

No 80. it being a principle, *that a debtor can do nothing in prejudice of his creditor, without an onerous cause*, it is certainly both fraud and prejudice, that he should not pay his debt, but should give away to his children, that part of his estate which the creditors might have affected: And inhibition being only in these terms, *That the party inhibited should do no deed in defraud of the creditor*; it might be pretended, by the same reason in reductions *ex capite inhibitionis*, that the party inhibited did nothing in defraud or prejudice of the pursuer, in respect the time of the granting the bond or right craved to be reduced, he had effects and sufficiency of estate beside. See FACULTY.

For Queensberry and other Creditors, *Lockhart, &c.*
Cunningham, Anderson, & Mackenzie.

For the Children and Relict,
Clerk *Gibson. In presentia.*

Dirleton, No 418. p. 205.

No 81. 1679. February 7. HAMILTON of Pardowie, against Mr ANDREW HAY.

BONDS of provision sustained, though the fathers be under burden, if solvent, and he have another visible estate, as found in the case of Moufwell's Creditors, No 80. p. 961.)

Fol. Dic. v. 1. p. 71. Fountainhall MS.

No 82. 1679. December 23. ERSKINES against CARNEGIES & SMITH.

A wife was provided to the liferent of her husband's whole means. She restricted herself to a half, and renounced the remainder in favour of her children. The children were postponed to creditors whose debts were before the contract of marriage. There was no other fund of payment during the relict's life.

JOHN ERSKINE having adjudged certain tenements in Edinburgh, upon a debt due by Alexander Carnegie, pursues Janet Smith, relict of the said Alexander, as possessor of the maills and duties. Compearance was made for James and Elizabeth Carnegies, who craved preference for the half of the rents of these tenements, because, by contract of marriage betwixt the said Alexander and the said Janet Smith, 'she was provided to the liferent of the said whole tenements, but in case there were children surviving, she restricts herself to the one half, and renounced the same in favours of the children;' so they being the only children of that marriage, have right to that half.—The pursuer answered, That this was a fraudulent contrivance, to prefer children to creditors, preceding the contract, which, if sustained, would be of pernicious consequence; for, though a mother may restrict in favours of children, where there remains to the father a sufficient free estate to satisfy his debt; but here the pursuer was an anterior creditor, and the defunct's whole means and estate was liferented by his wife, his tenements being worth 1800 merks, or 1000l.; and the tocher also liferented by the wife, being 5000 merks; so that the liferent was exorbitant, and the constituent had nothing unliferented.—It was replied, That beside the tocher, he had 1000l. to be paid at his good-father's death, with the property of the houses and the tocher.

THE LORDS found the jointure was exorbitant, and the restriction fraudulent, and therefore preferred the creditor for his annuities, during the life of the father, and the tocher thereafter.

Fol. Dic. v. 1. p. 72. Stair, v. 2. p. 726.

1688. February 10.

MR. ROBERT STUART Advocate against ROBERTSON'S BAIRNS.

MR WILLIAM ROBERTSON being obliged, in his contract of marriage, to provide 20,000 marks to the heirs, by way of destination, and, without any obligation to re-employ it, if uplifted, did, at his going to be married for the second time, when he was abundantly right and solvendo, grant a bond of provision to the children of the first marriage *nominatim*; of which reduction being raised, as of a latent and fraudulent deed, at the instance of posterior creditors;

It was *alleged* for the children: That the contract of marriage was onerous; and, as lucrative deeds are valid against posterior creditors, *multo magis* these bonds which are onerous; especially when it is offered to be proven, that they were delivered to the defenders grand-father long prior to the contracting the pursuer's debt.

Answered: That if bonds of provision to children were sustained against lawful creditors and strangers, no man would be in security to contract with parents; for there is that confidence among near relations, that a thousand conveyances would be made, and the parents, or the trustee, have them in their power to use or destroy them as they saw occasion, unless such bonds were made some way public, that persons be put on their guard as to having any after-dealing with these parents; and here the one of the sums was payable at the bairns respective age of 21 years, and the other half at the father's death. Besides, that the bond contained assignation to bonds, in corroboration whereof the sums were afterwards lifted by the father, and the assignation never intimated, which argued some fraudulent design; and there is less danger of any [thing] fraudulent in bonds granted to strangers *ante contractum debitum*, than in bonds granted to bairns, especially those *in familia*, who are more at the father's disposal, and in his power; and private back-bonds between a father and his children might be kept always in his power, though after delivery. *2do*, In real rights of lands, latent prior rights, and interest in favours of children, are not sustained against posterior creditors, as in the cases of Ballochmill and Marjoribanks, *multo minus* personal bonds.*

THE LORDS preferred the posterior creditors, though the debtor was no trading merchant, and was not bankrupt at the granting of the bonds of provision, he being now bankrupt by cautionry.

Harcarse, (BONDS.) No 218. p. 49.

* Examine General List of Names.

No 82.

No 83.

Posterior creditors preferred to children holding bonds of provision, tho' the debtor was no trader, and was not bankrupt when the bonds of provision were granted, but became so afterwards by cautionry.