

and mentioning of the possession by the father, the son's right could not be known...

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*Gosford, MS. No 641. p. 373.*

1677. January 24. BLAIR against WILSON, Minister of Cultie.

JAMES BISSET grants bond for love and favour to the Laird of Ardblair, that in case Bisset and his brother died without heirs of their body, their heirs should pay to Ardblair the sum of two thousand and five hundred merks, redeemable by Bisset himself in his life, for payment of a penny. Thereafter Bisset borrows a sum of money from Wilson, and Blair pursues a decret *cognitionis causa* against the heir of Bisset for establishing of the debt, that he might adjudge, because Bisset redeemed not, and he and his brother died without heirs of their bodies. Wilson is also going on in diligence for adjudication, and raises reduction of Ardblair's bond, in so far as it might be prejudicial to him, a lawful creditor, on this reason, That this bond is a fraudulent contrivance and latent, which might disappoint and exclude all lawful creditors; for by that preparative, any person may give bonds to his friends equivalent to his estate, only to take effect in case he had no heirs of his own body, whereby all creditors would be excluded, who neither did nor could know it.—It was *answered*, That defraud of creditors can only be extended to anterior creditors, according to the act of Parliament.—It was *replied*, That the remeid by that act doth not exclude the common remeid by fraud, which therefore was sustained at the instance of posterior creditors, in the cases of Street and Mason, No 32. p. 4911. Pollock, No 31. p. 4909, and Reid of Ballochmilne, No 33. p. 4923.

THE LORDS found, That bonds of this nature could not exclude posterior creditors, and therefore decerned in favour of Ardblair, with preference to Wilson the creditor.

*Fcl. Dic. v. 1. p. 334. Stair, v. 2. p. 498.*

\* \* \* Gosford reports the same case:

THERE being a mutual adjudication pursued at the instance of the Minister and Ardblair against the Heirs of James Bisset of the lands of Balleonie, it was *alleged* for the Minister, That he ought to be preferred, and Ardblair ought not to come in *pari passu* with him; because George Bisset the common debtor having bought the same lands, and not being able to pay the price, he did borrow from the said Mr Thomas four thousand five hundred merks; whereof he made payment to the disponers of the said lands; and for which he did grant a bond, bearing a precept of infeftment; whereas the bond granted to Ardblair was only for love and favour; and was most fraudulently purchased for no onerous cause; and was only payable after the decease of Bisset or his brother, with-

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An intention to defraud creditors was found to be inferred, by granting a bond payable after the obligant's decease, if he had no heirs of his body, and redeemable for an elusory sum.

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out heirs; and was redeemable during their lifetime, by payment of a small sum; and therefore he could not crave adjudication to come in *pari passu*, unless it were with the burden of his debt and adjudication.—It was answered for Ardblair, That, notwithstanding, he ought to come in *pari passu*, because he was a prior creditor by his bonds; and albeit the term of payment was not until after the decease of Bisset, his brother, and their heirs, yet the same granter being dead, he ought to secure the same by adjudication, that he may recover payment in case of their deceasing without heirs; and so his diligence being within year and day of Mr Wilson, they ought to come in *pari passu*, but prejudice to reduce his right upon the act of Parliament, as accords.—THE LORDS having considered this case, with the two bonds granted to the competitors, did find, That Mr Thomas Wilson, as a true and lawful creditor, was preferable, and that Ardblair's bond was only *mortis causa*; and being for no just and onerous cause, albeit it was prior to the Minister's bond, yet that the Minister's adjudication should be decerned. And if Ardblair should insist to lead his adjudication, it should be affected with preference of the Minister's sum, and that he should only have thereby right to the superplus.

Gosford, MS. No 945. p. 623.

\*.\* This case is also reported by Dirleton :

A BOND being granted by James Bisset of Netherbalcarne to the Laird of Ardblair, for love and favour, to be paid after his decease; the LORDS found, That the said being granted without an onerous cause, to be paid in manner foresaid after the granter's decease, could not prejudice posterior creditors, who were in *bona fide* to lend their money, notwithstanding any such latent deeds and bonds.

This decision seems to be hard, seeing it was lawful both to the granter and receiver of the said bond, to grant and receive the same; and the said donation being lawful *ab initio*, could not become thereafter unlawful by any deed of the granter; and fraud cannot be pretended, but where creditors or others, the time of the granting of such bonds, were prejudged; unless it did appear by some speciality and circumstance in the case, that there had been a design to cheat and circumvene those who were to lend their money, by granting and settling upon the relations of the debtor his estate, and thereafter to get in his hands his creditor's means,\* whom he was not able to satisfy; which was found in the case of Mason, No 32. p. 4911, and Pollock, No 31. p. 4909, and was not alleged in this case.

Reporter, Newoy.

Clerk, Mr John Hay.

Dirleton, No 438. p. 214.