

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.

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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

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

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 granter having had a sufficient estate at the date of the bond.

merks, 23d May 1738, to commence at the first legal term after her husband's decease; upon a narrative, ' That there had been no marriage articles between her and his son; and that he wanted to prevent all questions which might arise, if she survive his son; and that he had considered the circumstances of his worldly affairs; which obligation he declares to be in full satisfaction of all 'terce,' &c.

The creditors *urged*, That the bailie's funds were not sufficient to pay his onerous debts; so the question was, Whether they who were onerous creditors should be first paid, or if Mrs Scot's debt, which is gratuitous, is to be ranked *pari passu* with them? It was likewise said, that the bailie had not 1200 merks a-year to live upon himself; and if this relict, who brought no portion, was insisting against him, he would have the *beneficium competentie*; and if the granter would have a good exception against payment of at least a part of it, that is a demonstration that such a gratuitous creditor can never come in *pari passu* with the bailie's onerous creditors, who are entitled to the utmost farthing, though their debtor should be reduced to absolute poverty. Besides, it is obvious what dangerous consequences would attend the sustaining latent and gratuitous deeds in favours of conjunct persons, so as to bring them in *pari passu* with onerous debts; if a loss is to be sustained *ex eventu*, it is juster the same should fall on the conjunct person, who has only a gratuitous gift, than upon strangers who have become creditors *ex causa onerosa*. See 12th February 1669, Pot. Stair, v 1. p. 602. *voce* FRAUD; 10th February 1665, Lady Greenhead, *infra h. t.* Voet. lib. 42. tit. 8. § 5.

Answered for the relict: That, at the time of granting this annuity, the bailie had sufficient funds both to answer that purpose, and likewise for himself; so that, if his affairs are in disorder, it must have arisen from contractions after that period, which is sufficient to sustain her bond, even supposing it were to be considered in the eye of law as gratuitous; for it is only upon the fraudulency of a person's gifting away his effects to a conjunct person, in disappointment of his anterior lawful creditors, that they could be heard to plead; and there is no fraud, if at the time there was sufficiency of effects to answer all the debts, and the donations likewise. But so far is it from being gratuitous, that it is truly onerous, as every husband is bound to provide for his wife; and, if he neglects it, the law takes care to provide her. Nor does it make any difference that it was not her husband, but his father, who granted the bond, seeing he did it, as appears from the narrative, to avoid all after-questions; and, by a proviso therein, he bound her, by her acceptance, to renounce all her legal provisions: So that here was a direct transaction, whereby, in place of legal provisions, the relict was to take herself to this stipulated annuity, which made her rest satisfied, and neither ask her husband to make any settlements upon her, nor enquire what subjects might have belonged to him; and though it may be considered as gratuitous with respect to the bailie, yet it is onerous *quoad* her. Thus cautionary obligations, though, *quoad* the debtor, they be gratuitous, yet are onerous *quoad* the creditor.

THE LORDS, in respect it was admitted by the procurator for the creditors, that Bailie Hay had a sufficient free estate at the date of the bond, sustained the same.

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C. Home, No 203. p. 337.

S E C T. VI.

What is to be considered such a separate Estate as will bar Reduction of a Gratuitous Alienation.

1624. February 20. GEORGE PRINGLE *against* MARK KER.

THE LORDS found this exception relevant against bankrupts, that the Lord Bothwell, the time of the bond made to Mark Ker, his good-brother, there was as many lands free, as to pay the debt owing to George Pringle.

Kerse, (CREDITOR.) MS. fol. 57.

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1665. February 10. LADY GREENHEAD *against* LORD LOURIE.

THE Lady Craig, and the Laird of Greenhead her second husband, pursues the tenants of Craig, wherein she is infest, for mails and duties. In which process, my Lord Lourie compares for his interest, and *alleges*, That he having apprised the estate of Craig, and being infest, thereupon hath raised reduction of the lady's infestment, on this reason, that a part of his sums being anterior to the lady's infestment, who was competently provided, by her contract of marriage, in thirty chalder of victual; and this additional infestment of fifty chalder of victual, being betwixt most conjunct persons, husband and wife, in so far as it is posterior to the pursuer's lawful debt, ought to be reduced upon the act of Parliament 1621.—The pursuer *answered*, the reason ought to be repelled, *imo*, Because the act of Parliament being only against gratuitous dispositions made by bankrupts, in prejudice of their lawful creditors, is not relevant, seeing Craig the disponent was not a bankrupt. *2do*, As he was not a bankrupt, so neither was he *insolvendo*; because the reversion of his estate is sufficient to pay his debt, albeit the same were effected with this additional jointure.—It was *answered* for the defender, That albeit the title and narrative of the act be against bankrupts, yet the statutory part thereof is against all gratuitous dispositions by conjunct persons; so that the defender needs not allege, that either the disponent was bankrupt, or *insolvendo*, but that the lady's infestment is betwixt conjunct persons, without an

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A debtor, not bankrupt, had granted an additional jointure to his wife, formerly provided for. Contended for the lady, in a competition with an appriiser, that the reversion of the granter's estate was sufficient, altho' burdened with the additional jointure. The appriiser preferred.