

No 109. said provisions, and to the heritable security granted for the same, in virtue of the postnuptial contract.'

Lord Ordinary, *Monboddo*.

For the Creditors, *Maconochie, Rae*.

Alt. *Honyman, Cathcart, Arch. Campbell, junior*.

Clerk, *Colquhoun*.

*R. Davidson*,

*Fac. Col. No. 198. p. 476.*

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S E C T. XIV.

Who are to be accounted Prior Creditors.

1669. *January 21.*

The CREDITORS of JOHN POLLOCK *against* JAMES POLLOCK, his Son.

No 110.

Debts constituted by witnesses, as bargains, furnishings, &c. found effectual, from the time of contracting, not from the time of decree only, to frustrate posterior gratuitous deeds of a bankrupt.

THE creditors of John Pollock having adjudged his tenement for their debt, and James Pollock having gotten a bond of 5000 merks from his father, payable after his father's death, which was granted after he was married, he did also apprise thereupon, within year and day of the adjudication. The adjudgers raise a reduction of this bond, and the apprising following thereupon, upon these reasons; *first*, Because the bond was granted for love and favour, and albeit it bear borrowed money, yet the said James has acknowledged by his oath, that it was for love and favour; and so, being granted betwixt most conjunct persons, after the contracting of their debts, it is null by the act of Parliament 1621.—The defender *alleged*, That the reason was not relevant as to such debts as were not constituted by writ, anterior to the defender's bond; and as to any constituted by probation of witnesses, for proving bargains, merchant accounts, and furnishings, wherein the probation and decret are both after the bond, they cannot be said to be anterior debts, because they are not constituted till sentence; and albeit the sentence bear the debt to have been contracted before this bond, yet that cannot make them anterior debts; because writ cannot be taken away by witnesses, proving an anterior debt, which would be as effectual against the writ, as if the payment thereof had been proven by witnesses; and the time of bargaining or furnishing, being a point in the memory, and not falling under the sense, nobody would be secure who had writ, but that bargains and *furniture* might be proven anterior thereto.—The pursuer *answered*, That his reason was most relevant, and the constitution of the debt is not by the decret or probation, but by the bargain, and receipt of the goods or furniture, after which, no posterior deed of the debtor can prejudice the creditors furnishers; and albeit in many cases witnesses prove not, and witnesses are not admitted to prove, where writ may, and uses to be interposed, yet where the probation is competent, the debt is as well proven

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