

1734. *January.*CREDITORS of SCOT of Blair, *against* FRANCIS CHARTERIS of Amisfield, and his Tutor.

IN the year 1705, William Blair of Blair granted an heritable bond for L. 15,000 Scots to the Earl of Glasgow, who, in the year 1713, conveyed it to William Scot, who again transferred it to Colonel Charteris in security of certain debts. Neither the Earl nor Mr Scot were ever infeft upon the procuratory and precept contained in the bond. The first infeftment was in 1728, in favour of Colonel Charteris, upon the precept contained in the original bond.

In the competition among the Creditors of Scot, and of Lowis of Merchiston, (who had been conjoined with Scot in many obligations and securities) the Creditors infisted to have the conveyance in favour of Colonel Charteris, reduced upon the act of Parliament 1696, by which the date of a conveyance is to be deemed to be that of the infeftment, which in this case was taken within 60 days of Scot's bankruptcy.

THE LORD ORDINARY ' found that this case did not fall under the act of Parliament 1696.'

In a petition, the Creditors referred to No 261. p. 1234. in which an heritable bond, granted by Merchiston to the same Colonel Charteris, though bearing date long before Merchiston's bankruptcy, was held to be of the date of the infeftment taken six years after, within 60 days of the bankruptcy, and therefore reduced.

Answered. The cases are not parallel. The fafine in Merchiston's case, was upon the precept in an heritable bond, granted by the bankrupt *directly* to the creditor. Here the fafine is not upon any bond granted by the bankrupt, but upon that granted by Blair of Blair in 1705. Any right which the bankrupt had in this bond was merely personal; upon which no infeftment could have followed, in the person of any creditor, to whom the bankrupt might have conveyed it. Neither the words, therefore, nor the spirit of the act of Parliament, support the plea of the creditors. The words of the statute declare, all dispositions, heritable bonds, or other heritable rights, upon which *infeftment may follow, granted by bankrupts*, shall only be reckoned to be of the date of the fafine lawfully taken thereon. With this description the facts of the case do not agree. The bond on which infeftment followed was not granted by the bankrupt: And the disposition and assignation granted by him, was not of such a nature as that infeftment could follow upon it.

The case is equally remote from the spirit as from the letter of the statute. The intent of the statute was to protect creditors, who, trusting to the records, had lent their money to persons, to appearance possessed of estates. Such persons are prevented from alienating their property, to the prejudice of creditors, long before it can be known from the record that they have done so. But Scot

No 262.

A debtor had right to an heritable bond, without infeftment, upon the estate of a third party. He conveyed it to one of his creditors, who neglected to take an infeftment on the original unexecuted procuratory and precept, until within 60 days of his immediate author's bankruptcy. The case found not to fall under the statute of 1696.

No 262. was never infest upon the heritable bond : His right was merely personal. The case would have been the same, in so far as regards the point in discussion, as if there had been no clause of infestment in the bond ; but Mr Scot had been possessed of a personal bond of the same value. His assignation, surely, to such a personal bond in 1716, could not have been affected by his bankruptcy in 1726.

Although no infestment had been taken on the original bond, the conveyance from Mr Scot was complete. He was by it effectually divested of any personal right he had, as much as after the infestment was taken. If Mr Scot had assigned this right to another, and he to a third, till by progress it came into Charteris's person, and then infestment had been taken, posterior to Scot's bankruptcy, it could not be maintained, that the taking of infestment avoided all the intermediate rights, which were absolute and complete without respect to any infestment. The direct conveyance, then, to Charteris from Mr Scot, can make no difference in law. If Mr Scot had been himself infest, he would not have been denuded by a simple disposition, without procuratory and precept. Had infestment followed on his disposition, it must have been upon procuratory and precept granted by him ; and the taking of the infestment would, abstracting from the statute, have afforded a preference ; therefore, in force of the statute, would have been annulled.

The statute has indeed imposed a nullity upon the presumed frauds, which might happen between debtors and creditors, by keeping transactions latent ; but the transactions are only such where infestment is necessary to denude the disponent, and afford a preference to the receiver, in prejudice of other creditors. When the statute goes this length, it has a most valuable effect ; but it ought not to be extended to cases which neither do, nor, by construction, can be understood to be comprehended under it.

THE LORDS adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Newball*. For the Creditors, *Ro. Craigie*. For Charteris, *Ja. Graham*.
Fol. Dic. v. 1. p. 86. Session Papers in Advocates' Library.

No 263.

1735. *November*. TRUSTEES OF MATHESON'S CREDITORS *against* SMITH.

AN heritable bond was dated in June 1727. Infestment was not taken on it till April 1729 ; by which time the granter had become bankrupt. The Court decided, as in the case of Merchiston No 261. *supra* ; that the security must be held to be of the date of the fine ; consequently that it afforded no preference, and must be considered as a mere personal security. See The particulars *voce* PERSONAL and REAL.

Fol. Dic. v. 1. p. 86.