodigality, from opulent eſtates, fall into the very gulph of poverty; and yet will any man ſay, that when he bruiks a flouriſhing eſtate of L. 1000 Sterling *per annum*, that he cannot provide his children, or give a gratuity to his friends and relations, becauſe *ex poſt facto*, he dies a beggar? What embarraſſment would this lay on all commerce and bargaining; if eventual inſolvency, occurring many years after, were ſufficient to annul theſe deeds? And by the *actio Pauliana* he only is repute inſolvent, who, at the time of the deed, or by the granting it, is incapable to pay his debt; as Juſtinian determines § 3. *inſtit. quib. ex caus. manumittere non licet*. Now Mr Fletcher, at the making this diſpoſition, had the lands of New Cranſton, with a jointure of 1200 merks yearly, and a poſt in the army, which were funds more than ſufficient to pay all his debts. And Preſtonhall may *ſibi imputare* that *non ſibi vigilavit*, in affecting theſe funds till his debtor began to ſink: And this is no new doctrine; for the Lords on the 30th June 1675, Clark *contra* Stewart, p. 917. found it relevant to aſſoilzie from the act of Parliament, that he had a ſufficient unincumbered eſtate at the time: And the like, the Creditors and Children of Mouſewell competing, (*infra h. t.*); and 6th March 1632, Garthland *contra* Ker, No 45. p. 915. *See* alſo 8th February 1681, Neilſon *contra* Roſs, (*infra h. t.*); and in Langton and Cockburn's caſe No 9. p. 884. it is required they be altogether inſolvent, at leaſt *difficilis conventionis*, and the eſtate ſo overburdened, that it cannot extricate itſelf without a ſale.—*Answered*, Where a debtor's eſtate is reduced to that condition that it cannot ſatisfy all; it is more reaſonable that the bankrupt debtor's relations ſhould be at the loſs, than extraneous onerous creditors put to expiſcate their debtor's concealed means; and though deciſions have varied on this head, yet they have, in many caſes, reduced theſe voluntary deeds, without regarding the debtor's ſol-

No 52. vency at the time, if *ex post facto*, he turn inſolvent. *See* the 25th January 1681, Bathgate and Bouden, (*infra h. t.*) And 10th February 1665, Lady Greenhead *contra* the Lord Lowrie, (*infra h. t.*) And Sir John Niſbet, (Dirleton) relating the deciſions of Clark, (p. 917.) and Mouſewell, (*infra h. t.*) cited by the other ſide, adduces irrefragable arguments to convell them with great penetration and cloſeneſs. And where there appears ſuch variety of opinions among the Lords, though the plurality makes a *res judicata*, yet it affords ground to examine the reaſons on both ſides, when they come to be cited as precedents and practics, eſpecially when the point is only carried by a vote or two, and on the abſence of ſome of that firſt ſederunt, the Lords come to alter; therefore ſome have propoſed this expedient, that theſe dubious caſes ſhould be reviewed, either by a full bench, or elſe by the ſame who ſat in the firſt interlocutor, which would prevent the frequent alterations that daily occur; but this is ſcarce practicable, ſeeing ſome are detained, at the ſecond review, from the houſe, by ſickneſs; others are in the outer-bench, ſide-bar, or on the bills. *See* Dirleton's reaſonings, at page 140 and 207. Sir George Mackenzie does alſo concur with him, in his obſervations on the ſaid act 1621, and thinks ſufficiency of eſtate, at the time, not relevant, if eventual inſolvency ſuperveen, and that it is better that conjunct perſons ſuffer, than ſtrangers who lent their money *bona fide* on the view of a clear eſtate.—THE LORDS thought there was no doubt but a brother-in law was a conjunct perſon in the ſenſe of our law; but yet, by plurality, having balanced the inconveniencies on all ſides, they found, if James Fletcher had a viſible unincumbered eſtate, at the time of his diſponing to his ſiſter and her huſband, more than would have paid all his debts, the ſaid diſpoſition could not be annulled on the act 1621, eſpecially conſidering that Preſtonhall was *in mora*, not having adjudged the lands for ſeventeen years after the ſaid diſpoſition; and it ſeemed to have ſome reſemblance of an onerous cauſe, like a tocher given *ad sustinenda onera matrimonii.*

Fol. Dic. v. 1. *p.* 69. *Fountainhall, v.* 2. *p.* 703.

*** Forbes reports the ſame caſe thus:

MR RODERICK MACKENZIE of Preſtounhall, one of the Senators of the College of Juſtice, having 20th January 1699, obtained an adjudication againſt the repreſentatives of James Fletcher of Cranſtoun, upon a 1000l. bond granted by him as principal, and Kenneth Earl of Seaforth, as cautioner to the deceaſed Sir George Lockhart, 5th February 1678, and aſſigned by progreſs to the adjudger, who thereupon did charge, denounce, and regiſter James Fletcher at the horn, in December 1680: Preſtounhall raiſed a reduction againſt Jean Fletcher and her huſband, upon the act of Parliament 1621, of a gratuitous bond of 8000 merks, granted by James Fletcher to the ſaid Jean his ſiſter, February 6, 1678; and of a diſpoſition granted by him in Auguſt 1681, of the lands of Kilgirſtoun, to her and John Graham, poſt-maſter, then her huſband, in conjunct-fee and

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fferent, in ſatisfaction of the gratuitous bond, clothed with infeftment in September 1682: In reſpect, 1*mo*, The bond quarrelled was of a day's date after the bond granted to Sir George Lockhart, the purſuer's author, and being a deed for love and favour *inter conjunctas perſonas*, could not prejudice a prior onerous creditor, by the firſt part of the ſaid act of Parliament, the granter having *in eventu* proved inſolvent; and the diſpoſition *inter conjunctas* could not be ſupported by the onerosity of the precedent gratuitous bond. 2*do*, The diſpoſition was quarrellable upon the ſecond clauſe of the ſtatute, whereby no voluntary right by a debtor to his creditor can prejudice the more timely diligence of a co-creditor.

The Lords ſuſtained this anſwer to the reaſon of reduction upon the firſt part of the act of Parliament 1621, That James Fletcher had, at the time of granting the bond to his ſiſter, a ſufficient ſeparate unincumbered eſtate, for payment of all his debts: And alſo ſuſtained this anſwer to the reaſon, on the ſecond part of the ſaid ſtatute, That the diligence, by ſimple horning and denunciation, was not habile to reduce the diſpoſition, not being duly proſecuted for many years by real diligence.

Albeit it was *alleged* for the purſuer: 1*mo*, Mens circumſtances are known very quickly to alter, and if the ſuch debtors prove eventually inſolvent, the juſt creditor is equally diſappointed, as if his debtor had been bankrupt from the beginning. 2*do*, Tis no novelty in our law for a conveyance that was good when firſt made, to fall under the act of Parliament 1621, through the granter's ſupervenient inſolvency; more than for a diſpoſition within the half of ward lands, without conſent of the ſuperior, though valid, when granted, to become thereafter null by more of the lands being diſponed. 3*tio*, By the civil law, all deeds and rights in prejudice of creditors are null, at leaſt may be reduced *actione pauliana*, if prejudicial to them *ex eventu et re*, though not fraudulent *conſilio*, which being *in animo* is *per-difficilis probationis*. *L.* 6. § 11. *ff. quæ in Fraud. Credit. L.* 5. *C. de Revoc. his quæ in Fraud. Cred.* How hard is it to put creditors to diſpute their debtor's condition the time of making donations: Men of the beſt credit being frequently found to manage moſt cloſely? Is it not more juſt, that, in the caſe of eventual inſolvency, a donatary who hath but a lucrative title, ſhould ſuffer rather than a juſt anterior creditor? 4*to*, As it cannot be pretended in reductions *ex capite inhibitionis*, that the party inhibited did nothing in prejudice of his creditor, in reſpect the time of the alienation he had ſufficiency of eſtate beſide: So *a pari*, the like allegeance ought not to be ſuſtained to take off or enervate the effect of the act of Parliament 1621.

In reſpect it was *anſwered* for the defender: 1*mo*, It were more unreaſonable that a right good from the beginning ſhould depend upon after events, than that a creditor ſhould loſe thereby who had it in his power to prevent the ſame by calling for his money, or ſecuring the ſame by diligence. 2*do*, The purſuer's parallel from recognitions, where partial alienations good *in initio* may *ex eventu* become void, ariſeth from the nature of the feu, which every partial purchaſer

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*tio*, 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*to*, Inhibitions are legal remedies ſtricking 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.

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

The EXECUTORS CREDITORS of JANET MELDRUM *againſt* KATHARINE KINNIER.

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 adquirendo.* 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