could affect this price to Sir David's prejudice; for whatever objection meets Sir Robert, must meet his creditors' arresters. No 46.

THE LORDS found, That Sir Robert Forbes was trustee to Sir David Thoirs by his backbond, in so far as concerned the superplus price of the lands disponed, over and above the payment and relief of debts and engagements, wherein Sir Robert was concerned with Sir David, and therefore found Finmouth ought to be preferred to Ballogie, as arrester.

Clerk, *Mackenzie.*

Fol. Dic. v. 2. *p.* 65. *Bruce, v.* 1. *No* 118. *p.* 148.

1715. *July* 20.

M'CUBBINS, Heirs-Portioners to DAVID M'CUBBIN, Younger of Knockdolian, *against* MARGARET FERGUSON.

No 47.
A backbond granted by a trustee not good against a singular successor by infeftment.

ADAM of Glentig granted an heritable bond of 1600 merks to the said David M'Cubbin, and granted other bonds to Fergus M'Cubbin, his father, and both father and son assigned their bonds to William Baird, (who was likewise a creditor to Glentig) to the effect that he might lead an adjudication for all; and Baird granted a backbond of trust, and accordingly an adjudication was led.

Margaret Ferguson obtains a bond of 1200 merks from the said William Baird; and, of the same date, for the more sure payment of the said sum, he assigns and transfers the said heritable bond of 1600 merks, to which he had right by assignation from David M'Cubbin; and Margaret Ferguson obtains herself infeft, as having right by progress to the precept of sasine contained in the said heritable bond.

In a competition of the Creditors of Glentig, the heirs-portioners of David M'Cubbin craved preference for the annualrent of the said 1600 merks; because, albeit Margaret Ferguson had obtained herself infeft as assignee to the precept of sasine, yet William Baird, the granter of the assignation, was a trustee, and his right affected with a backbond, which could not be prejudged by his assignation to Margaret Ferguson; because, when the backbond was granted, no infeftment had followed on the heritable bond; and backbonds qualify all personal rights, as apprisings within the legal, even though infeftment had followed; and infeftments of annualrent may be pleaded to be also so qualified, but much more so while they remain personal rights.

It was *answered* for Margaret Ferguson, That she ought to be preferred, because the heritable bond was only rendered a real right by her obtaining infeftment upon the precept; and a backbond was never found to qualify an infeftment of annualrent. And there is no parallel betwixt an apprising and an annualrent; because an apprising is a diligence for obtaining payment; and

No 47. apprisers, in many cases, are bound for diligence; and all purchasers acquire with the hazard of what may be objected against their authors. The real right of annualrent is only for security of the interest, and which is not destinated for extinguishing the principal sum.

2do, There is a great difference betwixt the case of a person purchasing the right of an annualrent, or indeed any other right *bona fide*, relying upon that purchase as the security of their money, and the case of a creditor who, finding the right of annualrent in the person of his debtor, affects the same for security of his debt, but advances no money in contemplation of that right. In which last case, the user of diligence *utitur jure auctoris*, and carries the right under the exceptions that were competent against his debtor. But where a party *bona fide* purchases and pays his money for the purchase, there is much more favour allowed in equity; and, in like manner, purchasers of apprised lands *bona fide*, for just and equitable causes, have always been considered in other circumstances than the apprisers themselves, bruiking by virtue of their diligence.

"THE LORDS preferred Margaret Ferguson, as having lent her money on the faith of Glentig's heritable bond."

*** The above decision is drawn out at the end of the Manuscript more fully, as follows:

IN the competition betwixt these parties, about an heritable bond, granted by John Adam of Glentig, to David M'Cubbin, younger of Knockdolian, the right produced for either party stood thus: Knockdolian the creditor, April 1699, assigned the bond to William Baird of Sallochan in trust, to the effect he might lead an adjudication thereupon, together with several other debts; and Baird grants a backbond, of the same date with the assignation, declaring the trust in ample form. Upon this heritable bond and backbond, Knockdolian, the original creditor, his heirs-portioners competed. On the other hand, Margaret Ferguson produced a translation from the said William Baird the assignee, dated March 1701, whereupon she was infeft, and thereupon craved preference. After several other debates, this question was stated by Margaret Ferguson, How far the backbond or declaration of trust, granted by Baird the assignee to Knockdolian his cedent, could be effectual against Margaret Ferguson, a singular successor by translation from Baird, and who stands infeft upon this translation in Glentig the original debtor's lands?

It was *pleaded* for Margaret Ferguson, That Baird having disponed the foreannualrent to her, no backbond of his can affect her, a *bona fide* singular successor, for an onerous cause, standing infeft; and that, *1st*, From the nature of the thing; *2d*, From the particular constitution of our law requiring registration.

No 47.

As to the *first*, It was urged as a principle, That an assignation to a precept of sasine transmits to the assignee all the right that was in the cedent; so that there remains nothing in his person, more than the precept had been directly granted by the proprietor to the assignee; whence it was concluded, that a backbond granted by the cedent (which in its nature is merely a personal right) may indeed create a good action against himself, but can never affect a right that is no longer in his person. A backbond by an assignee to a personal bond will indeed affect his singular successor; because an assignation to a personal bond does not denude the cedent of the *jus crediti*, but is only of the nature of a procuratory giving power of exaction. And though, where there is no backbond, the same is irrevocable, as being *in rem suam*, yet still the *jus crediti* remains with the cedent; and all exceptions go against the assignee, though by our custom there are some restrictions as to the probation. But, where a backbond is granted, the assignation becomes of the nature of a simple revocable mandate; so that betwixt an assignation to a personal bond and a precept of sasine, there is this difference, that, in the one case, an assignation is only a procuratory without any conveyance; in the other, an assignation makes a complete conveyance from one to another; and thence it is that a personal bond will affect the assignee in the one case, and not in the other.

As to the *second* ground, it was *pleaded*, That the design of the registers being to secure singular successors by infeftment, it is a general rule, that singular successors by infeftment, must be secure against all latent private rights whatever; and therefore it was concluded, were this backbond in its nature otherwise good against singular successors, it could have no place against Margaret Ferguson now standing infeft, upon the faith of the registers.

To the *first*, *answered*, That it is granted, backbonds purely personal, the design of which is simply to create a personal obligation upon the granter, and which do not affect or qualify any right in his person, are indeed not good against singular successors; but since backbonds for the most part are designed to qualify or affect the right, as it is in the granter of the backbond, they must be good against singular successors; for, if the right itself be once qualified or affected, it must continue to be so in whatever person existing. Thus, in the present case, since Baird's backbond does not only import an assignation to denude, but is a declaration, that he had not the absolute right of the heritable bond in his person, but only *qualificate* as trustee for a certain effect, viz. to lead an adjudication, the backbond must in its nature affect the right in whomever placed, because Baird could convey the right in no other shape than he himself had it. And so the distinction made betwixt an assignation of a precept, and a personal bond, were it even true, falls to the ground without effect. But, in the next place, there is no manner of foundation for the distinction; an assignation to a precept of sasine is no more but a substitution in the right for granting and receiving the infeftment, and transmits no more in the case

No 47. of an heritable bond bearing procuratory and precept, than another assignation does in the case of an ordinary moveable bond, bearing no such precept. One thing is clear, that the precept which is an accessory can be conveyed in no other manner than the personal obligation itself; and if an assignation to the personal obligation in the heritable bond be only a procuratory, it is incompatible, that any of its accessories should be torn from it, and conveyed to any other person than who has the personal right.

Answered to the *second* point, That our law makes a great difference betwixt the absolute property of lands, and a qualified right in lands for security of debt; See Stair, *lib.* 2. *t.* 3. § 22. *in med.* The first of these being in its nature a perpetual right and a proper subject for commerce, has the absolute protection of the law, so as no separate latent deed can be good against it. But as for a right in security, it being in its design only temporary, without any view to pass from hand to hand, it has no special privilege indulged to it by the law, and therefore, even after infeftment, is qualified by backbonds, extinguished by discharges, and intromission with the rents of the subject given in security, equally as where there is no infeftment; which holds equally in infeftments of annualrent, adjudications, and all of that sort. But, 2*do*, Whatever might be pleaded, if Margaret Ferguson had purchased *bona fide* from Baird after infeftment, the case here is quite otherwise, where Baird was never infeft, but had only a personal assignation. It is certain, from the nature of the thing, there is nothing to hinder even him who stands infeft in an absolute right to qualify it by a backbond; the reason then why irredeemable rights clad with infeftment cannot be so qualified, must be drawn from the particular disposition of our law concerning the publication of infeftments by registration; our law has prudently introduced the registrating of infeftments for the security of purchasers; and of consequence, that infeftments should not be affected with any thing but what enters into the sasine and warrants thereof; when one therefore purchases upon the faith of a registered infeftment, there is good ground to plead, that he ought to be secure upon the footing of the infeftment as it stood recorded; but this will not apply to Margaret Ferguson's case, because she did not purchase upon the faith of the registers, but contracted with one not infeft, upon his faith, and therefore must lie open to his deeds. And there is no hardship here, where the remedy is so easy; for she had no more to do, but to infeft first her author, and afterwards herself; and then she would have contracted upon the faith of the register, and so been secure.—3*tio*, Margaret Ferguson is none of the *bona fide* onerous purchasers, that the law has taken under its particular protection; for she did not absolutely purchase this heritable bond, nor with ready money, but took a right thereto only in security of a debt owing her. Now, besides the favour of commerce, which has not so much place in the purchases of creditors, there is this consideration, that at present, if Margaret Ferguson be obliged to succumb, she is

in no worse state, than if the translation to her had not been made; whereas, had she paid money for it, her case had been that of one *certans de damno evitando*. No 47.

Replied to the objection, That Margaret Ferguson purchased only a personal right, without infefting her author. It can make no difference, that she took infeftment directly herself without infefting her author; for since the principle is, that backbonds do not qualify infeftments, though she purchased what might truly be a qualified right, yet, so soon as she took infeftment, no matter whether in her author's name, or her own, the right behoved to become thereby absolute. And, were this otherwise, there could be no conveyance of land-rights without every successor being infeft, which yet are very frequent; for, if it should happen in the longest series, that any one disponer was not infeft, this would lay an embargo upon the subject, and effectually exempt it from commerce for the course of the long prescription; no body being sure that the right was not extinguished in the person of him that was never infeft, so as not to be capable thereafter of being conveyed. And in this view perhaps there would not be found many secure purchases in Scotland, which therefore would draw the registers to have a very limited effect.

"THE LORDS found, That the backbond granted by William Baird to Knockdolian, was not effectual in prejudice of the said Margaret Ferguson her infeftment, she being a *bona fide* purchaser for an equivalent onerous cause; and therefore preferred the said Margaret Ferguson."

Fol. Dic. v. 2. *p.* 65. *Dalrymple, No* 151. *p.* 207.

1743. *December* 13. GORDON *against* GRANT.

GORDON of Craig granted to —— of Tillyfour a disposition of certain lands, containing absolute warrandice, and receipt of the price; and Tillyfour executed an obligation, narrating, That he had detained 1000 merks, in satitfaction of a real incumbrance due to one Farquharson. Tillyfour disponed the lands to Grant of Rothmaise with absolute warrandice, and further assigned the warrandice in Craig's disposition. It appeared, that Rothmaise had retained the 1000 merks, though Tillyfour had some time after the sale granted a discharge of the price. As this incumbrance never was purged, Craig, whose separate lands were bound in warrandice, brought an action both against Tillyfour and Rothmaise for payment of the 1000 merks. THE LORDS found, That the action was not competent to Craig against Rothmaise, reserving to Craig his defences, if pursued for Farquharson's debt. See APPENDIX. No 48.

Fol. Dic. v. 4. *p.* 66.