

remains in the mandant, till the execution of his last orders by payment. *2do*, If any back-bond had been given in the terms of the oath to Kinauld without intimation to my Lord Ross, that *negotium* betwixt Kinauld and his trustee, could not hinder him to destroy the back-bond, and call for his money *in specie* from his trustee.

The Lords found that the property of the money remained with Kinauld, and was therefore arrestable by his creditors.

Forbes, p. 71.

1707. December 18.

LADY PITMEDDEN and her Husband *against* SIR ROBERT GORDON.

ALEXANDER FARQUHAR merchant in Aberdeen being creditor to umquhile Sir Ludovick Gordon of Gordonston, conform to a back-bond, Farquhar assigns that debt to Mr Robert Forbes, and takes his back-bond, declaring it was but in trust, and that he should denude (being always paid in the first place any expense he should ware out upon the process), and that in favours of Mr William Lauder (to whom he stood debtor in a considerable sum of money) in the first place, and, after his payment, to William Gordon and some others of the said Farquhar's creditors, in the next place. Farquhar and Forbes his trustee being remiss in carrying on the process against Gordonston, Mr William Lauder applies to the Lords, craving to be admitted for his interest; but before this is determined, the parties die, and the Lady Pitmedden, as heir and executrix to her father, raises a transferring against Sir Ludovick's heirs; and her title being objected against, the process is transferred *in statu quo*, and being now insisted in, the dilator is renewed, that you have no action against Gordonston till you first denude Forbes the trustee, and you obtain the concurrence of the other creditors of Farquhar's, mentioned in Forbes's back-bond, otherwise we have not a legal full contradictor; for a *res judicata* betwixt the lady and me, will not produce me an absolvitor against Farquhar's other creditors mentioned in the backbond, in case they should pursue me; so the lady's direct action lies not against Gordonston, but against the heirs of Mr Robert Forbes, the trustee, to make him denude in the terms of his back-bond in favours of Mr William Lauder, and his heirs; and this is plainly insinuated by my Lord Dirleton, *voce* TRUSTEE, committing treason, and was decided in a parallel case 18th January 1706, betwixt Chaplain and Henderson *, where the Lords did not think a back-bond equal to a retrocession and transmission of the right. *Answered*, That Mr William Lauder being *nomina-tim* insert in the backbond, and ranked *primo loco*, who can doubt but Forbes was only his hand, and so it accresces to him; and in a case betwixt Mac-

No 7.

No 8.

One assigned a bond to a trustee, taking him bound by back-bond to denude in favour of certain creditors in order. Both parties deceased before the money was recovered. The first named creditors found to have sufficient interest and title to prosecute the debtor in the bond.

* Examine General List of Names.

No 8.

kenzie and Watson, 5th February 1678, *voce* PERSONAL and REAL, the Lords preferred him who had right by the back-bond to a creditor who arrested for the trustees debt, without putting him to the necessity of an action for denuding. THE LORDS considered, that, by the tenor of Mr. Robert Forbes's back-bond, there was no debt preferable to Mr. William Lauder's, but only what Forbes should deburse in carrying on the process, and that the creditors named after him had no interest to oppose payment of his sum; therefore they sustained the Lady Pittmeden's interest as sufficient to give her a title on Forbes's back-bond to prosecute this action against Gordonston, the lady always finding caution to pay what expenses shall be instructed, that Forbes wared out on this matter, in case the fund in Gordonston's hand be not able to pay both.

Fol. Dic. v. 1. p. 512. Fountainball, v. 2. p. 404.

1738. July 20.

THOMAS TAIT *against* THOMAS and MARGARET POLLOCKS.

No 9.

A provision in a contract of marriage to the wife's children of a former marriage, was found not to import a *jus quæsitum tertio*, but only a destination of succession, alterable at pleasure by the husband and wife.

IN the contract of marriage entered into betwixt Christian Morison and John Tait, he provided her 'in and to the hail insight and houshold-plenishing, and other moveable goods and gear, belonging to him, with power to her to use and possess the same during all the days of her lifetime, in case she survive, and remain unmarried.' The contract further declares, 'That, after her decease, it is to be divided in the following manner, viz. two thirds thereof to Thomas and Margaret Pollock's children, procreated betwixt Christian Morison and Hugh Pollock, her second husband; and failing of them, or either of them, by decease, the deceaser's third to accresce and belong to the survivor; which failing, by both their deceases, to the said John Tait and Christian Morison, spouses, their nearest heirs and assignees whatsoever; and the other third of the said moveables, goods, and gear, to pertain to the said John Tait, his assignees, or to which of his children he should think fit to dispoñe the same before his decease,' &c. And, by another clause, the liferent use of the household furniture is reserved to the longest liver of them two, with full power to them to meddle, intromit with, possess, use, and dispose thereof, at pleasure.' Thereafter the said John Tait dispoñed to the said Christian Morison, her executors and assignees, all household-plenishing, goods, gear, and effects, that should happen to pertain to him the time of his decease, with this quality or provision, That in case Thomas Tait, his second son, survived his said spouse, the one half of the plenishing should, after the decease of his spouse, accresce and belong to him, or the value thereof, in his option.

John Tait died first, whereupon Christian Morison confirmed the general disposition; and, after her decease, Thomas Tait brought a process, upon the