

No 24.

A person having filled up a trustee's name in a blank bond, and taken a backbond of trust, this was found good against the trustee's creditor arresting the sum in the debtor's hands.

1678. February 5. MACKENZIE against WATSON and STUART.

THE Lord Elphinston having granted a bond blank in the creditor's name to Sir William Thomson's relict, she, for the like sum, delivers the bond to Mr Roderick Mackenzie, who being unwilling to distress Elphinston in his own name, fills up the name of Hector Mackenzie, and takes from him a backbond, bearing, that his name was but in trust to Mr Roderick's behoof. John Watson being creditor to Hector, arrests in Elphinston's hand, and pursues to make furthcoming. Mr Roderick compares, and produces the backbond, and *alleges*, That this sum cannot be made furthcoming for Hector's debt, because his name is only borrowed to Mr Roderick's behoof. It was *answered*, That such backbonds can have no effect further than against the granter, but not against his singular successor by assignation or arrestment, otherwise no assignee can be secured; and therefore *jus crediti* is stated in Hector, and his backbond is but a personal obligation to pay or denude, which therefore may have effect against Hector, but not against his singular successor; and this will be an easy way to mar commerce, and cheat assignees, who seeing a clear bond, are in *bona fide* to trust the creditor, or contract with him; and Mr Roderick had a remedy by intimation of the backbond, by which it would have had the effect of an assignation intimated, and thereby have been preferable to a posterior assignee or arrester. It was *replied*, That the common ground of law is, that *nemo plus juris in alium transfert quam ipse habet, et quisque scire debet cum quo contrahit*; and therefore in personal rights singular successors can never be secure against the deeds of their cedents instructed by writs, though their oaths are not receivable against singular successors, and therefore no party, by seeing a clear liquid bond, and contracting *bona fide*, can be further secure, because it is without controversy, that the cedent's discharge before intimation or arrestment, will exclude the assignee or arrester; yea compensation against the cedent, instructed by writ, will exclude them, much more should a backbond relating to the very right itself, which is *pactum ex incontinenti adjectum* is *pars contractus*. It is true, our law, to secure real rights, hath by remedies peculiar to us, cut off the deeds of authors, which are not in the body of infeftments or reversions, ingrossed or registered, but that hath never been attempted or designed in personal rights, nor is the matter now entire that the LORDS would declare they would respect such backbonds, as to singular successors, unless they were expressed or mentioned in the right; for there is now *fixa consuetudo* in the contrary, whereupon all parties think themselves secure by backbonds, as to personal rights, yea as to dispositions before infeftments or apprisings, before the expiring of the legal, as was found in the case of Sir Ludovick Gordon *contra* Skene and Crawford, July 6. 1676, No 1. p. 7167. And there is nothing more ordinary than when apprisings are to be led, many creditors assign their rights to one in whose name the apprising is to be led for all, and takes backbond, that the appriser's

name is instructed to the behoof of the cedent, which hath ever been sustained against all singular successors of the apprising before the legal expire; and though our custom hath required intimation to compleat assignations, yet never to compleat backbonds, restricting or qualifying rights, or declaring the trust for behoof of any party.

THE LORDS found, That the backbond declaring the trust was effectual, not only against the granter, but also against the arrester arresting for the granter's debt, and therefore preferred Mr Roderick Mackenzie, to Watson.

*Fol. Dic. v. 2. p. 64. Stair, v. 2. p. 607.*

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1705. July 19.

ALEXANDER BLACK, Merchant in Edinburgh, *against* ANDREW SUTHERLAND, Writer to the Signet, and BARBARA GUTHRIE, his Spouse, and other Creditors of PATRICK STEILL, Vintner in Edinburgh.

PATRICK STEIL and Alexander Black being bound to Sir Robert Cheisly, late Provost in Edinburgh, in L. 300 Sterling; and Steill having received from Black for relief of his proportion, a precept for L. 462 Scots, upon Mr Tock, perriwigmaker in the Wrightshouses, and obliged himself by backbond to Black, that he should apply the same for the satisfaction of Sir Robert Cheisly's debt *pro tanto*; Andrew Sutherland, and others of Patrick Steil's creditors, arrested the money in Tock's hand, as belonging to their debtor, and raised a forthcoming; wherein Alexander Black compeared and craved preference to the arresters, although the intimation of his backbond was posterior to their arrestments; in regard Steill had only a personal right to a moveable subject, qualified with a backbond for a specific use, and so upon the matter a trust not affectable for his debts.

*Answered,* The sum arrested cannot be called Black's money, but Steill's, whose faith Black followed; and therefore Steill's Creditors are preferable, unless there had been a retrocession or intimation of the backbond, prior te their diligences of arrestment; seeing they were not bound to know of a latent backbond.

*Replied,* By our law backbonds are real and subsist against third parties, February 5. 1678, Mackenzie *contra* Watson and Stewart, *supra*. The like holds in apprisings or adjudications, where many assign their debts to one, that he may adjudge in his name for their behoof, and they get backbonds from him as a trustee, which militate against his successors, and qualify the adjudication led by him within the legal, till it be made real by infestment.

THE LORDS found that Steill's backbond so affected the money, as it could not be arrested for his debt. For they thought a backbond of this nature was *factum ex incontinenti adjectum*, and *pars contractus*, being of the same date with

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A bill being indorsed to one upon his giving a backbond to apply the money to a certain use, the backbond was found so to affect the money, as it could not be arrested by the creditors of the indorsee