

have no more right to this sum than he had himself; however there is an inconvenience to purchasers and creditors, which registration would prevent.

No 25.

*Fountainhall, v. 2. p. 285.*

1710. November 8. MONTEITH *against* DOUGLAS and LECKIE.

THE Lord Dun probationer reported Monteith against Douglas and Leckie. Kennedy of Culzean being debtor to Captain Andrew Douglas in L. 500 Sterling per bond, the Captain assigns it to Mr Alexander Leckie of Dashers, and takes his back-bond, narrating, that he had received it for paying L. 160 Sterling the Captain owed him; and *quoad* the superplus assigned, he should either retrocess, or refund it, if he received payment of the same. Leckie, upon shewing his assignation, and concealing that he was under back-bond, borrows money from Walter Monteith merchant in London, and others, they relying on the faith of that right, which Monteith causes arrest in Culzean's hand, and pursues a forthcoming, which forces Culzean to suspend, where Captain Douglas compares, and produces Leckie's back-bond of the same date, and before the same witnesses with the assignation, and craves preference, in so far as concerns the remanent above the L. 160 Sterling, wherein Leckie was creditor to him, and was the sole onerous cause of the assignation. *Alleged* for Monteith, and the other creditors of Leckie, That they finding a total assignation of the whole sum in their debtor's person, they could never *per rerum naturam* know of any latent clandestine back-bond contrived betwixt Douglas and him, and which bore *per expressum*, that it was for sums advanced equivalent to those assigned, and not a bare general narrative of onerous causes, which plainly shows a design and contrivance to defraud and ensnare; and that Douglas has been *socius et particeps fraudis*, and *nemo debet lucrari ex suo dolo*; and the LORDS have been in use to discourage such sinister practices, as Thomson *contra* Henderson, No 28. p. 4906. where a discharge of a bond of the same date with it, was found not to militate against an onerous assignee, seeing it could admit of no other construction but to have been done *animo decipiendi*; and that famous decision, Street and Jackson *contra* Mason, No 32. p. 4911. where an infefiment given by him to his son, did not hinder their access to affect that estate; and the like was found, Reid against Reid, No 33. p. 4923. *Answered*, All accession of fraud on Captain Douglas's part is denied, and is there any thing more usual than for creditors to assign their debts to one person in order that he may adjudge for them all, to save expenses, and he grants each of them a back-bond; will his creditors pretend the whole sums in the adjudication to be his; *nullo modo*, so it is *juris indubitati*, that personal back-bonds affect personal rights, restricting and qualifying them, ay till they be made real by infefiment, after which the back-bonds have no effect

No 26.

An assignation qualified with a back-bond of trust to a certain extent, found to give absolute right to the assignee, only to the extent of what he had actually paid.

No 26. against singular successors, but only against the granter; for, in the first case, it is reputed *pars contractus et pactum ex incontinenti adjectum*, and militates against all assignees, as has been oft found, particularly Gordon and Skeen *contra* Crawford, No 1. p. 7167.; and Mackenzie against Watson and Stewart, No 24. p. 10188. Stair is also clear in this point, B. 3. T. 1. § 21.; and Mackenzie, p. 106. And the back-bond has the same legal effect with a compensation, or a discharge against the cedent, which will undoubtedly meet the assignee, and so will the back-bond. THE LORDS preferred Douglas, and found Leckie had no farther interest in the total assignation, except in so far as he was creditor, and that the superplus was Douglas's; and Leckie's Creditors, by arresting, had no right thereto, neither could it be affected, nor reached for his debts, but still belonged to Douglas, the cedent, and that the back-bond excluded Leckie's singular successors, whether legal or voluntary.

THE LORDS were sensible of the hardship that parties might be circumvened by such latent rights, but the decisions were so pat, there was no remedy. It might deserve either an act of sederunt, or act of Parliament, that back-bonds should be registered within 60 days of their date, which would prevent many mistakes; whereas, at present, there is nothing but the probity or warrandice of the granter to be relied on.

*Fol. Dic. v. 2. p. 49. Fountainhall, v. 2. p. 595.*

\* \* \* Forbes reports this case :

CAPTAIN Andrew Douglas having assigned to Mr Alexander Leckie of Dashers, a bond granted to him by Sir Alexander Kennedy of Culzean, and John Kennedy his son, for L. 500 Sterling, upon Mr Leckie granting to the Captain a back-bond, declaring the assignation to be in trust, except as to L. 160 then advanced to him, and obliging himself to hold compt to the Captain for the superplus; Walter Monteith, upon the faith of his assignation, lent several sums to Leckie, for which he got three bonds, and thereupon raised horning, and arrested in the hands of Culzean as debtor to Leckie, and pursued a forthcoming. Wherein Captain Douglas compearing, craved preference to the superplus debt owing by Culzean over and above the L. 160; because, personal bonds and assignations may be qualified and restricted by such back-bond, which are of the same force, as if the granter of the back-bond had granted a discharge, and operates not only against the assignee, but also against his creditors and singular successors, Gordon and Skeen against Crawford, No 1. p. 7167; Mackenzie against Watson and Stuart, No 24. p. 10188. Seeing in personal rights, every one ought to know and rely upon the condition and faith of his author; 'et nemo potest transferre plus juris in alium quam ipse habet;' which must far more hold in this case, where the assignation and back-bond being of the same date, the latter is understood to be *pars contractus*, and *pactum ex incontinenti adjectum*.

*Alleged* for Walter Monteith ; The assignation bearing to have been granted for an equivalent sum then advanced, he a trading merchant, was *in bona fide* to trust the assignee, and not obliged to know of any private latent back-bond, industriously granted to tempt and ensnare persons to lend money to Leckie. And the LORDS are in use to discourage such fraudulent practices ; Thomson against Henderson, No 28. p. 4906. ; Jackson against Mason, No 32. p. 4911. ; Reid of Ballochmyle against Reid of Dalvelling, No 33. p. 4923.

*Answered* for Captain Douglas ; No respect to the inconveniency, that Monteith could not know of the backbond ; seeing the same may be pretended against discharges, or grounds of compensation, which are as latent, and yet affect singular successors.

THE LORDS found, that the back-bond doth restrict, affect and qualify the assignation ; and therefore preferred Captain Douglas.

*Forbes, p. 438.*

1747. December 9. LADY KINMINITY against SIR JOHN GORDON.

GEORGE MURRAY of Polrossy granted an heritable bond to Sir John Gordon of Embo, for 20,000 merks Scots ; whereupon he was infeft 1722, and assigne it to Gordon of Garty, who never compleated his title by infeftment, but, 1729, adjudged the estate for this, and a further debt of 2000 merks, on which neither was he infeft ; but having, 1731, borrowed L. 6000 Scots from Robert Gordon, brother to Sir John, he obliged himself to infeft him in an annualrent, correspondent thereto, out of the said sum of 20,000 merks, assigning him to as much thereof, and of the annualrent due to him therefor, as would satisfy the said annualrent of L. 6000, and this right came into the person of Sir John Gordon, by succession to Robert.

Alexander Sutherland of Kinminity, 1734, purchased from Gordon of Garty, this heritable bond and adjudication, and transferred in trust for himself to Gordon of Bucky, who was infeft, 1737, upon the precept in Sir John Gordon's disposition to Garty.

Mary Sutherland, Lady Kinminity, as executrix to her husband, pursued Sir John Gordon for the rents of part of the estate of Polrossy, which he possessed by tack ; to which he pleaded, a preference in his own right, for that Garty having only a personal right to the heritable bond, when he transferred it to Robert Gordon, this must give a preference to him on those rents which fell due betwixt the date of that deed, and the time when Bucky's posterior disposition was compleated by infeftment ; although it was owned, that agreeably to what was found between Bell of Blackethouse and Gartshore, No 80. p. 2848. Bucky would have been preferable from the date of his infeftment,

No 26.

No 27.

A second assignee to a personal right, which he first compleates by infeftment, carries the profits accruing thereon, between the date of his assignation and infeftment.