

ANSWERED,---Back-bonds are but personal rights, and can never militate against them who are singular successors to the granter. It is true, so long as an apprising or adjudication is current within the legal, and is not perfected and made public by infestment, then such a private incomplete right as a back-bond may restrict, qualify, or affect it; but after a real right, whether voluntary by an absolute disposition, or legal by apprising or adjudication, is perfected by infestment, and the legal expired, there it would subvert all the public records and securities of the nation, if a back-bond should meet the creditors or singular successors of that trustee who gave the back-bond; so the receiver of the back-bond has nothing but action against him whose faith he followed, and cannot affect the lands disposed or apprised, where it is completed by infestment or expiration of the legal.

See Stair's Institute, *lib. 3. tit. 1. Of Assignations, num. 21st*; and *June 20th 1676, Brown against Smith*; and Mackenzie's Institute, *Book 2. tit. 3.* See also *5th February 1678, M'Kenzie against Watson*, where a back-bond of the date is sustained against an arrester. This case is an eminent instance where favour and equity plead one way, and strict law the contrary; and it were safer, that either latent back-bonds should operate against none but the granter and his heirs, or else to be ordained to be registrate as reversions, and to be effectual as real rights against all singular successors whatsoever, that the lieges may not suffer by splitting on rocks they could not foresee; otherwise no remedy is left but to recur on the personal warrandice of the granter, which, in process of time, through diligences done against him, may not be worth a sixpence; to which the only answer is,---*caveat emptor, qui scire debet conditionem ejus cum quo contrahit.*

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1698. *June 28. SIR JOHN SHAW of GREENOCK against SIR JOHN HOUSTON of that ilk.*

RANKEILOR reported the bill of suspension given in by Sir John Shaw of Greenock against Sir John Houston of that ilk, of a decreet-arbitral pronounced by my Lord Whitelaw, upon a submission entered into betwixt them, anent their rights on the estate of Maxwell of New Wark exposed to sale, and which of them should have it at the roup, and some other claims; wherein the arbiter assoilyed Greenock from the articles craved by Houston, and discharged Greenock to bid at the roup of the lands of New Wark; and, lest he should do it by an interposed person, decerned him to grant a reversion for himself and his heirs, that these lands should be always redeemable, from him and his heirs, by Houston, for sixteen years' purchase. The reasons of suspension were, *1mo.* That to restrain him to bid at a common roup was *contra bonos mores*, against public utility, *et contra libertatem subhastationis fiscalis*; and was condemned in the case of *Sir Thomas Kennedy* and the *Lord Bargeny*, about the roup of Girvanmains, lately sold. *2do.* The decreet is *ultra vires compromissi*; the discharging of Greenock's heirs to purchase New Wark being neither submitted nor submittable in itself, laying them under a perpetual servitude and interdict, exempting these lands from commerce *quoad* them.

ANSWERED,---*Esto* there were both hardship and iniquity in the case, yet now,

by an article of the regulations 1695, decreets-arbitral are declared unquarrel-
lable upon any head whatsoever, except that of corruption and bribery, which is
not pretended here. *2do.* The decret may be maintained against the injustice
founded on; for what hinders a man from binding himself up from bidding at
such a roup? If that obligation be lawful, why may it not be the subject of
a submission; and that case of Bargenie's and Kennedy's came to no decision,
but was transacted. And as to the perpetual reversion, it was only to make the
prohibition effectual, that he might not evacuate it by the interposition of a
third party; *et quod directo fieri non debet, nec per obliquos cunniculos licere de-
bet*; and in a late case of a decret-arbitral, pronounced by one Forrester, be-
tween *Henderson of Meggetland* and *John Luke*, merchant in Glasgow, though
it was carried on by tricks and fraud, yet the Lords would not reduce it,
unless they proved bribery or corruption.

The Lords sustained the decret-arbitral, and repelled the reasons of suspen-
sion. *Vol. II. Page 6.*

1698. *June 29.* EUPHAME SETON *against* BERNARD M'KENZIE.

I REPORTED Euphame Seton, relict of John Robertson, and now spouse to
Bailie Gilbert Fife, against Mr Bernard M'Kenzie, for repetition of two years'
stipend paid by the said Robertson, her first husband, when factor for the estate
of St Germain's, in respect they have been forced to pay the same stipend over
again to Mr Mungo Watson, minister at the new erected church at Gladsmuir.

ALLEGED,---There could be no repetition, *1mo.* Because *qui suum recipit con-
ditione non tenetur*; and he had right, because he had preached these two years
at the church of Tranent on the call and invitation of some of the parishioners,
(but not the Presbyterians,) as also had a right to the stipend 1691, from Doc-
tor Gartshore, the incumbent; and to the former year 1692, he had right, by a
gift from the Lords of the Treasury. *2do.* *Esto* the minister of Gladsmuir's
right were better, in respect of the dismembration of the lands of Greendykes
from Tranent kirk, and the union and annexation of them to Gladsmuir kirk;
yet John Robertson's heirs or assignees cannot repeat, because you knew of Mr
Mungo's right before you paid me, and yet took your hazard; for his decret
of locality is long prior to the discharge, and wherein you were called as a de-
fender; and it cannot be called *indebite solutum et per errorem*, seeing it was
done *scienter, et cujus per errorem dati est repetitio ejus consulto dati est dona-
tio*; *et qui sciens indebitum solvit, is donare præsimitur.*

ANSWERED,---However this might take place where a proprietor pays, yet the
brocard cannot hold in a factor or *negotiorum gestor* for another.

The Lords repelled the defences, and found him liable to restore.

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1698. *February 12 and July 1.* LADY DALRY *against* ARCHIBALD HOME.

February 12.—The Lady Dalry, as donatar to her husband's escheat, pur-