

1677. December 6.

CRAIG *against* The LAIRD of CARBISTON.

## No. 17.

Found that an assignation in trust, being a *depositum*, admits of no compensation.

Umquhile Catharine Stirling having granted an assignation to umquhile Francis Cathcart of Carbistoun, her good-son, of two bonds, due to her by George Stirling, for 2000 merks, he granted a back-bond, bearing that this assignation was granted to him, but to the effect, that he might do diligence; and therefore he obliged himself, that in case he recovered payment, to repay the same to the said Catharine, or otherwise to reponer her to her said bonds. The said Francis did apprise the said George Stirling his estate, for these and several other sums adebted to himself. Catharine assigns this back-bond to her son, who thereupon pursued Francis before the Baillies of Edinburgh, and he did depone, but no sentence followed, but the back-bond was transferred to Elizabeth Stirling, apparent heir to the said George Stirling the debtor. The said Elizabeth and Craick her husband pursued Mr. James Cathcart of Carbistoun, as heir to Francis his father, to denude himself of a proportionable part of the said apprising, and lands apprising conform to the back-bond: Who alleged, *1mo*, That the back-bond being personal, not bearing heirs or assignees, granted by a good-mother to a good-son, it could take no effect, not being pursued in her life. The Lords repelled this allegiance. The defender further alleged, that the back-bond being alternative, it was in his option, either to pay the sums, or to reponer and denude. It was answered, that the back bond was not alternative, but contained two distinct obligations in several cases, viz. If payment were recovered to repay, and if not to reponer; and payment not being recovered, but the apprising expired, that case only occurs; and therefore the defender must denude: For if the lands apprising were not so good as the sum apprising for, he would not be obliged to pay, but to denude, and therefore the lands being better, and the legal expired, he must still denude. The Lords by a former interlocutor decerned the defender to denude himself of a proportionable part of the lands apprising, effeiring to the 2000 merks in the back-bond. It was now further alleged, that Catharine Stirling's son as assignee, had actually made his election of the sum, and not of the land, and accordingly Francis had paid a considerable part of the sums; which defence the Lords did also find relevant. The defender further alleged *separatim*, that by his contract of marriage produced, the said Catharine Stirling was obliged for the tocher, being 2000 merks presently, and 3000 merks at her death, and therefore if Catharine had pursued him to denude, he had compensation against her upon his contract, which is competent against his assignees. It was answered, that compensation is only competent *de liquido in liquidum*, and cannot take place here, where the obligation is *ad faciendum*, to reponer, and not to pay. It is true, that if Francis had obtained payment, he might have compensated; *2do*, The assignation being in trust, it is *depositum*, which admits of no compensation: The Lords found no compensation competent. It was further alleged for the defender, that his cedent having no other means or estate, but these bonds whereupon apprising followed, the defender could not affect the lands apprising, which stood in his own person, and therefore must be *in eodem*

*casu*, as if he had apprised, and have *jus retentionis* for his tocher, for which he used no execution upon account of this trust. The Lords repelled this defence, seeing it was not an absolute trust, but a back-bond in writ, which might have been affected for the tocher. It was further alleged for the defender, that the assignation granted by the cedent Catharine Stirling to her son and apparent heir, was null and fraudulent betwixt the most conjunct persons, in prejudice of the defender a lawful creditor for the tocher; and for the translation, it could not defend against the fraud, as being *bona fide* acquired for an onerous cause, because it was offered to be proved, that it was either gratuitous, or was *rei litigiosa*, after the dependence of the cause against Francis upon the back-bond, and his oath given thereupon. It was answered, that this is not competent by way of exception, but by reduction. It was replied, that where all is produced, and the question is of a personal back-bond, and the reason instantly verified, there needs no reduction; and it were most unfavourable to force the defender to denude, when there is nothing else to affect for his tocher, and put him to an action of reduction against insolvent parties. The Lords sustained the allegiance of fraud, or litigiousness by way of defence, being instantly verified, and only relating to a personal right. The pursuer further alleged, that the contract of marriage could have no effect; first, because it is subscribed on the margin only by Francis Cathcart, who might have changed the sheets in which the tocher might have been acknowledged paid, or been conditional, or for a less sum. *2do*, The tocher must be presumed paid; *1mo*, Because if it had been resting, Francis would have given the back-bond burdened with his own payment, or at least for the 2000 merks which were presently payable; *2do*, There is a subscribed account betwixt him and his good-mother produced, wherein he holds count to her for several sums without mention or deduction of any part of his tocher; *3tio*, It cannot be thought that if his good-mother had no more means, that he would not have affected this sum for his own payment. It was answered, that so solemn a contract could not be taken away upon such light presumptions; and as for subscribing the margin, the good-mother contracter subscribes by a notary, who uses not to subscribe margins; and whatever that might work as an indirect article of improbation, it cannot make the writ improbativ, for till of late the margins of all decreets and sentences were unsubscribed.

The Lords would not sustain the presumptions, but before answer, as to the margins, ordained trial to be taken anent the other side of the contract in the good-mother's hand, or any adminicles by writs relating to the same, or writers and witnesses who saw the same subscribed as it now is.

*Stair, v. 2. p. 571.*