ANSWERED, That the defunct's liferent, being reserved, with a power to dispose of the bond at his pleasure, during lifetime, he had just reason to keep the same in his own custody; and that it was offered to be proven, that, on death-bed, he gave the key of his cabinet, where the bonds and other papers lay, that, after his decease, they might be delivered according as he had ordained; so that the debate was, if the assignation, being made to an heritable bond a year and a half before his sickness, with the foresaid reservation, and an order given for delivery upon death-bed, did give the assignee a right to pursue for delivery.

The Lords, finding this to be of a general concernment, would not pronounce their interlocutor upon this point: but it being confessed by the defender, that she did likewise take out of the cabinet an assignation to a wadset made in her own favours, and if both the wadset and this bond had remained undelivered, the pursuers would have had more for their share, as heirs-portioners, than the bond in question would amount to;—they ordained, That the defender should deliver up this assignation to the pursuer, or otherwise should return again her own assignation and wadset taken out of the cabinet, to the effect the whole heirs-portioners might pursue their rights as if none of the assignations had been delivered.

Page 77.

1669. *July* 24. CRAWFORD *against* ANDERSON, Provost of Glasgow.

IN a reduction of a disposition, made by one Fleming to Anderson, of his lands, upon the Act of Parliament 1621; Anderson confessed that his right was only in trust; and that, within half a year after his infeftment, he did give a back-bond, bearing the trust, and an obligement to dispone, he being satisfied of any debts due to himself; after which, he had paid several sums of money to Fleming's creditors, whereof he could get no relief but by making use of his right.

It was ALLEGED for Crawford, That he had comprised Fleming's estate as a lawful creditor, and was publicly infeft thereupon long before any payment made by Anderson to Fleming's creditors, which was voluntary, and had done no diligence; and therefore his right, being in trust, as said is, no such payment could make the same onerous; seeing, if that were sustained, it would be a door to defraud lawful creditors, who had done diligence, and, by such contrivance, to prefer any other the common debtor pleases.

The Lords did sustain the reduction, notwithstanding of the answer, and found, That Anderson was *in mala fide* to pay any creditors, to whom he was not obliged after the pursuer's public infeftment; and that, notwithstanding that Anderson's right was before the contracting of debt, whereupon comprising was led; so that it did not fall under the Act of Parliament 1621; and the back-bond given thereafter being voluntary, and no diligence done against him

to put him *in mala fide* to pay any creditor, it was against reason to take from him the estate without any allowance of those sums whereof he could get no relief: But, notwithstanding, the Lords reduced his right, as being upon trust, which he had declared by his back-bond; and, finding it to be a contrivance, would have no respect to any voluntary payment he had made.

This decision, though it was hard, as being the first of this nature, yet was done upon a just consideration to obviate fraud and contrivances to prejudge lawful creditors. *Page* 77.

1669. *July* 28. CAMPBELL of ORMSAY *against* CAMPBELL of GLENCARADEL.

SIR Archibald Campbell of Glencaradel, *in anno* 1614, having disponed his lands and estate in favours of his grand-child; with an express condition, that, so soon as he should attain to the possession of the lands, he should assign to his brethren a bond of 4000 merks due by the Earl of Argile; his said brethren did pursue for delivery of the bond, and an assignation thereto. The defenders did make offer of an assignation; but ALLEGED, That they were not obliged to produce the bond, which was never their evident, but retained by the goodsire, who had power to dispose thereof during lifetime.

The Lords, notwithstanding, found, That they were obliged to produce the bond; unless the defenders would offer to prove that there was such a provision, and that, conform thereto, the goodsire had uplifted and discharged the sums therein; seeing the said 4000 merks were granted as a provision from the goodsire; and the estate being disponed to the eldest brother, with a condition to assign that bond, behoved to be interpreted *cum effectu;* and, without delivery of the bond, the assignation could signify nothing.

Page 79.

1669. *November* 20. MARY STIRLING, and POLTOUN, her Spouse, *against* BAILIE JUSTICE.

IN an exhibition, pursued at the instance of the said Mary, and her husband for his interest, against Bailie Justice, of a principal bond which he had in his custody, as tutor to the said Mary's son; the said Bailie did produce an extract out of the register: It being ALLEGED, That the principal ought to be produced and taken out of the register; because it was put there after the death of the principal debtor, whose estate was to be comprised for this debt; and so could not work against him, but only against the cautioner, who was then alive; especially seeing the defender had registered the same after intenting of the exhibition, and so did it *dolo malo.*