debts concurred. And the *L.* 7. *ff. de compensationibus, loquitur de die incerto, qui habetur pro conditione.* For in other cases *dies cedit, quamvis nondum venit*; and compensation takes place, so soon as mutual obligations are granted. The instance of bank-notes, is nowise parallel; for David Spence is only insert in these *nomine tenus*, the bearer being understood to be proprietor. 3*tio*, This note being granted to a Scotsman at London, after the Scottish form, by a Scotsman accidentally there, and ignorant of the laws of the place; what can hinder him from any legal defence competent by our law in a process for payment here? But *esto* the custom of England were to regulate the matter, the pursuer *qui allegat consuetudinem debet eam probare.* No 30.

THE LORDS repelled the compensation; because, the two notes being granted for the same sum within a day of one another, it seemed a contrivance in Culzean to furnish Drumsuy with credit.

Forbes, p. 250.

SECT. V.

Latent deeds are presumed to be fraudulent in order to protect against Creditors.

1669. *January* 21. The CREDITORS of JOHN POLLOCK *against* POLLOCK.

No 31.
In a reduction of a bond of provision, in favour of a son at the instance of a creditor, whose debt was posterior to the delivery, the Lords refused to sustain the reasons of reduction upon the act 1621, but ordained the pursuer to condescend, if he had any particular ground of challenge on the head of

THE Relict and Creditors of John Pollock having intented a reduction upon the act of Parliament 1621, of a bond of 5000 merks granted by the defunct John, to his son; it being *alleged* for the son, That the pursuers were only constituted Creditors by decreets recovered against the Relict and executors after the death of John; the LORDS found, that where by the decreets the debt was proven to have been prior to the bond in question, they might reduce upon the act of Parliament; but where the debt was posterior to the bond, they found that they had no interest to pursue a reduction thereupon; but prejudice to the Creditors to reduce or declare the same null upon any special reasons, as that the bond was latent, and never made known, or not delivered, or was *donatio mortis causa.*

1669. *February* 12.—THE foresaid reduction, mentioned 21st January last, being again called, the pursuer did insist for reducing of the said bond granted to the son of the first marriage, upon this reason, That it was a latent deed

No 31.
fraud; and he having condescended that the son was forisfamiliated and sufficiently provided before; that the term of payment was after the father's death, bearing no interest in the interim; and that the bond remained latent betwixt the parties; the Lords reduced the bond, and preferred the creditors, and even the relict, in so far as she was an onerous creditor.

granted by a father to a son who was otherways sufficiently provided; and notwithstanding thereof, Creditors were *in bona fide* to lend their money to the father, who could not be prejudged by any such deed, albeit it was prior to their bonds. The Lords did sustain the reason at the instance of true and lawful creditors, upon these specialities, that the bond was only granted before the father's death, and that it was only payable after the father's death, and was neither registrated nor inhibition served thereupon, but kept latent during that time; so that if such bonds were sustained, it would open a door to all fraud, and the undoing of all trade and commerce; and therefore preferred lawful creditors; but likewise found, that the son, upon this bond, was preferable to the Relict and bairns of the second marriage, as to what they might crave *jure relicti*, or bairns' part of gear; but not in so far as they were creditors by the contract of marriage; and the Lords ordained this to be inserted in the books of sederunt, to be a leading cause in all time coming.

Fol. Dic. v. 1. p. 334. Gosford, MS. No 91. p. 33. and No 115. p. 42.

*** Stair reports the same case, No 110. p. 1002. and as follows:

1669. *February* 12.—Umquhile John Pollock having granted a bond of 5000 merks to James Pollock his second son of the first marriage, and he having adjudged thereupon, Pot as assignee by his wife to her provision, and the Creditors' debts, having also apprised, raises reduction of James Pollock's bond and adjudication, on this reason, that the said bond was without a cause onerous, given by a father to a son, as is clear by the son's oath taken thereupon, and therefore a posterior debt lent by creditors, *bona fide* to the father, is in law preferable thereto. *2dly*, This bond to a son can be but *de natura legitimæ* having no cause onerous, as if it had borne for his portion natural, and bairn's part; in which case it is revocable by the father, and the father's creditors, (though posterior) are preferable thereto. *3dly*, This bond is reducible, *super capite doli*, as being a contrivance betwixt a father and a son to ensnare creditors to lend to the father, who then drove a great trade, which must be inferred from these circumstances, *1st*, The son was forisfamiliate, and sufficiently provided before, *2dly*, The bond bears no annualrent, and the term of payment is after the father's death, and remained ever latent betwixt the parties, without any thing following thereupon; and these debts were all contracted within a very little after this bond, which was only a year before the defunct's death. The defender *answered*, That the reasons are noways relevant; for there is neither law nor reason to hinder any person to give bonds or gifts freely, there being no impediment the time of the granting; neither hath the law any regard to posterior creditors; but in personal debts, whether for causes onerous or not, the first diligence was ever preferable; nor was it ever heard that a posterior onerous obligation did reduce, or was preferred to a prior gratuitous obligation, upon that

ground, that the prior was gratuitous. And to the *second*, Albeit this bond was in satisfaction of a portion natural, as it is not, yet, being delivered to the son, who is forisfamiliate, he can be in no other case than any other person to whom a bond were granted, without an onerous cause. As to the *third*, *Dolus non præsumitur*, and all machinations being only *animi*, are only probable *scripto vel juramento*, and can be inferred by no circumstances. The pursuer *answered*, That albeit *in dubio dolus aut culpa non præsumitur*, yet it is doubtless probable otherwise than by the oaths of the parties, whereunto trust is never to be given, in relation to their own shame, contrivance, or fraud; and therefore matters of fact do necessarily infer, and presume fraud in many cases; and in none more than this, where the deed was clandestine, and latent betwixt father and son, and where the father's estate was thereby rendered insufficient to pay both his debt, and the others contracted shortly thereafter; and if it were sustained that such latent rights betwixt conjunct persons were valid in prejudice of posterior creditors contracting *bona fide*, and not knowing the same, all commerce behoved to cease; for every man might give such bonds to his children, and continue to trade and to borrow money, and upon the children's anterior bonds be totally excluded. The defender *answered*, That our law by a special statute, in anno 1621, having determined the cases of presumptive fraud, and extended the same only to anterior creditors, without mention of posterior creditors, the same might be thought to be of purpose omitted, and cannot be extended by the Lords. No 31.

THE LORDS found the matter of fact and circumstances alleged, relevant to infer a presumptive fraud, and contrivance betwixt the father and the son, which did ensnare the creditors who continued to trade; and therefore reduced the same as to the creditors; and preferred them and the relict, in so far as she was a creditor, but not for any posterior or gratuitous provision to her, or to her children; but they did not find the two first grounds relevant to prefer a posterior onerous obligation to a prior gratuitous, or that this bond was as a *legitim* revocable; and the LORDS were chiefly moved because of the inconvenience to creditors, acting *bona fide* with a person trading, and reputed in a good condition; and where *in eventu* his estate is not sufficient, both to pay his creditors and this bond; for if it had been sufficient for both, they would have come in *pari passu*, having both done diligence within the year.

Stair, *v.* 1. *p.* 602.

1672. *February* 27. STREET *against* MASON.

No 32.
A disposition by a merchant to his infant son of his

JAMES MASON merchant in Edinburgh, having begun a correspondence and traffic with William Street merchant in London, did, after the said correspond-