

THE LORDS found the jointure was exorbitant, and the restriction fraudulent, and therefore preferred the creditor for his annuities, during the life of the father, and the tocher thereafter.

Fol. Dic. v. 1. p. 72. Stair, v. 2. p. 726.

No 82.

1688. February 10.

MR. ROBERT STUART Advocate against ROBERTSON'S BAIRNS.

MR WILLIAM ROBERTSON being obliged, in his contract of marriage, to provide 20,000 marks to the heirs, by way of destination, and, without any obligation to re-employ it, if uplifted, did, at his going to be married for the second time, when he was abundantly right and solvendo, grant a bond of provision to the children of the first marriage *nominatim*; of which reduction being raised, as of a latent and fraudulent deed, at the instance of posterior creditors;

It was *alleged* for the children: That the contract of marriage was onerous; and, as lucrative deeds are valid against posterior creditors, *multo magis* these bonds which are onerous; especially when it is offered to be proven, that they were delivered to the defenders grand-father long prior to the contracting the pursuer's debt.

Answered: That if bonds of provision to children were sustained against lawful creditors and strangers, no man would be in security to contract with parents; for there is that confidence among near relations, that a thousand conveyances would be made, and the parents, or the trustee, have them in their power to use or destroy them as they saw occasion, unless such bonds were made some way public, that persons be put on their guard as to having any after-dealing with these parents; and here the one of the sums was payable at the bairns respective age of 21 years, and the other half at the father's death. Besides, that the bond contained assignation to bonds, in corroboration whereof the sums were afterwards lifted by the father, and the assignation never intimated, which argued some fraudulent design; and there is less danger of any [thing] fraudulent in bonds granted to strangers *ante contractum debitum*, than in bonds granted to bairns, especially those *in familia*, who are more at the father's disposal, and in his power; and private back-bonds between a father and his children might be kept always in his power, though after delivery. *2do*, In real rights of lands, latent prior rights, and interest in favours of children, are not sustained against posterior creditors, as in the cases of Ballochmill and Marjoribanks, *multo minus* personal bonds.*

THE LORDS preferred the posterior creditors, though the debtor was no trading merchant, and was not bankrupt at the granting of the bonds of provision, he being now bankrupt by cautionry.

Harcarse, (BONDS.) No 218. p. 49.

No 83.

Posterior creditors preferred to children holding bonds of provision, tho' the debtor was no trader, and was not bankrupt when the bonds of provision were granted, but became so afterwards by cautionry.

* Examine General List of Names.