owing by him for the same year, he had proponed the very same allegeance; and it was repelled by the Lords, who found where the minister was only a stipendiary, and no beneficed person, though the teind be wasted by calamity of war, or other accident, that did not liberate him who had right to the said teinds, because that loss might be compensed and supplied by the uberty of preceding or subsequent years; and which is the reason assigned by the law, wherefore tenants can plead no abatement upon the head of sterility or vastation. *L.* 15, *p.* 4, *D. Locati; L.* 8. *et* 18, *C. eodem.*

The Lords adhered to their interlocutor given in Roxburgh's case.

Advocates' MS. No. 404, *folio* 219.

1673. *June.* ANENT COMPRISINGS.

IN an action for maills and duties at the instance of a compriser, it fell to be contended, that a first compriser having arrested, and by virtue thereof obtained payment of his annualrents, he was bound by the act of Parliament 1661 (declaring second apprisers within year and day to come *pari passu*, and to be reputed a part of the first comprising, as if but one apprising had been led for all their sums,) to communicate proportionally what he had so got to the said apprisers within year and day. (And yet the intent of the act of Parliament 1661 may be eluded easily, if their diligences were proper.)

It was not decided. Only it seems he ought to communicate nothing, save what directly and immediately flows from his comprising. What if he has attained payment, in whole or in part, by virtue of some other right he was necessitated to acquire, or by an inhibition he had served on his bond, or by confirming executor creditor? Sure posterior creditors apprisers should claim no share in that as common; *nam sibi vigilavit; meliorem suam conditionem fecit; jus civile vigilantibus scriptum est; non revocatur id quod precepit; L.* 24, *p.* 1, *D. Quæ in fraudem creditorum facta sunt, ut restituantur.*

Advocates' MS. No. 405, *folio* 219.

1673. *June.* STREET and JACKSON *against* MASON.

IN the action pursued by the English merchants, Street and Jackson against Mason, the case was, James Mason, elder, merchant in Edinburgh, having, in 1665, granted heritable bonds to thir two Londoners for L.1000 sterling, whereon they were infeft in his lands of Howboot and Gayside; they pursued a poinding of the ground. In which action compearance was first made for my Lord Torphichen, superior, his donator to Mason's liferent escheat, who craved to be preferred.

ANSWERED, That Torphichen having received the said Mason's son vassal in the said lands, and he being publicly infeft before his father's rebellion, he could not thereafter, as superior, gift his liferent escheat of these lands, whereof the father, who became afterwards rebel, was denuded by a resignation, accepted by the said superior, in favours of his son, and whereon infeftment was taken by the son.

The Lords found, that after he had received the son, he could not gift the liferent escheat of these lands as befalling to him by the father's rebellion.

Then my Lord Torphichen himself compeared, and as a creditor of the said Mason, and having apprised his right for sundry considerable sums of money, craved to be preferred. The Lords allowed Torphichen to propone, upon the right made to Mason the son, what he could to exclude thir pursuers, and they would receive the same. Whereupon the said Lord ALLEGED, That the son being publicly infeft in the lands controverted, in 1662 long before thir pursuers' bonds for infefting them in an annualrent, and he being lawful creditor to old Mason before he disponed in favours of his son, he had reduced the son's right upon the act of Parliament 1621; and so he behoved to be preferred to thir pursuers, whom the son's right would eternally exclude, being long prior to their bonds and debts. *Si vinco vincentem, te— &c. Vide* Dalzeel against Tenants of Caldwell, June 1673.

REPLIED for the pursuers, That they had reduction and declarator of nullity depending of the son's right, as of a most gross and fraudulent contrivance in prejudice of them: for albeit their bonds were of a date posterior to the son's right, yet they bore to be granted for merchant-ware which was furnished before; and so depending upon an antecedent cause, it was sufficient to give them preference to the son's right; they having entered before into a public and stated trade and correspondence with old Mason, and by the result, product, and currency whereof, he was debtor to them in the foresaid great sums.

Upon this debate, the Lords, by an act in July 1669, sustained the said bond for a sufficient title and interest whereupon to reduce the son's infeftment though prior to the same; they proving always the said bond to have been granted for merchant-ware furnished by them to old Mason, preceding the son's right. Whereupon probation having been led, and a condescendence and report at length given in, it appeared that old Mason, the time of his son's infeftment, stood debtor to thir pursuers allenarly in L.49 sterling, for prior merchant-ware got by him from them; and, consequently, that this bond now pursued on is for merchant-ware furnished since the date of the son's right: and, therefore, it was alleged, that the Lords having gone the utmost length in favour to thir pursuers, strangers, by their interlocutor, and wherein the pursuers having succumbed, they must be assoilyied from their said reduction, except *in quantum* they have proven, L.49 sterling of prior furnishing.

But upon a bill given in by the pursuers, they were allowed a hearing *in presentia;* where they ALLEGED, that, *esto*, they could not make it appear that the furnishing for which the bond now pursued on was granted or made before the son's right, but was truly after the same, yet the said right could not be sustained in their prejudice: but they, upon their bond, had a good and sufficient interest to quarrel and reduce the same, because the son's right was after a begun and stated tract of correspondence and trade betwixt thir pursuers and old Mason; of which constant and uninterrupted correspondence and traffic, both before and after the son's infeftment, this bond was the result: and which trade varied; sometimes Mason owed them more, sometimes less; at other times nothing, having satisfied them, either in money, security, or ware. Yet the payment of the former furnishing was, in effect, a foundation of new trust for the future. And which continued tract of correspondence and bonds granted thereupon, must, and are in law, considered, with respect to their dependence upon the beginning of the said correspondence, *tanquam suam causam quoad hoc*, to question and impugn any fraudulent infeftment in prejudice of the interests of the

persons who are so stated, and have entered in such a public trade. And the interest of which trade would be considered, that by such detestable unheard-of contrivances, merchants may not be encouraged to draw the means of other honest persons, their correspondents, into their hands under trust, and then betwixt the payment of the old debt and the contracting of the new, to put their children and wives in their estates by fraudulent deeds: which will subvert and destroy all trust betwixt merchant and merchant, violate the law of nations, and draw ignominy and reproach upon our country. But, *ita est*, thir pursuers acted and dealt *bona fide* with old Mason, upon the faith, assurance, and credit of that public trade and correspondence was begun and settled betwixt them before the son's infeftment, and continued the same thereafter without any interruption. And though the act of Parliament 1621 allows such alienations only to be granted at the instance of creditors whose debts were contracted before the alienation questioned, yet this case is no breach, no invasion on the said act; but a just, a rational, and a necessary interpretation thereof, and a most just extension of it; whereby thir pursuers, in all law and conscience, must be holden and reputed as anterior creditors, their bond depending on an antecedent cause; viz. a clear, fixed, and stated trade, prior to the fraudulent conveyance made to the son; and their debt being the result and product of a correspondence entered into long before the son's right. That the said act of Parliament appoints these deeds to be quarrellable, as they are by the civil and canon laws. But so it is by the civil law, *Actio Pauliana seu revocatoria (recissoria) eorum quæ fiunt in fraudem creditorum*, the same remedy with our reductions upon the act of Parliament 1621, was competent to posterior creditors, even to reduce dispositions and rights made before the contracting of their debts; if so be they were made *animo fraudandi*, and their means and estates engrossed to purchase and acquire the same: and which is the very case here; he having, in all probability, paid the price of thir lands wherein he has so fraudulently put his son, with thir pursuers' means. And as the seller would have had good interest to have reduced the son's infeftment upon the said act 1621, if he had been unpaid of the price; so may thir pursuers crave to annul the son's infeftment, at least, to have it burdened and affected with their debts for the same cause. That *actio Pauliana* was competent *etiam futuris creditoribus*, appears, *ex l.* 10, *p.* 1; *l.* 15 *et* 16, *D. Quæ in fraudem creditorum. Cæterum si illos dimisit quorum fraudandorum causa fecit, et alios sortitus est, siquidem simpliciter dimissis prioribus quos fraudare voluit, alios postea sortitus est, cessat revocatio; si autem horum pecunia quos fraudare noluit priores dimisit quos fraudare voluit, Marcellus ait, revocationi locum esse, &c.* And Jason and Sueidivinus, *ad par.* 6 *or* 7 *Institut. De Actionibus*, tell the particular presumptive cases wherein posterior creditors are supposed defrauded, and, therefore, may pursue *actione Pauliana*. But all of them fall short of this cheat here. He gives it to a son, a pupil, *in familia*, who had no means of his own to acquire it; he gives it without the least reservation, either of his own liferent, or of any power to affect and burden the same with his debts, or any reversion: notwithstanding of all which, he does all the deeds of a proprietor, and ever retained the possession, and conceals the son's infeftment, that his very neighbours knew nothing of it; neither could the registers learn them any thing, seeing the son is only designed there, *Ja. Mason*, which is also the father's name. That the bond depending *ex causa præterita*, is good enough to give them an interest. That the act of Parliament anent the prescription of merchant accounts has regard to a stated and continued correspondence, and does not proceed in that case but only from the last year of the furnishing; and that there is much

more reason to advert to the beginning of the correspondence here. That bills of exchange are sustained obligatory, without the solemnity of witnesses; and orders for payment of them, though not intimated, are preferred to posterior assignees and arresters: and annualrent is sustained between merchant and merchant, without paction, &c., and all upon that exuberancy of trust which is the sinew and foundation of trade. And any extension now sought in favours of the pursuers, is every whit as warrantable and just as any of these; here the public honour and justice of the kingdom, and the security of trade, being absolutely concerned.

Whereunto it was REPLIED, that the son's right can never be quarrelled by Jackson, because no tract of trade between old Mason and him prior to the son's infeftment, but the said correspondence, is clearly proven to have commenced since between them. As for Mr Street, it is contrary to all law, and to the express tenor of the act of Parliament 1621, to allow him who was not a creditor the time of the said right, now to question the same: and the said act cannot be stretched nor extended to this case in hand by any save only the King and the Parliament in a new law. Neither is there any inconvenience to trade here, because the faith and trust betwixt merchants, especially in several kingdoms, is not founded upon any real estate in the merchant's person, but upon their faith and personal credit abstracting from their real estates: else, if the foundation of trust between them were in contemplation of real estates, then no merchant, after he had begun a stated trade, could give any valid provision to his daughters or youngest children, but it might be questioned; which were absurd. And as for the *actio Pauliana*, *Bartolus* begins his commentary upon that *lex* 10, with this rule, *Creditores futuri non habent revocatoriam.* *2do*, Though the Roman law allowed that remeid to posterior creditors in some cases, yet there was good reason for it there, which ceases with us, *videlicet*, that they had no means to know the debtor's condition, or prevent the hazard of latent and fraudulent rights, which, *ex l.* 19, *D. de R. Juris*, he was bound to know; but with us public registers are established for that. *3tio*, The Roman law allowed this remedy to posterior creditors, under sundry restrictions: 1*mo*, if the former was dismissed and paid with their money, in which case the law judged it but equal to bring them in their place, *ex natura subrogati: 2do*, where the receiver of the disposition was *fraudis particeps*, upon that excellent ground of law, *quod nemo debeat lucrari ex suo dolo;* but *ita est* the receiver here is acknowledged not to be *doli capax.* But, *3tio*, As there was no fraud upon the receiver's part, so there was none upon the granter's, because at that time he was not thir pursuers' debtor. *4to*, A right is only presumed fraudulent where it is done *clam et remotis arbitris:* but this right was most public, being on resignation, &c. And, certainly, if such an action as this had been sustainable, there had been many of them intented before now; the case frequently occurring: and a negative custom on an express law, where the case did offer, is very well founded.

DUPLIED,—As for that pretence that there is *dispar ratio* between the civil law and ours, because we have registers to discover men's condition by, which they wanted; and, therefore, thought it just to help posterior creditors against prior deeds, which might be so latent as they could not know them; whereas that cannot fall out with us if they be real rights:—it is answered, that registers are only introduced for farther security, and do not derogate from any remedy allowed by the common law, and founded on natural reason and evident justice, as this is. *2do*, Even by the common law, *insinuatio donationum* was requisite, and which was judicially done, and an act more

solemn than our registers; and yet if any such donation had been made, a posterior creditor had power to quarrel the same: and so their registration hindered not the natural equity of this remeid. *3tio*, As for that pretence, that to give posterior creditors an interest there must be not only *animus fraudandi* in the granter, but the receiver also must be *conscius fraudis;* the same is a false, ignorant, and ridiculous assertion: for any who has read the Paratitles on that place will find, that the law uses a most rational distinction, *videlicet*, if the alienation be *ex causa onerosa*, then it cannot be questioned, unless the receiver was also *particeps fraudis;* but where it is *ex causa mere lucrativa*, (as this was,) then *fraus in eventu sufficit* without *animus fraudandi:* and which is agreeable to our practique.

Vide l. 6, *p.* 11, *D. et l.* 5, *C. Quæ in fraudem creditorum, &c.* See the full debate in the Informations beside me.

The Lords found the pursuers to be in the case of anterior creditors, in the interpretation of law; and, therefore, reduced the right made to the son, upon the act of Parliament 1621, and found it fraudulent, and to fall under the compass thereof; and in regard of the unhandsome conveyance made by the father, conform to the said act 1621, (though it was not craved by the pursuers,) they declared him a bankrupt, infamous, and incapable of all office of trust, &c.

This decision was mightily applauded as equitable by all, for discouraging cheats: only it seemed to be a very licentious discession from the letter of the act of Parliament. Street was so overjoyed with it, that he vowed he would have the whole fifteen Lords canonized, and that nothing pleased him so in their sentence as that they had declared him infamous. Thus, the son's right being annulled and taken out of the way, the pursuers and my Lord Torphichen will fall next to debate upon their own several interests.

Advocates' MS. No. 407, *folio* 220.

1673. *June.* Bailie ROBERT LERMONT *against* WILLIAM BROWN, The INCORPORATION of the SKINNERS of Edinburgh, and Others.

THE said Robert Lermont, being to rebuild a waste tenement he had acquired in Skinner's Close, obtained from the Council of Edinburgh, after a visitation appointed by them, and a report thereon, an act giving him liberty to oversailyie the close, having both sides thereof, and cast a transe over it for communicating with both his houses, as also, for building fore-stairs alongst the said close; and after he had proceeded a pretty length in his building, a suspension was put in by William Andersone, William Brown, the Skinners, and the other neighbours in the close, of the said act and warrant, and for stopping his building. And the Lords having ordained them to be heard upon the bill, they ALLEGED, 1*mo*, The said act behoved to be suspended, because only the Dean of Guild Court, and not the Council of Edinburgh, were competent judges to such questions, *in prima instantia.* 2*do*, The neighbours were not heard nor cited, as uses and ought to be. *3tio*, The ground whereupon the council granted him the said liberty, was frivolous and unjust, *videlicet*, that none of thir complainers had any servitude upon his tenement, and, therefore, he might raise it *ad cœlum* if he pleased, though it should damnify their lights: because the passage of the close is common to all the heritors there;