

ground, that the prior was gratuitous. And to the *second*, Albeit this bond was in satisfaction of a portion natural, as it is not, yet, being delivered to the son, who is forisfamiliar, he can be in no other case than any other person to whom a bond were granted, without an onerous cause. As to the *third*, *Dolus non præsumitur*, and all machinations being only *animi*, are only probable *scripto vel juramento*, and can be inferred by no circumstances. The pursuer answered, That albeit *in dubio dolus aut culpa non præsumitur*, yet it is doubtless probable otherwise than by the oaths of the parties, whereunto trust is never to be given, in relation to their own shame, contrivance, or fraud; and therefore matters of fact do necessarily infer, and presume fraud in many cases; and in none more than this, where the deed was clandestine, and latent betwixt father and son, and where the father's estate was thereby rendered insufficient to pay both his debt, and the others contracted shortly thereafter; and if it were sustained that such latent rights betwixt conjunct persons were valid in prejudice of posterior creditors contracting *bona fide*, and not knowing the same, all commerce behoved to cease; for every man might give such bonds to his children, and continue to trade and to borrow money, and upon the children's anterior bonds be totally excluded. The defender answered, That our law by a special statute, in anno 1621, having determined the cases of presumptive fraud, and extended the same only to anterior creditors, without mention of posterior creditors, the same might be thought to be of purpose omitted, and cannot be extended by the Lords.

THE LORDS found the matter of fact and circumstances alleged, relevant to infer a presumptive fraud, and contrivance betwixt the father and the son, which did ensnare the creditors who continued to trade; and therefore reduced the same as to the creditors; and preferred them and the relict, in so far as she was a creditor, but not for any posterior or gratuitous provision to her, or to her children; but they did not find the two first grounds relevant to prefer a posterior onerous obligation to a prior gratuitous, or that this bond was as a *legitim* revocable; and the LORDS were chiefly moved because of the inconvenience to creditors, acting *bona fide* with a person trading, and reputed in a good condition; and where *in event* his estate is not sufficient, both to pay his creditors and this bond; for if it had been sufficient for both, they would have come in *pari passu*, having both done diligence within the year.

Stair, v. 1. p. 601.

1672. February 27.

STREET against MASON.

JAMES MASON merchant in Edinburgh, having begun a correspondence and traffic with William Street merchant in London, did, after the said correspond-

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A disposition by a merchant to his infant son of his

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 whole estate,
 without a re-
 served life-
 rent or power
 to burden,
 was found
 fraudulent,
 and presumed
 to have been
 done of pur-
 pose to cheat
 his corres-
 pondents, who
 had traded
 with him be-
 fore the alien-
 ation; and
 their debts,
 though pos-
 terior to the
 disposition,
 were found to
 affect the
 estate. The
 defence, that
 the son's sa-
 sine was re-
 gistered, was
 repelled, the
 defenders be-
 ing foreign-
 ers.

ence infest his eldest son James Mason, a child of two years old, in certain lands belonging to him in the country, and did thereafter continue the commerce with Street till the year 1665, and then gave bond for L. 500 Sterling, with a clause of infestment in an annual rent out of these lands, whereupon Street was infest; but finding that the son was infest before him, he raised reduction on this reason, that the son's infestment was a most fraudulent deed, done by contrivance and machination of the father, to ensnare and deceive this pursuer; who was under correspondence and commerce with him by an uninterrupted tract of trade, begun before the son's infestment, and continued till Mason broke. It was *answered*, That the reason of reduction is no ways relevant, because the ground of reduction is more than two years after the son's infestment; and though the law of this kingdom hath been most favourable to secure creditors against fraudulent alienations by the act of Parliament 1621; yet it is justly limited to creditors who were creditors the time of such alienations; but no fraud can be said to be done to those who then were not creditors; and if posterior creditors might quarrel anterior rights, though granted to children, it would utterly incapacitate parents to provide their children, either for livelyhood, employments, or marriage; and there never hath been an example sustained of this kind in this kingdom. It was *replied* for the pursuer, *1mo*, That there being a continued tract of traffic between the pursuer and old Mason, begun before the disposition to the son, it may justly be taken jointly; as the Lords have ordinarily interpreted the statute, of excluding probation by witnesses, of merchant accounts after three years; if it continued in a current account, it was to be esteemed as one account, and that the three years were to be reckoned from the last furnishing, though the beginning of the account might have been for many years before; so here the credit given by the pursuer to Mason at the beginning of the correspondence, is the cause of all the posterior furnishing; in the same way as if at the beginning Mason had given a bond, mentioning the credit he had received from Street, and obliging him as an honest correspondent, thankfully and honestly to pay all furnishings he should receive. *2do*, Albeit this reduction could have no ground from the act of Parliament 1621, yet that act is not derogatory to the common law of nations; whereby all deeds done by fraud, contrivance, and machination, whereby parties have been ensnared and deceived, are null and void; and by the civil Roman law, such fraudulent deeds are annullable *per actionem paulianam*, as done *in fraudem creditorum*, though they be posterior creditors; neither doth the pursuer pretend that all dispositions in favours of children are quarrelable by posterior creditors, but only such dispositions as can have no rational ground for which they are granted, and are evidently presumed to be done of design to ensnare persons, and induce them to give credit, and yet be excluded by these fraudulent deeds; and there was never a grosser fraud or machination than this in question, as appears in these points. *1mo*, It is by a father to his apparent heir. *2do*, Upon no convenient occasion for the son's use, he being an infant of two

years old. *3tio*, The disposition produced does neither reserve the father's life-rent, nor a power to affect or burden, as is ordinary in such dispositions; and it is most probable, that there hath been another disposition, of the same clauses, of the same date, that the son's infeftment might equally relate to either, and to be made use of as the father saw cause. *4to*, The pursuer is a stranger, and could not in the continuance of a trade, be always searching registers. *5to*, Mason a few years after this disposition became a most notorious bankrupt, his debt doubling his estate; so that there is no doubt but at the very time of the son's disposition, the father knew himself insolvent; and therefore the disposition could have no other interpretation or design, but to be a reserve when his credit should be broken; and thereby parties continuing to trade with him were ensnared. *6to*, The father continued in possession, and granted infeftment both to this pursuer and others, as if the son's infeftment had never been granted, or it had been in his power; all which evidence the fraud to be exceeding gross; and upon far less grounds the Lords reduced a bond granted by John Pollock to James his son, payable at the father's death, though the son was no infant, but out of the family; and preferred the father's posterior creditors, who continued to trade with him till then; and found the bond, and an adjudication thereon null, as a fraudulent latent deed, upon the 12th of February 1669, No 31: p. 4909. The defender *duplicated*, *imo*, That there is nothing here to shew an anterior debt; and that though *actio pauliana* did extend to posterior creditors, yet that was only in case of a contrivance betwixt the disponent and acquirer, which cannot be in this case, the acquirer being an infant. *2do*, This kingdom having public registers, by which parties that contract may know their debtor's condition, even strangers ought to have constituted a procurator here to enquire into the condition of their correspondent; especially seeing the ground of this reduction is a bond bearing infeftment in land, and not in the ordinary way of traffic; and these registers, not being among the Romans, or elsewhere, though they extend fraud to posterior creditors, we ought not, who have a special statute fixing the limits of fraud; neither can the son's disposition here be called a latent deed, as Pollock's bond was, it being a public infeftment holden of the superior, and the sasine registered.

THE LORDS laid hold upon two points in this debate, *viz.* That the father knew himself insolvent at the time of granting the son's disposition, and yet continued his traffic with the pursuer as before; and that it was probable that the father had another disposition of the same date, reserving his life-rent, and with a power to burden; and therefore they ordained Mason's count-books to be produced, that it might appear whether his debt did exceed his credit; and allowed witnesses *ex officio* to be adduced for instructing the condition of his estate at that time; and likewise the writer and witnesses in this disposition, and any other witnesses; whether there was another disposition than this produced, having reservations therein contained.

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July 2. 1673.—Mr STALER and Mr JACKSON being creditors to James MASON elder in sums extending to above L. 2500 Sterling of principal, which became due by a trade and correspondence that was entered into, and begun before his granting a right of the lands of Ponbeath and others, in favour of Mason's son, pursue a reduction and declarator of the son's infeftment, as being made and granted by a most gross and fraudulent contrivance, in defraud and prejudice of the pursuers, who of before were entered into a public trade and correspondence with Mason elder, and by the result and product whereof, he is debtor to them in the foresaid sum.—It was *alleged* for Mason younger, That the pursuers' reduction and declarator cannot be sustained, because the ground of their debt being founded upon a bond, and the furnishing of merchant-ware, it appears both by the date of the bond, and by the furnishing of merchant-ware, that the same was posterior to the infeftment quarrelled; and the Lords, by their former interlocutor, did go the utmost length in sustaining the bonds, albeit posterior, in so far as it could be proven that they were granted for furnishing of merchant-ware prior to the son's infeftment. *2do*, The law of this kingdom hath fully provided for the interest and security of creditors, by the act of Parliament 1621, and which does only proceed in the case of anterior creditors, to whose fraud and prejudice rights are made, without true, just, and onerous causes; and besides, public registers are established, that every one may know the condition of him with whom he contracts; and it is evident, by an account produced, that Mason elder was not debtor to the pursuers the time of the granting of the infeftment to his son, except L. 49 Sterling; and Mason elder not being debtor, nothing could impede why he might not have granted a public infeftment in favour of his son, of all, or any part of his estate; and besides, it is known that the foundation of credit betwixt merchants is not in contemplation of real estates.—To which it was *replied*, That the pursuers reduction and declarator ought, notwithstanding, to be sustained; and the pretences insisted on are of no weight to justify or defend such a detestable, fraudulent, and unheard-of contrivance, as Mason elder hath made use of in settling and conveying his estate in favour of his son, and in the mean time drawing in his hands the means and estate of the pursuers, and of others who were acting *bona fide* upon the faith, assurance, and credit of a public trade and correspondence, that was begun before the pretended infeftment granted to the son, and continued without any interruption; and by the result thereof, the vast debts and sums that are due to the pursuers become justly due; and of which there can be no ground of law or justice to sustain the son's fraudulent infeftment upon the reasons after-mentioned, which your Lordships are desired seriously to consider, with regard to the pursuers, their private interest, and to the public credit, honour, and justice of the kingdom, and to the security of trade and commerce; and with regard to that equity, candour, and ingenuity which the laws and customs of all nations have owned, allowed, and established in cases betwixt merchant and merchant. And therefore it was *replied, imo*,

That albeit by a former interlocutor, your Lordships sustained the bonds, in so far as it could be proven they were granted for anterior furnishing; yet upon a new debate, principally upon this ground, that the pursuers debt was the result and produce of a trade and correspondence begun before the son's infestment, your Lordships, by a new interlocutor, did ordain, before answer, Mason elder his count-books to be produced, that it might appear what his condition was the time of making the disposition to his son, and if the same was granted of design to frustrate his creditors; as also, that witnesses should be adduced by either party, for proving the continued trade betwixt the pursuers and Mason elder before the son's right; and granted commission to Sir Robert Murray and Mr Erskine, John Young and Mr Donaldson, to take inspection of the pursuers their count-books; and accordingly, there is a report under the hands of the said commissioners, and witnesses have been adduced upon the points of the said interlocutor; by which it is supposed, it is clear and evident that there was a trade and correspondence entered into betwixt Mason elder and the pursuers, before the son's pretended infestment; and that Mason elder, before the granting thereof, was a person of no visible fortune, but on the contrary was under great difficulties to maintain any appearance of credit, and which he struggled with for a time, upon a fraudulent design to ingross the means and estate of the pursuers; and as to what methods, frauds, and contrivances, and other circumstances and qualifications thereof Mason elder made use of to conceal the son's pretended infestment, and in the mean time, to act and behave himself as heritor, the pursuers refer to the report and depositions, and humbly desire your Lordships seriously to consider and peruse the same; and from which the pursuers do shortly insist upon the grounds of law and justice after-mentioned, why no regard ought to be had to the son's pretended infestment, in so far as the same may be any ways prejudicial to the payment of the pursuers their just debts; for, *imo*, Mason elder having entered into, and being stated in a public trade and correspondence with the pursuers, which was not interrupted nor broken off; although, as is obvious, the method and state of accounts behoved to alter; whatever is the result and product of the said correspondence, is in law to be considered with regard to, and dependence upon the beginning of the said correspondence; whereupon to question all fraudulent infestments made by Mason elder in favour of his son; and which is no incroachment upon law, or upon the act of Parliament 1621; but on the contrary a just, rational, and necessary interpretation thereof, and whereby the pursuers are to be looked upon, and reputed as in the case of anterior creditors; in regard the natural quality of the debt is a result and product of a correspondence, and was entered into, and begun before the son's infestment. *2do*, It was obvious and apparent, that in such trade and correspondence, the state, condition, and method of accounts do often and necessarily vary, according to the several payments made; but which is not respected where the said trade and correspondence continue and are not interrupted nor broken off; it being certain, and may appear by the

No 32. report, that former payments are still the foundation of new credit ; so that what can be more absurd and prejudicial both to private and public interest, and to the security of trade, and to the faith, and trust, and ingenuity of merchants, than to allow, that after the entering upon such public trade and correspondencies, it should be lawful betwixt the payment of old debts, and taking credit for new, to make and grant fraudulent rights and infestments in favour of children ; which, if it were sustained, it would inevitably tend to the ruin and subversion of all trade and commerce ; and would lay such a foundation for fraudulent contrivances, as no man could be secure against the same. 3^{tho}, Cases of this nature should be judged with regard to natural equity, and the laws and customs of nations, and the exuberancy of trust that is necessary and usual betwixt merchant and merchant, and without which the freedom and interest of trade and commerce cannot be maintained ; and upon which account your Lordships, in other cases, have so interpreted the laws and customs of this kingdom, as might be consistent with the laws and customs of nations, and equity and interest of trade ; as, for example, the act of Parliament anent prescription of merchants accounts, hath been found not to proceed, where the case was a continued trade and correspondence ; and bills of exchange have been sustained to be obligatory, without the solemnity of witnesses ; and orders for payment thereof sustained without the solemnity of intimation against posterior assignees and arresters ; and annualrent sustained betwixt merchant and merchant, without paction ; and many others that might be instanced ; and there is much more reason in this case, and which indeed is no unwarrantable extension, but a just, necessary, and rational interpretation of the act of Parliament 1621 ; and wherein both the public justice of the kingdom, and the security of trade and commerce are absolutely concerned. 4^{tho}, By the laws and customs of all nations, and by the common law, to which the act of Parliament 1621 relates, and which in itself was most just, and founded upon excellent reason ; albeit *actio pauliana sive revocatoria*, which is the same with our reductions upon the act of Parliament 1621, was only competent to anterior creditors ; yet both that law, and natural reason and justice, did extend the remedy of that action to posterior creditors, wherein it did appear that their means and estates were ingrossed *animo fraudandi*, and that prior rights were made of design to secure their estates, that posterior creditors might have no way to get satisfaction of their just debts ; and as to which the common law is clear, as may appear by Jason in his *Tractat de actionibus Rubr. de actione Pauliana* ; and where both he and others condescend upon the presumptions and adminicles that are sufficient to evince that the posterior debts were contracted *animo fraudandi* ; but indeed all the presumptions that any lawyers ever thought on, are far short of the pregnant and unanswerable qualifications of fraud and contrivance, which are made appear in this case, ‘ That Mason elder did, after the granting of the son’s infestment, ingross ‘ the means and estates of the pursuers *animo fraudandi*,’ which will be evident upon consideration and perusal of the report and depositions of the witnesses ; and

if the common law and natural reason did think fit to allow and grant a remedy in the case of posterior debts, that were absolutely posterior to the rights quarrelled, how much more in this case, where the pursuers debts cannot be looked upon as in the case of posterior debts, having a dependence *ex causa praterita*, and being the result and product of a correspondence that was entered into before the granting of the son's infeftment. 5^{to}, Besides the grounds above-mentioned, which beyond doubt are more than sufficient in law and justice to cancel and redargue such a fraudulent infeftment, the pursuers do add and conjoin this ground farther, that it will appear by the probation, that Mason elder was a person that had no visible estate, and that he was not in a capacity to buy lands, and it cannot be made appear that he had any means and estate the time he bought the same; and seeing it appears by the probation, that his great trade was about the year 1662, law and reason presume, that seeing it cannot be otherways condescended upon, what way he did pay and satisfy the price of the lands, which he hath fraudulently conveyed to his son, that therefore he hath paid and satisfied the same with the pursuer's means and estates; and as the seller being creditor, the pursuer would have good interest to have reduced the son's infeftment, upon the act of Parliament 1621, even so the pursuers, out of whose means and estates it is satisfied, have good interest to pursue a declarator, that the son's infeftment may be burdened and affected with the debts. To which it was *duplicated*, 1^{mo}, That the son's public infeftment is opposed. 2^{do}, Though the common law did allow *actio pauliana* to posterior creditors, yet that was only where the receivers of such rights were *participes fraudis*; and besides, there is *dispar ratio*, seeing in that law posterior creditors had no remedy to prevent or discover their hazard against latent, private, and fraudulent rights made of before; whereas by our law there is a clear remedy, viz. the public registers; and it doth not concern Mason younger what fraudulent contrivances were made use of by Mason elder to conceal the infeftment after it was granted, seeing by the granting thereof he had *jus quæsitum*, and which the pursuers might have known. 3^{tio}, It cannot be pretended for Mr Jackson, that he is so much as in the case of a trade and correspondence entered into before the son's infeftment, as will appear by the report; and though he was, it is not relevant, since it appears the time of the granting the son's infeftment, Mason elder was not debtor to the pursuers, and that merchants turn bankrupts, to the frustrating and disappointing of their just creditors, is no novelty in this and other kingdoms; and the act of Parliament *anno* 1621, is the only remedy, and doth only proceed in the case of anterior creditors; and it were a dangerous preparative to extend the same upon points and circumstances of favour, which may occur in many cases as well as in this. Whereunto it was *triplicated*, That the pursuers repeat and oppose the solid grounds of law and reason after mentioned. For 1^{mo}, Albeit the law of the kingdom hath introduced public registers, yet that is for further security, and doth noways derogate from any remedy that was introduced by the common law, to which

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the act of Parliament 1621 relates, and is founded upon evident reason, and natural justice. *2do*, The act of Parliament 1621, doth not less militate in this case, than in any other case whatsoever, in respect the debts pursued for were the result and product of a correspondence begun and continued before the fraudulent infeftment granted to the son, as is evident by the report, both as to Mr Street and Mr Jackson. *3tio*, Even by the common law, it was necessary and requisite, that there should be *insinuatio donationum*, which was judicially made, and was more solemn than the case of public registers, and was no less recorded than these; and yet that law upon natural reason and justice did allow a remedy to posterior creditors against fraudulent rights, where it appeared the posterior debts were contracted *animo fraudandi*; so that the pretence of registers is of no weight, and of as little weight in this case as any, both the father and son's names being the same, so that little could be known from public registers; and how little was known even to his Majesty's subjects living within the kingdom, and his doer neighbours, will appear by the probation, where the son's pretended infeftment was not so much as known to any; but on the contrary the father represented heritor, and behaved himself as such, by all deeds of property and possession, and by granting infeftments to these pursuers and others, and which by a detestable contrivance he did under disguise, pretending that it would wrong his credit, if any did know that he granted the same infeftments, making use of the fraudulent contrivances in the way and manner of granting thereof, as will appear from the probation. *4to*, It is a groundless and ridiculous assertion, to pretend that by the common law, *actio pauliana* was not competent to posterior creditors, except where the receivers were *participes fraudis*; because then persons might have had a clear way to have defrauded the law, by making of rights in favours of pupils, idiots and furious persons; and the argument is retorted, for there is here much more reason, seeing Mason elder was the sole actor and contriver, the son being a pupil, and not capable; and the distinction in the common law, as may appear by any common paratitle, is singly this, that where the alienation was *ex causa onerosa*, it could not be questioned, unless the receiver had been *particeps fraudis*; but where it was *ex causa mere lucrativa*, *fraus in eventu* was sufficient, whether there was *animus fraudandi*, or not, which is in itself most just and consonant to the act of Parliament 1621, and to the practise thereupon. *5to*, The pretended infeftment granted to the son, was by a most detestable, gross, and unwarrantable contrivance; and if this preparative were sustained, it were impossible there could be any faith, or trust, or security for trade or commerce; and albeit in this and other nations it is not denied but there be too many instances of broken merchants, yet that is in regard of the secret and fraudulent contrivances of their estates, which cannot be discovered; but it is without all example, that a visible estate should be conveyed, and enjoyed by a bankrupt's son, upon pretext of such a fraudulent infeftment, to the prejudice of the father's just creditors; and your Lordships would consider the ho-

nour, interest, and public justice of the kingdom; and there can be no case of greater consequence to the trade of this kingdom, as is known, being chiefly founded upon credit; and if such a hellish contrivance as this should be sustained, it behoved to break off and subvert all hope and expectation of credit; and upon the matter it were to authorise and give encouragement for the committing of fraudulent contrivances; persons being secure that they might settle their estates in favours of their children, without being liable to their just creditors; and as the inconveniences both to public and private interest, are very great on the one hand, so there is not the least shadow of any inconveniency upon the other; the case being very singular betwixt merchant and merchant, and depending upon an anterior trade and correspondence; and the circumstances and qualifications of fraud and contrivance so high and violent; that they cannot concur in any case wherein law and reason, and the public justice of the kingdom, are not concerned to give redress against the same.

THE LORDS having considered this debate, and the writs and testimonies produced, they found that there was a trust and correspondence betwixt Street and Mason elder, begun in *anno* 1660, and constantly continued till the furniture and bonds whereupon this pursuit was founded; and likewise that the same correspondence was begun betwixt Jackson and Mason a day before Mason's disposition to his son, and a month before the son's sasine; and that Mason did produce no count-book to instruct that he had any means to purchase this right for his son, and pay his creditors, or any means to satisfy the pursuer's debts, but that he was commonly looked upon as having no such estate; and therefore the LORDS found that the reasons of reduction upon this gross fraud and contrivance, viz. that the disposition by the father to his son was done by a merchant, who carried on a public trade and correspondence, and could have no rational intent, but to deceive the pursuers, being strangers, and his correspondents, the son being an infant, and no obligation upon the father to infest him, neither being provided for his marriage, or for a stock when he were of age; and being almost the father's whole estate, and more than he had free, without reservation of the father's liferent, or power to burden, and the father carrying constantly himself as creditor; therefore the LORDS reduced the disposition, and declared Masson the father infamous for so great a fraud; but the Lords did not decide severally upon any of the grounds, either upon the account that these debts were to be drawn back to the first trust, or upon any other, but upon all jointly. See No 111. p. 1003. See REDUCTION.

Stair, v. 2. p. 79, & 197.

* * * Gosford reports the same case:

In a reduction and declarator of an infestment granted by old James Mason to his eldest son, of the lands of Howboot and Gayside, at the instance of

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Street and Jackson, as being creditors to the father by two several bonds, exceeding the sum of L. 10,000 Sterling; it being *alleged* that the son's right could not be reduced upon that interest, because both the bonds were posterior to the infeftment, and so did not fall within the act of Parliament 1621, which was only against dispositions made *inter conjunctas personas*, in prejudice of lawful creditors the time of the making thereof; to which it being *replied*, That albeit the bonds were posterior, yet they were accepted by the pursuers for the price of merchant-ware, and in contemplation of a continued tract of trade and commerce, which had begun before the son's infeftment; for clearing whereof, there being a commission granted for taking inspection of the pursuers compt-books at London, and of old Mason's here in Scotland, and to examine witnesses upon the condition of his estate, and of the way of conveyance of these lands to his son; after report whereof, and advising of the depositions of the witnesses, procurators for both parties being heard, *in præsentia*, it was *alleged* for the pursuers, That it being clear by the depositions of the witnesses, and report that there had been a tract of commerce begun and continued betwixt the pursuers and the father, before the son's infeftment, and long thereafter; so that albeit he had made payment at several times before the son's right of all that was resting, and that the new bonds were granted posterior thereto; yet the former commerce being the cause of the trust; and accepting of these bonds they depended upon a prior cause; and were only the result of that trade and commerce, and so fell under the act of Parliament; and, albeit the said bonds did not depend upon that antecedent cause, and that the pursuers had not been creditors till after the son's infeftment; yet they were well founded in law to reduce the same *ex capite fraudis*; in so far as the said infeftment was made *animo fraudandi*, and could be ascribed to no other cause; the son being but a young child, having no estate of his own, and carrying that same name of James Mason. The father did make the disposition without so much as reserving his own liferent, and did behave himself still as proprietor of these lands, by infefting not only the pursuers, who were strangers, but several other creditors therein for security of their debt, and that by private and indirect ways, having disguised himself and gone to some remote places, where he gave sasive to those creditors: Likeas, when he was ordained to produce his compt-books, his own servant deponed that he would have wished him to write a new book; and that which was produced was confessed by the writer to have been made up but very lately since the Lords' ordinance; and yet was produced by him as his merchant-book, wherein were set down the whole diets and terms of his trade and commerce with the pursuers, as it happened and continued from time to time; by all which particulars, there appearing a gross and palpable cheat, upon the pretence of trade, to draw the pursuers means into his hands, and to put away his estate, for no onerous cause, to his apparent heir: The pursuers were founded in the civil law, and were in the case of *actio pauliana*; whereby creditors, albeit after indirect consequen-

ces, were justly reponed against the same, that they might be satisfied of their just debts out of their debtor's estate fraudulently put away; and, if such conveyances were sustained, it would obstruct all commerce and trade; seeing strangers could never be in security; and by such indirect ways, which could never be known to them, the merchant might purchase land, albeit he have no estate, and by continuance of his trade, may, upon trust, procure great parcels of merchandise to be sent him, and immediately may sell the same for ready money, and therewith pay the price of the lands disposed to his son; and then retire himself and take a *cessio bonorum*, and thereby frustrate or circumvene those who trusted him, without all remedy; whereas, money being borrowed to buy land, or any other thing, the law gives a real right in the thing acquired, as being *surrogatum*, and come in place of the money lent, and so prefers them to other creditors as to that interest.

It was *answered* for the defenders; That it being clear, by the pursuer's own count books and instructions, that old Mason had paid all accounts, and recovered discharges, before the son's infestment, of all debts and furnishing of merchant wares, that did put an end to all preceding commerce, there being no contract or bond betwixt the parties, whereby they were obliged to furnish him for the future; and so the right made to the son being then the father's own means, and in his power to dispose the same to whom he pleased, our law and acts of Parliament would be no ground of reduction, which did only militate against rights made to conjunct persons in defraud of lawful creditors, the time of the making thereof: And as to the civil law, and *actio pauliana*, whereupon the allegiance is founded; the same did never take place, nor were allowed in this kingdom, where a reduction of fraud and circumvention was never sustained, but at the instance of the party, who, by that deed, was circumvented, and had a true interest and right, wherein he was defrauded by that deed and circumvention; but the same was never extended to cases and creditors who were not then in being; and, if this were sustained, it would alter and subvert the fundamental law of this kingdom for provisions made by fathers to their children, or infestments to their eldest sons; and apparent heirs could never succeed them, seeing, by contracting debts thereafter, and continuing in a trade of merchandize, their estates and provisions might be taken from them, which is quite contrary to the meaning of the act of Parliament 1621, and to all law and practice: Neither can the civil law, or *actio pauliana*, be obtruded; seeing, in that case, the law doth allow reductions only of the rights and conveyances made to a third party, who is *particeps fraudis*; but if he be innocent and free thereof, as is this defender young Mason, who had not attained to the years of understanding, his right could never be taken from him; and as to the inconvenience of trade and commerce, it cannot be obtruded; seeing the trust amongst merchants is never founded upon real estate, but upon the faith and credit of the buyer of the commodities, which is personal. But as to real estates, seeing we have our public registers, whereby the condition of every heritor may

No 32. be known, if he be denuded or not in favours of another ; and that the son's sasine was not only registrate, but his infeftment was public upon resignation in the superior's hands ; so that the father's condition might have been easily known ; and that he was denuded, which is the only remedy appointed against all future trust and credit ; the pursuers can only blame themselves, or those they intrusted in this country ; and if thereafter they did furnish any merchant wares to old Mason, in contemplation of that real estate whereof he was denuded by a public deed, it was their fault.

THE LORDS having much reasoned among themselves upon the said debate, being a new case never as yet decided, did unanimously decern and reduce the right made to the son, as being a most fraudulent and indirect conveyance made to the son, of purpose to prejudge the pursuers ; being moved thereto upon these reasons, which made the cause singular, and such as had not been before the ground of any action, and hardly could fall out thereafter ; as *first*, That the right was made to the son, being a young boy, and *in familia*, without any motive, or by a contract of marriage, or to constitute a tailzie, or for fulfilling any prior obligation ; and did bear for onerous causes, which is altogether false ; neither did the father so much as reserve his liferent, or any power to alter or burden the same with any debts during his lifetime ; albeit at that time he was in far greater debts than all his estate was worth ; which was done of purpose to defraud those that should trust him thereafter ; thinking that they could never reach the son upon the act of Parliament ; and yet he should still have a power in his own hand to cause the son supply him, or burden that estate as he should think fit ; seeing he was master of the disposition and whole warrants of the sasine ; and might destroy, or cause write the same over in what terms he pleased ; or have two or three draughts subscribed by him the time of the resignation, of contrary tenors and provisions, and to make use of any of them that did best serve his purpose ; *2do*, The fraud was most eminent, in that his son and he being of one name and surname, after the sasine given to the son, he did continue to do all deeds, as if he had been still proprietor, by granting infeftments, and setting tacks, and uplifting the duties, in that same manner as he did before he was denuded ; *3tio*, It being clear that he was a bankrupt the time that he had bought the lands, when he was in great debt ; and did basely prevaricate in making up count books, and bribed persons for that effect ; and at that very same time that he subscribed the disposition to the son, and a month before his infeftment, upon his former tract of commerce, he had induced Jackson to furnish him merchant wares for considerable sums, and entered in a trade with him and Street, which was continued for the space of three or four years thereafter ; so that they being strangers, and altogether ignorant of the way of conveyances of real estates, especially where it was done with so much art and contrivance, it was just, and concerned the public good and honour of the kingdom, that they might have access to that estate conveyed with so much fraud and circumvention ; *4to*, That albeit, by the act of Parliament, and for-

mer practiques, the interest of present creditors was only secured, where rights were made to conjunct persons, or to apparent heirs *post contractum debitum*; yet these were not exclusive of all other lawful remedies against fraudulent conveyances, where they were made, and could have no other cause but to cheat, and circumvene, and depended upon a prior trust, and tract of which was most clear and manifest in this case; and being so circumstantiate, deserved to be made a practise; and, that all others might be deterred from such inclinations, the LORDS did reduce the son's right, and declared the father infamous and unworthy of all trust, and incapable of any office hereafter.

Gosford, MS. No 609. p. 349.

No 32.

1673. January 9.

REID against REID.

REID of Ballochmilne pursues a reduction against Reid of Daldilling, of an infestment granted by his father to him (when he was an infant) of his estate, reserving his father's liferent, upon this reason, that the father continued in possession as proprietor, and that the infestment to the son was a latent fraudulent right; so that the father thereafter having borrowed money from the pursuer, and his cedent's, who neither knew, nor was obliged to know any such private latent right; as to them the said right is null, being base, never clad with possession, and did never become valid till after the father's death, that the son entered into possession; so that the creditors having contracted *bona fide*, before the right to the son became valid, the same cannot prejudice them: And albeit it were not null till possession, yet it is fraudulent, in so far as it is latent; for the father's possession reserved hath never been accounted sufficient to validate a base infestment to a child in prejudice of creditors. The defender answered, That a base infestment is a valid right in its own kind, and is not null till possession; albeit by statute a more public right, though posterior, be preferred thereto; for, without all possession, it would exclude creditors arresting. It was also found to exclude the terce, in the case of Bell against Lady Rutherford, January 27. 1669, No 2. p. 1260. And as to the reason of fraud, because it is latent, the law hath never taken notice of creditors contracting after infestment, but only of anterior creditors, as is clear by the act of Parliament 1621. 2do, There can be no reason of reduction upon fraud, as being latent, because the son's sasine produced is marked as registrate in the register of sasines of the shire of Ayr; so that the said register being appointed for publication of rights, and being a more competent way to publish it than a proclamation at the cross, it cannot be said to be latent; and if such infestments were found simply null against posterior creditors, the great mean of preserving the families of the kingdom, and providing of second children, should be overthrown, and all the settlements made thereupon annulled; for, where there is an improvident heritor, the ordinary remedy for preserving his family, and pro-

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A disposition by a father to an infant son, even reserving the liferent, and although the son's sasine was registered, was found fraudulent, and in prejudice of *posterior* creditors; the father having continued ostensibly proprietor, and the public register not having at the time been regularly kept.