

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.*

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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.

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viding his children is, that friends prevail with him to infest his eldest son, reserving his own liferent, which hath been always thought sufficient by a base infestment, and is more easily procured than a public infestment, which casts that heritor out of the remembrance of his family; whereas a base infestment hinders not his heir to enter heir to him, as to the superiority: Neither will parties be easily induced to interdyte themselves; nor is that so secure for the family, and is very disgraceful for the party; and it is much more frequent for fathers to infest their younger children in parcels of land, reserving their own liferent; and if posterior creditors can annul the same they signify nothing. It was *replied, imo*, That the base infestment is always called and reputed in law a private infestment, albeit it be registrated; and that creditors are neither obliged nor accustomed to search registers when they lend their money; and that this reason is not founded upon the act of Parliament 1621, but upon the common law, that all fraudulent rights are null; and if such infestments to children were sustained, it would open a door to all fraud of creditors; neither is this method necessary, for, if parents would secure their children, they may do it by a public infestment. *2do*, The registration of this sasine can be no ground to take off the latency thereof; because, by the sasine produced, it is clear that there is no leaf of the register whereunto it relates, as it ought to do, and that therefore it hath not been registrated; and it is well known that Mr William Caldwell, who hath marked it as registrated, did for many years make no register of sasines, and that he was turned out by the English, and Mr James Weir put in his place, who was not authorised by the Clerk-register after the King's return; so that this pretended registration did neither oblige nor capacitate the creditors to know the same, and so it remained still latent and fraudulent.

THE LORDS found, that seeing the sasine produced related to no leaf in the register, that the marking thereof did not take away the fraud and latency; unless the defender would instruct that there was a register book, wherein this sasine was registrated before contracting of the debts in question; or that the creditors, before they lent their money, knew that the son was infest: And as to the general reason of being a base infestment to a son not clad with possession; if it had been duly registrated, the LORDS found no necessity to decide the same; but if it behoved to be decided, many were of opinion, that, as was done in the case of the Earl of Nithsdale\*, who possessed his estate upon an adjudication for a bond granted by himself, such infestments as preceded that interlocutor were found valid; but the LORDS declared, that all such infestments thereafter should not defend the heirs, if they possessed thereby: So in this case, that anterior infestments to children should not be void, lest the settlements already made were overturned; but that all such infestments in time coming, if they were not public, should exclude no creditor contracting before possession; and others thought, that that required a law, that the lieges were obliged to know; but none were for annulling of bygone infestments upon that ground.

\* See General List of Names.

1673. December 4.—REID of Ballochmilk for himself, and as assignee by several other creditors, from whom umquhile Reid of Daldilling had borrowed several small sums of money in *anno* 1660, and thereafter finding that they could not overtake this Daldilling as heir to his father, because he was infest by his father before the contracting of their debts, and so neither heir, nor lucrative successor *post contractum debitum*; therefore they pursue a reduction of the disposition and infestment granted by umquhile Daldilling their debtor to his son, *ex capite fraudis*, as being a fraudulent contrivance, to infest the son in fee of his whole estate, the son being then an infant, and the infestment latent, whereas the father continued thereafter to set tacks, cut woods, and do all other deeds as fiar, and not as liferenter; and yet in the mean time he borrowed these sums from persons who knew not he was denuded, and saw him act as absolute fiar; which sums he borrowed when it was known to him, and all the country, that the registers of the shire were carried out of the country by Mr William Cadwell keeper thereof into Ireland; so that by these circumstances it appears, that the son's infestment was granted by fraud and machination to deceive the creditors, and the infestment itself is base; and it was found in the case of Street against Mason, No 32. p. 4911, that even a public infestment taken originally by a father to his son, then an infant, was fraudulent to deceive the strangers, he having left no means or estate whereby to satisfy his credit to them; and was reduceable *ex capite fraudis*, though their debts were posterior to that infestment; and if it were otherways, a door were opened to deceive all creditors; and albeit the act of Parliament against fraudulent alienations reacheth only in favours of anterior creditors, yet it is not exclusive of a reason of fraud founded in *jure communi*, as was found in Mason's case. It was answered, That the reason of reduction is not relevant, because fraud and circumvention is never pursued, where there can be any rational or probable intent of the deed done; but here there was a most rational motive for infesting of this child in fee; because the father having received a great portion, was by his contract of marriage obliged so soon as a son should be born, to infest himself, and the son as heir of the marriage; and the father being commonly known to be a lavish prodigal, his wife's father and other friends did very justly induce him to secure his estate, by infesting his son, reserving to himself the liferent of the lands, which was above 2000 merks; and which was a sufficient ground of credit for these small sums; which liferent might have been affected by the creditors, and paid all their debts, the father having lived for several years thereafter; and the son's infestment was registrated in the register of the shire, and an extract thereof is produced; and the creditors, if they had rested on a land estate, ought to have inquired if there were registers in the shire, and if therein this infestment was registrated, and if they found no register they should not have lent their money without personal surety; and as there are pretended inconveniencies for creditors by sustaining such infestments, so the inconveniency is far greater on the contrary; this being the ordinary way to preserve families, when they fall into the hands of unthrifts, who will not be induced to inter-

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dict themselves, or to grant public infeftments to their apparent heir, which will obliterate their memory ; whereas a base infeftment will necessitate the apparent heir to enter heir to them, the superiority being retained ; nor is this case any thing like to Mason's ; who before he acquired the land to his son, had begun a trust and correspondence with the strangers, and left nothing to himself wherewith he might pay, having not so much as reserved his own liferent ; and the infeftment being taken to James Mason, without mentioning son or father, and having still acted as proprietor.

THE LORDS found the reason of reduction by the circumstances condescended relevant to infer fraud, and to reduce the disposition, in so far as it is prejudicial to posterior creditors, viz. that the infeftment was granted to a son when infant, and that the contract of marriage provided the son only to be infeft as heir, and not in fee ; and that the father continued to act as fiar, and not as liferenter ; and that the registers were out of the country the time of borrowing of these debts.

*Fol. Dic. v. 1. p. 334. Stair, v. 2. p. 144 & 234.*

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

IN a pursuit at Daldilling's instance against Reid of Ballochmilk for making payment of a debt due to him by Daldilling's father, as successor *titulo lucrativo*, by intrömission with the mails and duties of the lands wherein his father died infeft ; it was *alleged* for the defender, that his father was denuded, and he infeft in his father's estate, before his father's decease ; which infeftment was made public by the registration of the sasine ; which being put in the public register, all his father's creditors might have known the same ; and thereby were put in *mala fide* to transact debts with the father. It was *replied*, That the defender being but then an infant, and in *familia paterna*, the said infeftment was to be looked upon as a private and a latent deed, notwithstanding of the registration of the sasine ; because his father, notwithstanding thereof, was still master of the disposition, and might have cancelled or innovated the same as he pleased ; likeas he did continue to bruik the estate, by setting tacks in his own name, and uplifting the mails and duties ; whereby his father's creditors could not be put in *mala fide* to contract with him. THE LORDS having considered this a general cause, did find that the naked registration of a sasine was not sufficient to make his right and disposition public ; but that notwithstanding thereof it remained still a latent deed, unless that the disposition itself had been registered ; or delivered by the father to the son's friends as administrators ; or decreets obtained against the tenants, in the son's name, for removing, or for mails and duties ; whereby his right might have been made known to the country, and made public ; whereby no creditor could pretend ignorance to contract with the father *intuitu* of that estate, whereof it was publicly known that he was divested ; so that they found this case as strong as that of Mason's and his creditors ; where the son was infeft by the superior, but upon manifest collusion,

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.