

1745. July 3.

AITKIN *against* GOLDIE.

No 5.

A purchaser of an estate from an heir not infeft, having made up his titles, by a charge to enter, and adjudication, instead of infesting the seller, it was found he could not compete with an heritable bond and infestment granted by the seller, of which he knew at his purchase.

JOHN AITKIN of Ryes gave an heritable bond for 5000 merks to James his second son, on which infeftment followed, and afterwards sold the estate to Alexander Goldie writer to the signet, who, observing his author was not infeft, made up his titles, by charging him to enter heir to his predecessor, and thereon adjudging and obtaining himself infeft.

James Aitkin also charged, in order to adjudge; and Mr Goldie appearing to oppose him, the Lord Ordinary ordained them to dispute as in a competition.

THE LORDS, 21st June, pronounced this interlocutor, 'It appearing to the Lords, that the transaction between the father and the purchaser was a contrivance to disappoint the son of the payment of his bond, they therefore found that the purchaser could not upon his adjudication, and charter and infeftment, compete with the son, or prejudge his bond.'

Pleaded in a reclaiming bill, That the purchase was real and onerous, and the design of making it no ways in order to disappoint the bond, which at the same time was an imposition upon the father, and the question whether it could be effectual at present in dependence; that in point of law the two rights, viz. an heritable bond and a disposition were not of that sort as to infer fraud in the granter, as they might stand together; and with regard to the purchaser, there was nothing to hinder him, upon observing the incumbrance, to make up his titles in such a manner as not to be affected by it, *Brown against Smith*, No 76. p. 2844.; *Bell against Gartshore*, No 80. p. 2848.

That the price was not paid up so as it might be run away with, but made payable in the first place to the creditors that might be on the estate, and the remainder to the seller and his wife in liferent, and to his children in fee, according to a division to be made by him.

The interlocutor therefore ought to be reversed, or at least the point superseded till it appeared if the bond could be set aside, which was a question depending in this process, and if so determined, would make the present one useless.

'THE LORDS adhered.'

Reporter, *Lord Elchies.*

Act. *H. Home.*

Alt. *Graham sen.*

Clerk, *Gibson.*

D. Falconer, v. I. p. 112.

1749. July 11.

HOGGS *against* JOHN HOGG.

No 6.

A person, in his son's contract of marriage, fraudulent.

JOHN HOGG younger of Cammo made a proposal of marriage to Barbara Musgrave, sister to Sir Philip Musgrave of Edinshall; and to facilitate the compliance of the Lady and her relations, John Hogg his father laid before them a