

S E C T. VI.

Effect of *Bona et Mala Fides* relative to Cedent and Assignee.

1755. March 6.

WILLIAM IRVINE, Merchant in Lerwick, *against* JOHN GEORGE OSTERBYE,
RICHARD GILDART, and Others.

A NORWEGIAN vessel, Knudson master, struck on the rocks of Brassef-sound in Zetland. The ship and cargo were adjudged a wreck by the vice-admiral of Zetland, and by his authority exposed to sale. They were bought at an under-value by Irvine; and it appeared that Knudson, the master, had diverted certain persons from bidding at the sale, by distributing a sum of money among them; that Irvine made the purchase for the use of Knudson; that, before the sale, part of the cargo and the rigging had been brought on shore; and that, after the sale, the ship was got off, and the rest of the cargo saved.

Irvine afterwards purchased from Knudson the ship and cargo thus saved, and granted bond for L. 920 Sterling in part of the price. Knudson assigned this bond to Osterbye, a merchant in Norway. This assignation was held to have been granted for value, as it so bore; and, as no legal evidence to the contrary appeared, Osterbye brought an action against Irvine for payment of this bond.

Gildart and others, merchants in London, were underwriters on the ship and cargo; and, on the supposition of her having been a wreck, paid the loss to the owners; but, having discovered the fact to be as here narrated, they brought an action against the owners and Knudson, for repetition of the sums so paid; they also arrested the bond for L. 920 Sterling in the hands of Irvine, as debtor to Knudson.

A multiplepounding having been raised by Irvine, the case resolved into a competition for the sum in the bond between the insurers and the onerous assignee.

Pleaded for Osterbye the onerous assignee:—The rule of the civil law, That *dolus auctoris non nocet successori ex titulo oneroso* prevails with us, in the case of one purchasing a real estate from a person infest, or moveables which the seller neither stole nor got by robbery, or of one purchasing bills of exchange for value; the same rule must obtain, by parity of reason, in the case of a fair purchaser of personal rights; and therefore the fraud of Knudson cannot affect the right of his onerous assignee in the bond. Stair indeed is of a different opinion, book 4. tit. 40. § 21.; but his assertion seems repugnant to the proviso in the statute 1621, which secures him who has fairly purchased any right whatever from the fraudulent assignee of a bankrupt; and to the decision, 1st December 1671, Crichton against Crichton*, by which a personal deed, reducible *ex capite fraudis*, against the first acquirer, was found valid in the person of one purcha-

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A ship cast away was fraudulently purchased at an under value, by a trustee for the shipmaster. The trustee afterwards bought the ship from the master, and gave bond, which the master assigned for value. The insurers who had paid as for a total wreck, arrested the bond in the hand of the assignee. The insurers were preferred to the assignee, on account of the fraud of the cedent; but action was reserved to the assignee against the trustee, as *particeps fraudis*.

* Stair, v. 2. p. 15. voce FRAUD.

No 26. sing fairly from him. These authorities prove, That, by the law of Scotland, fraud is understood to be a personal objection only, and that with respect to all rights whether real, or of moveables, or consisting in *nomina debitorum*.

Pleaded for Gildart and the other insurers: For the security of our land-rights, action is denied against the purchaser of a real estate on account of the fraud of his author; fraud also in the seller of moveables, affects not him who purchases *bona fide*: The same is the rule in bills of exchange, which are held as equivalent to ready money. In these cases, the necessities of mankind and the nature of commerce, require this rule; but the case of bonds is different; they are not the proper objects of commerce, they are securities for money, and are transmissible only by the form of assignation and procuratory. With respect to such personal rights, the rule in law is, That *assignatus utitur jure auctoris*; as with respect to them, the backbond of the cedent affects the onerous assignee, so also must his fraud. As the insurers might vindicate the ship and cargo, were they still extant, they have right to the bond, being the price of the ship and cargo; and as they would have this right in competition with Knudson the cedent, they must also have it in competition with Osterbye the assignee. The opinion of Stair is in point; and so the Court found 1742, Burden of Latterpin against Whitefoord of Dunduff*. The argument drawn from the exception in the act 1621, in favour of purchasers from the interposed person, is not conclusive; for that, as the remedy introduced by that act is wholly statutory, and may not be extended to other cases, so neither may the exception. The interposed person partakes not always of the fraud of the bankrupt; and the Legislature did not think proper to extend the statute against third parties purchasing *bona fide* from him. Neither is the case of Crichton in point; it related to a tack assigned for onerous causes; on which tack both the cedent and the assignee had possessed; the Court considered it as of the nature of a real right, and gave judgment accordingly.

‘THE LORDS preferred the insurers to the bond of L. 920; but reserved action to Osterbye against Irvine for payment of the price in the said bond.’

For Irvine, *Hamilton Gordon*. For Osterbye, *A. Lockhart*. For the Insurers, *Miller*.
Fol. Dic. v. 3. p. 93. Fac. Col. No 152. p. 226.

See APPENDIX.

See Neilson against Bruce, voce PACTUM ILLICITUM.

Hart against Collins, 14th December 1781, *Fac. Col. No 16. p. 27. voce PRIZE.*

M'Ghie against Forbes, 13th May 1793. *voce PRESCRIPTION.*

* General List of Names.