

1664. *November 23.*ALEXANDER LIVINGSTON and SHAW of Sornbeg *against* LORD FORRESTER and CREDITORS of GRANGE.

No 34.

An estate in a party's person under back-bond for certain purposes, was allowed to be adjudged after his death for his debts, under burden of the back-bond.

ALEXANDER LIVINGSTON, as assignee by Mrs Margaret Forrester, and Sornbeg her husband, to some debts owing to her by her father the umquhile Lord Forrester having charged the remanent daughters, and heirs of line, craves adjudication of the estate of Forrester, and barony of Grange, wherein the Lord Forrester died infest. Compearance is made for a creditor of Grange, who produces a back-bond, granted by the Lord Forrester to the Laird of Grange, bearing, that the infestment was in trust to the use and behoof of the Laird of Grange, and only to the Lord Forrester's behoof for relief of debts he should be engaged in for Grange; and *alleged*, That he being Grange's creditor, and now insisting against Grange, who has renounced to be heir, for adjudging of the estate of Grange, for Grange's own debt, he has good interest, in this process, to allege no adjudication of Grange's estate, because it is only in trust, except in so far as may be extended to my Lord Forrester's relief: and, if the pursuer condescend upon any distress or engagement, he will instantly relieve the same. The pursuer *answered*, That he, being now in an anterior diligence to this party, ought not to be stopped in his diligence, but must be admitted to adjudge from the Lord Forrester's Heirs whatever was in his person; and the other party may also proceed, according to his diligence, to adjudge the back-bond; and, when he pursues thereupon, he shall have an answer; *adly*, There is no reason to stop the adjudication, and to force the pursuer to condescend upon my Lord Forrester's debts or interest, because a creditor cannot possibly know them; and therefore adjudications are always granted, generally of all right the debtor had, and is the only ground upon which the adjudger can pursue the havers of the debtor's rights to exhibit and deliver them, and thereupon to found processes and condescendences, but cannot be urged to condescend before he obtain adjudication; and also insinuated, that he would take his adjudication with the burden of the back-bond; but some of his advocates resiled therefrom.

THE LORDS having considered the case amongst themselves, how dangerous it were, if the creditors, or persons entrusted, obtaining infestment of an entrusted estate, the back-bond of trust being personal, would not exclude them; and albeit the person entrusted were not *solvendo*, as in this case, the entrusted estate, as to the heirs and creditors, would be unavoidably lost:

And some being of opinion, that a personal exception upon a back-bond could not be competent to burden or qualify a real right, or an action for obtaining thereof; but the most part were of opinion, that albeit the right, if it were complete, would be real, yet this action for obtaining thereof is but personal; for real actions are such only which proceed upon real rights, and

against the ground, such as upon annualrents; and therefore this being a personal action, might be excluded or qualified by a personal exception upon the back-bond; and therefore they adjudged with the burden of the back-bond.

Fol. Dic. v. 2. p. 65. Stair, v. 1. p. 232.

*** Newbyth reports this case:

1664. November 25.—UMQUHILE Grange Hamilton, did dispone the lands of Grange to the umquhile Lord Forrester, who thereupon was infeft; and, at the same time, did grant a back-bond relative to the foresaid disposition, wherein he declares, that the foresaid right was granted to him upon trust, and that the same was for the use and behoof of the Laird of Grange's spouse, and their heirs, he always being satisfied and secured for sicklike sums as he hath already undertaken, or should undertake, for Grange, his weal and standing of his estate, and therefore obliges himself, that he being paid and relieved in manner foresaid, to denude himself, and dispone the lands in favours of the Laird of Grange, his heirs and assignees. David German, and others of the Laird of Grange's Creditors, upon several debts due to them, comprise the lands of Grange from John Hamilton, now of Grange, as lawfully charged to enter heir to his father in the said estate, and have expressly apprised the back-bond *in anno 1653*; Alexander Livingston, a creditor of the Lord Forrester, pursues an adjudication of the lands of Grange.—THE LORDS sustained the adjudication with the burden of the back-bond, notwithstanding it was *alleged* for David German, and remanent of Grange's Creditors, That any infeftment the Lord Forrester had was only upon trust, and to Grange's behoof, declared in the back-bond, so that the lands of Grange cannot be liable to Forrester's debt, nor be adjudged by the pursuer, especially seeing, David German, and the rest of Grange's Creditors, had comprised the estate for considerable sums of money, and particularly the back-bond, many years before the intending of this pursuit against the executor of the Lord Forrester; and that there is a pursuit depending against them, at their instance, for implementing and denuding, conform to the back-bond; for the LORDS founds that it was *not hujus loci* to debate any thing that might hinder the adjudication upon the back-bond, which was only a personal obligation.

Newbyth, MS. p. 7.

1666. January 31. HUGH DALLAS *against* FRASER of Inveralachie.

SIR MUNGO MURRAY having, by the Earl of Crawford's means, obtained from the King a gift of the ward and marriage, of Fraser of Streichen his nephew, he did assign the gift to Mr James Kennedy, and he to Hugh Dallas, before it past the seals; and, at the time that the gift was past in Exchequer, the same

No 35.
A back-bond
granted at
passing-a
gift of ward.