

thereby, for the time of contracting, as it is by writ; neither doth that ground, that writ cannot be taken away by witnesses, anyway hinder; for the meaning hereof is only, that the payment or discharge of that writ, must be proven by writ; and it were a far greater inconvenience, if, after bargain and furniture, any writ granted by the debtor, though without an onerous case, should prejudice these creditors.

THE LORDS sustained the reason, and repelled the defence, and found debts constituted by witnesses to be effectual, from the time of contracting, and not from the time of probation or sentence, to take away any posterior deed of the debtor, done without a cause onerous.

The pursuer *insisted* in a *second* reason of reduction, That albeit these debts were posterior to this bond, yet the same ought to be reduced, as being a fraudulent conveyance betwixt the father and the son, kept up and latent in some of their hands, without any thing following thereupon to make it known and public; so that the creditors having *bona fide* contracted with the father, having a visible estate, were deceived and defrauded by this latent bond, if it were preferred to them. *2do*, This bond bears only to be payable after the father's death, and so is but *donatio mortis causa*, and but a legacy; or if it be *inter vivos*, it is much more fraudulent and latent. *3tio*, Bonds of provision, for love and favour granted to children, are accounted but as their *legitim*, still revokable by the father, and all debts contracted by him are preferable to them.—The defender *answered*, That there was neither law, reason, nor custom to evacuate or exclude bonds of provision, granted by parents *ex pietate paterna*, to their children, upon account of their father's posterior debt, especially if the bonds were delivered; for there is no ground for any such thing by the act of Parliament 1621, which relates only to deeds done after the debt contracted; neither is there any sufficient ground of fraud, that the bonds were not made public or known, there being no obligation upon parties to publish the same; and creditors have less means to know the debts of other anterior creditors, than of children having a just ground to suspect that they may be provided, and to enquire after the same; neither doth the delay of the term of payment import either fraud, or that the bonds were *donationes mortis causa*.

THE LORDS would not sustain the reasons of reduction upon the act of Parliament 1621, or upon the general ground, that posterior debts were preferable to all bonds of provision, but ordained the pursuer to condescend upon the particular ground of fraud in the case in question. See FRAUD.

Fol. Dic. v. 1. p. 74. Stair, v. 1. p. 587.

1669. July 27. STREET *against* MASSON and LORD TORPHICHEN.

JAMES MASSON being debtor to the Lord Torphichen, does infect his son, an infant, in his lands, publicly holden of the superior; and being a merchant, there was

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 bond was dated posterior to a gratuitous deed, and the furnishings had been discharged upon receipt of the bond; yet the time of furnishing was allowed to be proven by witness, and so far as prior to the gratuitous deed, frustrated it.

a correspondence betwixt him and Mr Street, and other London merchants, whereupon he gave them bond, mentioning to be for former accounts and provisions betwixt them, and thereupon followed an infeftment of annualrent. The Lord Torphichen obtains decret of reduction of the infeftment granted to the son, as being posterior to his debt, and granted by a father in defraud thereof. The London merchants raise also a declarator, that the infeftment granted by Maffon to his son, (then an infant) ought to be affected with their debt, in the same condition as it were yet standing in the father's person, or otherwise ought to be declared void as a fraudulent deed by the father, in favours of his son; the father being then in tract of correspondence and traffic with these merchants, who *bona fide* continued the same, seeing the father continued in possession of the lands, and built thereupon, and gave an infeftment of annualrent to the merchants, after the infeftment granted to his son; and likewise raised a poinding of the ground upon his infeftment of annualrent, whereupon he now insists.—It was *alleged* for the son and Lord Torphichen, That the son's right being public, and registrated in the public registers, prior to the pursuer's annualrent for the bonds whereupon the same proceeds, it doth fully exclude them from poinding of that ground.—The merchants repeat their declarator by way of reply:—To which it was *answered*, That whatsoever may be said of latent and clandestine rights betwixt fathers and children, and other confident persons; yet there is no law hindering a father to give a public infeftment to his son, unless it be in prejudice of the creditors, to whom he was due sums at that time; which being a valid public right, no deed or pretence of fraud of the father thereafter can prejudice the son in his right; who being an infant, was not capable to be partaker of fraud; neither can fraud be presumed as to creditors, who are but to contract thereafter; nor can a public right registrate, and a public sale, which all the world may, and all concerned ought to know, be esteemed a contrivance or fraudulent right; and as to any commerce betwixt these merchants and the father, which began before the son's right, no respect can be had thereto, because the pursuer's bonds are lately, for a sum of money, and must import that the former debts by traffic were past from or discharged, and, if need be, offered to prove that they were actually discharged. *2do*, The making up a debt to be prior, to take away the son's infeftment; can only be probable by writ or oath of party, and not by witnesses who cannot prove above L. 100. *3tio*, Though the cause of the bond were proven to be a correspondence and traffic begun before the son's infeftment, it is no ways relevant against any provisions gotten after the infeftment; for such can have effect but from their own date, and the effect is cut off as to what is posterior to this public infeftment, seeing the merchants did either follow Maffon's faith upon their hazards, or else they should have had a procurator here, and taken advice how they might have been secured of Maffon's estate by the law of Scotland, who would have taken notice by the registers, that Maffon was denuded by a public infeftment, which nothing he could do thereafter could prejudice, and would have certified the merchants thereof; and their failing therein is on

their own peril; and albeit their payment, and acting *bona fide* is sometimes good, though made to those who had not a valid, but a colourable right, by those who knew not a better right; and might have been compelled to pay upon the colourable right; yet other deeds, though *bona fide* done, are upon the peril of the actor.—To which it was *answered*, That by the common law and custom of this nation, all fraudulent deeds are reducible; and there can be no deed more fraudulent than this of a father to his own infant son, for whom he is legal administrator, and must accept the right he gives himself, and so colludes with himself to make a snare to intrap merchants and strangers, in the midst of a course of trade with them; which is a common ground of law, whether the debt be prior or posterior to the son's infestment; and albeit the merchants bond be posterior, yet seeing it bears to be for ware, witnesses, according to the ordinary custom, are receiveable for affructing the writ, to prove what the ware was, and when received; which will not be prejudged, though there had been a discharge of the ware granted the time of the bond, unless there had been a real and true payment of the money; for there being nothing then paid, this bond ceases not to have a true anterior cause, as if it had been granted on death-bed upon a discharge then given, it would be valid, as being upon an anterior cause before the sickness; neither is there any difference to be made of the parts of the traffic after the son's infestment; but seeing the correspondence began before, and is once continued as a constant correspondence and traffic, it must all be drawn back to its beginning, as if the merchants on both sides had contracted when they began their correspondence, that they should faithfully pay what either of them received from other, till the correspondence was given up.

THE LORDS found that this bond, although posterior to the son's infestment, not bearing borrowed money, but merchant ware, that the quantity and times of furnishing thereof might be proven by witnesses; and albeit there had been a discharge of the ware, yet so much thereof as was furnished before the son's infestment would affect the same: But found, That the son's infestment being public and registrate, no posterior deed of the father's, by continuing traffic or correspondence, nor no pretence of fraud of his, could annul or burden the said infestment for any debt contracted posterior thereto.

Fol. Dic. v. I. p. 74. Stair, v. I. p. 645.

1679. November 28. CATHCART against GLASS.

GEORGE CATHCART pursues reduction of a disposition made by Glass to his good-brother, who married his sister, as being fraudulent betwixt conjunct persons, in prejudice of the pursuer, a lawful creditor, in this manner, viz. Glass, though but a shoemaker, took up a trade of buying seeds in Holland, and sold them to gardeners in Scotland, a parcel whereof he sold to the pursuer, which being corrupt and insufficient, the pursuer obtained decret against him for repetition of

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A gratuitous disposition reduced at the instance of a prior onerous creditor, by an implied warrandice, though the decree esta-