

## SECT III.

## Clauses in Deeds in favour of third parties.

No 16.

▲ purchaser of lands was taken bound to pay a part of the price to certain creditors of the seller. They were found entitled to use inhibition upon this right.

1627. *January 9.*

— against NIMMO.

THIS day a supplication was given to the Lords by some persons, in whose favour some clauses were conceived and introduced by a contract betwixt Heron and Nimmo; in the which contract, Heron having sold some lands to Nimmo, Nimmo was obliged to pay the sums contained therein for the price of the land disposed to the said persons, who craved inhibition against the said Nimmo, upon the foresaid clause introduced in their favour; and it being doubted if they might crave the said inhibition, seeing the said contract was not subscribed by them, neither were the parties contractors therein, nor in the inhibition craved by any of the contractors; the LORDS found that the said persons, notwithstanding they were not contractors, might seek inhibition upon the clause foresaid, conceived in their favour, against the party obliged by the contract, to perform the same to them. John Dunlop was procurator for the supplicants, and caused raise and seek this inhibition.

*Fol. Dic. v. 1. p. 512. Durie, p. 253.*

No 17.

A purchaser of lands was taken bound to pay a part of the price to a creditor of the seller. This was found a delegation in favour of the creditor, not a mandate which could be recalled.

1664. *July 7.*

OGILVIE and GRANT against KER.

THERE being a charge in the name of James Ogilvie and William Grant *contra* Mr Andrew Ker minister, on this ground, that by a minute of contract of alienation, Ogilvie had sold to Ker certain lands, and Ker was expressly bound by the minute to pay this Grant and others, in part of the price of the land, certain debts due by Ogilvie to them; Ker suspends, upon this reason, that he had satisfied Ogilvie, and obtained his discharge.

Grant *answered*, That by the foresaid clause contained in the minute, he had acquired right to the sum in satisfaction of his debt, which Ogilvie his debtor could not take away, without his consent, especially seeing the minute took effect; and the suspender, by his missive letters, after the date of this discharge wrote to the Laird of Pitmeddin, who was cautioner to Grant, that he would satisfy the debt. The suspender *answered*, That the clause in favour of Grant, who was no contractor, could not give him a right; *imo*, Because it was never a delivered evident to Grant; *2do*, Because it was but a mandate, whereby Ogilvie the contractor did order a part of the sum to be paid to Grant, which Ogilvie might recal at his pleasure, as he might have annulled the bargain, and

destroyed the writ ; especially seeing nothing had yet followed ; and as for the letters, they were not written to Grant but to a third party.

THE LORDS found, that seeing the bargain took effect, the clause in Grant's favour was not a simple mandate but a delegation, whereby Ogilvie constituted Ker his debtor, to be debtor to Grant his creditor, which needed no intimation, being contracted by, and so known to Ker himself ; and therefore found Ogilvie's discharge ineffectual.

*Fol. Dic. v. 1. p. 512. Stair, v. 1. p. 209.*

No 17.

1714. February 10.

MR WILLIAM CARMICHAEL Advocate, against GEORGE WILSON of Sands.

No 18.

Found in conformity with No 16. and No 17. p. 774<sup>o</sup>.

MR GEORGE LESLY donatar of the escheat of Mr Robert Craig of Riccarton, assigned the gift to Alexander Glass, writer to the signet, upon his back-bond, declaring the assignation to have been granted to him in trust for the behoof and relief of Sir Robert Forbes, Alexander Deuchar, and Mr James Oliphant of Langton of some particular debts mentioned in the back-bond for which they were cautioners for Mr Lesly. Mr William Carmichael having afterwards obtained a gift of the escheats of Mr Lesly, Sir Robert Forbes, and Alexander Deuchar, insisted on a special declarator against Alexander Glass to denude in his favours of the trust. Compareance was made for George Wilson, who craved preference, upon this ground, that he, as cautioner for Sir Robert Forbes and Deuchar, had paid to Lothian one of those debts for the relief whereof the assignation was made to Mr Glass. So that all the security in their persons for relief of that debt accrued to him who paid *ex mandato*, and in name of Sir Robert Forbes and Deuchar, just as if they had paid it themselves.

*Answered ; imo*, Sir Robert Forbes, or Deuchar had paid the debt, and were claiming preference ; Mr Carmichael, as donatar to both their escheats, would be preferred on their preference ; *2do*, The privilege in the back-bond being personally conceived in favours of Sir Robert Forbes and Alexander Deuchar, it cannot be extended to other persons not therein mentioned ; and, though Wilson, by paying the debt, became creditor to them, he hath no privilege but must come in among the other creditors conform to his diligence ; because personal privileges *quæ non egrediuntur personam* are not extended to cautioners, L. 1. § 2. D. De constit. princip. And it was found in the competition of the Creditors of Langton, that even a public infestment of relief to a cautioner did not accrue to the creditor for whose debt it was granted, but was so personal to the cautioner that he might renounce it at his pleasure. Stair, lib. 2. tit. 3. § 27. See No 11. p. 33.

THE LORDS found that Alexander Glass's back-bond, binding and obliging him for relief and re-payment in favours of Sir Robert Forbes, Langton, and