

1702. November 14.

JAMES ANDERSON against SIR JOHN DEMPSTER of Pitliver, and DUDGEON
in Inverkeithing.

SIR JOHN being elected commissioner for representing that burgh of Inverkeithing in the Parliament 1681, to capacitate him for that office, one Anderson, a burgher, disposes to him a tenement of land, whereon Sir John is infeft; but Anderson continues in the possession all the days of his lifetime. His relict, after his death, marries one called Dudgeon, and they enter into a transaction with Sir John Dempster, whereby, for L. 1000 Scots, he disposes the tenement over to them. Upon this, Anderson's heir raises a declarator and reduction, that the right given to Sir John was in trust to the particular end and effect above-mentioned, and therefore craves the right made by Sir John to Dudgeon to be reduced, and fall in consequence. And the Lords having ordained Sir John to be examined upon the onerous cause of his disposition, he very ingenuously depones, that he paid nothing for it, but got it on the consideration foresaid, to put him in a condition to be their Parliament man, and that no backbond nor declaration of trust was required of him; and it being argued, That his transmission and conveyance to Dudgeon must fall in consequence, the LORDS found, That Dudgeon having acquired it by an onerous title, equivalent to the value of the house, the trust in Sir John's person could not affect his right, it not being a *vitium reale*, and that Sir John his cedent and author's oath could not prejudice him, unless it could be qualified that Dudgeon was *consciens fraudis*, or knew of the trust; but they inclined to think Sir John would be liable, both in respect of his own acknowledgment that the disposition was given him on the account foresaid, and that *nemo presumitur donare vel suum perdere*; and the *natura negotii* seemed plain that a gift was not here designed, especially being *retenta possessione* by the disponent all his lifetime; but the summons being rather a reduction of Dudgeon's right than a declarator of trust, they assilzied Dudgeon from the reduction; but allowed Sir John to be further heard as to any personal conclusion of trust or damage against him for contravening the said trust.

Fol. Dic. v. 2. p. 65. Fountainhall, v. 2. p. 159.

1715. July 14. BRUGH of Finmouth against FORBES of Ballogie.

SIR DAVID THOIRS having acquired the lands of Wester-Lochgellie from William Malcolm; he, without being infeft, assigns the same to Sir Robert Forbes, who granted backbond, acknowledging he had paid no price, but that the right was granted to him, in order that he might sell the lands for relieving himself of what debts he had paid for Sir David, or should thereafter pay; and

No 45.

A party, who was in fact only a trustee, disposed a subject. Found, that the trust could not affect the purchaser's right, not being *vitium reale*.

No 46.

A trustee in a disposition to lands, in order to sell them, gave a backbond to the disponent to account for

No 46.
the price.
The Lords,
in a competi-
tion betwixt
the trustees
creditors, and
those of the
disponer, pre-
ferred the
latter, altho'
the disponer
was never in-
feft.

therefore obliged himself, that being so relieved, he should be accountable, and apply the balance to Sir David, his heirs, &c. And the backbond bears also, That Sir Robert should sell with consent of Sir David or William Thoirs, his nephew. David Brugh being creditor to Sir David, constituted the same by a decret against his heir, and thereupon adjudged the lands and the foresaid backbond; Sir Robert made over his right to Mr Henry Scrimzour, who obtained himself infest, and there being a part of the price yet in his hands, there falls out a competition about it, betwixt Brugh as creditor to Sir David, and Ballogie as creditor to Sir Robert, who as such, had arrested in Mr Scrimzour's hands.

And it was *alleged* for Ballogie, That in a former debate betwixt Mr Henry Scrimzour and David Brugh, wherein David had alleged the backbond granted by Sir Robert to Sir David did intrinsically affect Sir Robert's right, that Mr Scrimzour could not acquire any right but with the burden of his author's backbond; yet the Lords preferred Mr Scrimzour; and therefore Sir Robert's creditor arresting in Mr Scrimzour's hands is preferable for the price due to Sir Robert, which could not be affected by his backbond, but Sir David's Creditors must insist for implement thereof against Sir Robert as accords.

Answered for David Brugh, That though Mr Scrimzour was preferred, yet there was not the same reason for preferring Sir Robert's creditor; for the reason of Mr Scrimzour's preference was, his being purchaser *bona fide* from Sir Robert, and had compleated his right by charter, &c. so that the backbond could not affect him; but Sir Robert's creditor, who had only arrested the subject, can never be in better case than himself, who by his backbond, was to apply the superplus to Sir David. The reason is, that it is hard to tie purchasers who pay an adequate price, by backbonds that may be latent; but arresters and adjudgers only affect the subject as their debtor has it in his person, with its qualities; and therefore can never be in a better case than he himself. And this was so decided, 5th February 1678, Mackenzie *contra* Watson and Stuart, No 24. p. 10188. which was indeed a case of bonds for debt; but the reason of the decision hold likewise here. But there was a decision *in terminis*, 22d December 1680, Prince *contra* Pallat, No 39. p. 4932. which was under the Lords' consideration, when very lately they decided in the same manner, viz. 18th January and 4th February 1715, Simson's Creditors *contra* Maxwell, No 40. p. 4934.

Replied for Ballogie, That this was not a backbond of trust, but an obligation upon Sir Robert to pay the superplus price, just as if Sir Robert had given a bond to Sir David for the price.

Duplied for Brugh, That the backbond is granted of the date of the disposition, and Sir Robert bound to sell the lands, and apply the superplus to Sir David; now he does sell to Mr Scrimzour, and lying under an obligation to make the price furthcoming to Sir David, it is impossible Sir Robert's Creditors

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 disposed, 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.

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.

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

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 infest, 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 infest 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 infestment had followed on the heritable bond; and backbonds qualify all personal rights, as apprisings within the legal, even though infestment had followed; and infestments 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 infestment upon the precept; and a backbond was never found to qualify an infestment of annualrent. And there is no parallel betwixt an apprising and an annualrent; because an apprising is a diligence for obtaining payment; and