No 237. was compearance made for the creditors, and particularly for Cochran of Barbachly, who had right to several infeftments of annualrent, and comprisings upon the estate. And it was *alleged* for him, That there could be no poinding of the ground, as to 1300 merks of the said annuity, because the Lady had disponed the same in favour of for her husband's use and behoof, and which was ratified judicially upon oath. It was *answered*, That the foresaid disposition was never a delivered evident, and was now in the hands of the granter, and produced by her. It was *answered*, That the same being judicially ratified, it did necessarily infer, that the said paper was delivered. It was *duplied*, That the ratification being accessory, followed the principal disposition; and there was nothing more ordinary than women to ratify dispositions before the Judge Ordinary; and yet, to retain both disposition and ratification in their own hands, until affairs be finally ended. The Lords found the objection of not-delivery relevant, being now produced in the granter's hand, and that the defence was noways elided by the ratification upon oath.

P. Falconer, No 108. *p.* 75.

1697. *November* 16.

No 238. Daniel Simpson Writer *against* Euphame Finlay and John Colvill her Son.

A father granted a disposition to his son, kept latent for 17 years. Adjudication for a debt afterwards contracted was preferred.

Newbyth reported Daniel Simpson writer against Euphame Finlay and John Colvill her son. Quintin Finlay dispones some tenements to his son, and failing him by decease to the said Euphame his daughter in 1676; but no infeftment is taken thereon till 1693, by the space of 17 years after the disposition. But long before the infeftment, he borrows money upon bond; the right whereof coming into the said Daniel's person, he adjudges the tenement, and pursues for mails and duties. Compearance is made for the said Euphame and her son, who *alleged*, The father was *bona fide* denuded by the disposition, before the contracting these debts, and the same was perfected by infeftment before Daniel affected the lands by his real right of adjudication; and so the disposition could not be said to be in defraud of debts which were not then in being; and a father may, by bonds of provision, give portions to his children, if he be solvent and responsible, for these and all his other debts, at the time of his granting thereof. *Answered* for the creditors, That this disposition being latent and not so much as registered, but concealed for 17 years, and in favour of children, (though in implement of their mother's contract of marriage) it can never compete with true and onerous debts, which though contracted after the said clandestine disposition, yet long before it was any ways made public; and rights made in favours of children are not presumed to be delivered evidents of the date they bear, without some adminicle to astruct it; and by the current of decisions the Lords do not regard such latent alienations made by parents to

children, whether the creditors' bonds be prior or posterior thereto; as in the cases of Street and Mason, 27th July 1669, No 111. p. 1003; Reid *contra* Reid, 4th December 1673, No 33. p. 4925; Graham *contra* Roome, 24th January 1677, *voce* PROVISION to HEIRS and CHILDREN; and Napier of Tayoch *contra* Irvine, 17th June 1697, IBIDEM. There was another allegeance for Daniel, That the contract of marriage providing 4000 merks, was fulfilled to the children *aliunde* without this disposition; and the clause of conquest could not sustain it, for that is always to be understood *deductis debitis*. THE LORDS, in this case, preferred the creditors to the children, without entering on that last allegeance. No 238.

Fol. Dic. v. 2. p. 155. Fountainhall, v. 1. p. 794.

1701. *July* 24. Sir ROBERT CHIESLY *against* THOMAS CHIESLY.

No 239.
Found in conformity to Inglis against Boswell, No 236. p. 11567.

PHILIPHAUGH reported Sir Robert Chiesly late Provost of Edinburgh against Thomas Chiesly now of Dalry. Walter Chiesly of Dalry, in John his eldest son's contract of marriage with Margaret Nicolson, disponing the lands of Dalry to him, reserves a faculty to burden the estate with the sum of 10,000 merks. In 1676, he exercises this faculty, and grants an heritable bond for that sum to Robert Chiesly his youngest son, and at the foot of it there is a note wrote, that he had given sasine to his son *propriis manibus*; but this was never extended nor registered, and so was null. In 1679, in a transaction betwixt him and his eldest son, the father gives him a full and ample discharge and renunciation of that faculty, and reserved power of burdening the lands with the said 10,000 merks, without taking the least notice of his having exercised the said power in favour of the said Robert. He now pursues Thomas, as representing his father, for payment of that sum with its annualrents. *Alleged*, I have raised reduction of the bond; 1*mo*, Because *debitor non præsumitur donare*; and Walter had given Sir Robert a disposition to all his moveables and executry after his decease, which was worth 100,000 merks; 2*do*, The bond does not dispense with its non-delivery; and Sir Robert was then a minor, and *in familia* with his father; and bonds granted to bairns are not presumed to have been delivered *ab initio* and from their date, as law does in writs granted to strangers; and therefore Walter, any time before delivery, might discharge that faculty; 3*tio*, Sir Robert being executor to his father, he is liable to warrant his father's discharge and so can never quarrel nor impugn it; for, quem de evictione tenet actio, eundem agentem repellit exceptio. *Answered* to the *first*, If the disposition of the moveables had been after the heritable bond, there might have been some pretence to have pleaded the brocard of *debitor non præsumitur*; but they were of one date and very compatible, and the one could neither be a revocation nor implement of the other; To the *second*, The bond is now in his hands, and presumes delivery, unless the defender will prove that he found it among his father's writs after his decease, or that he got it *viis et modis*, without any fair