

name is instructed to the behoof of the cedent, which hath ever been sustained against all singular successors of the apprising before the legal expire; and though our custom hath required intimation to compleat assignations, yet never to compleat backbonds, restricting or qualifying rights, or declaring the trust for behoof of any party.

THE LORDS found, That the backbond declaring the trust was effectual, not only against the granter, but also against the arrester arresting for the granter's debt, and therefore preferred Mr Roderick Mackenzie, to Watson.

Fol. Dic. v. 2. p. 64. Stair, v. 2. p. 607.

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1705. July 19.

ALEXANDER BLACK, Merchant in Edinburgh, *against* ANDREW SUTHERLAND, Writer to the Signet, and BARBARA GUTHRIE, his Spouse, and other Creditors of PATRICK STEILL, Vintner in Edinburgh.

PATRICK STEIL and Alexander Black being bound to Sir Robert Cheisly, late Provost in Edinburgh, in L. 300 Sterling; and Steill having received from Black for relief of his proportion, a precept for L. 462 Scots, upon Mr Tock, perriwigmaker in the Wrightshouses, and obliged himself by backbond to Black, that he should apply the same for the satisfaction of Sir Robert Cheisly's debt *pro tanto*; Andrew Sutherland, and others of Patrick Steil's creditors, arrested the money in Tock's hand, as belonging to their debtor, and raised a forthcoming; wherein Alexander Black compeared and craved preference to the arresters, although the intimation of his backbond was posterior to their arrestments; in regard Steill had only a personal right to a moveable subject, qualified with a backbond for a specific use, and so upon the matter a trust not affectable for his debts.

Answered, The sum arrested cannot be called Black's money, but Steill's, whose faith Black followed; and therefore Steill's Creditors are preferable, unless there had been a retrocession or intimation of the backbond, prior te their diligences of arrestment; seeing they were not bound to know of a latent backbond.

Replied, By our law backbonds are real and subsist against third parties, February 5. 1678, Mackenzie *contra* Watson and Stewart, *supra*. The like holds in apprisings or adjudications, where many assign their debts to one, that he may adjudge in his name for their behoof, and they get backbonds from him as a trustee, which militate against his successors, and qualify the adjudication led by him within the legal, till it be made real by infestment.

THE LORDS found that Steill's backbond so affected the money, as it could not be arrested for his debt. For they thought a backbond of this nature was *factum ex incontinenti adjectum*, and *pars contractus*, being of the same date with

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A bill being indorsed to one upon his giving a backbond to apply the money to a certain use, the backbond was found so to affect the money, as it could not be arrested by the creditors of the indorsee

No 25. the precept; and that Steil's Creditors could have no more right to the sum, than he had himself.

Fol. Dic. v. 2. p. 64. Forbes, p. 28.

. Fountainhall reports this case :

STEIL and Black being bound to Provost Chiesly in L. 300 Sterling, and Steil charging Black to relieve him of his proportion, Black gave him a precept on Mr Tock, perriwigmaker in Wrightshouses, for L. 462 Scots; and Black took a backbond from Steil, obliging Steil to apply that sum in satisfaction of Provost Chiesly's debt *pro tanto*. Patrick Steil's affairs falling into disorder, Sutherland, and others of his creditors, arrest this sum in Tock's hands, as Steil's money, and pursue a furthcoming; in which action Black compears, and *alleges*, He must be preferred to all Steil's Creditors who had arrested; for though their arrestments were prior to the intimation of his backbond, yet Steil's right was only personal, and on a moveable subject, and qualified by a backbond, and so is a trust on the matter, and not affectable for his debts, being assigned for a specific use of paying Sir Robert Cheisly, and cannot be diverted to any other use. *Answered* for Sutherland, and the other arresters, They were preferable, unless there had either been a retrocession, or intimation of the backbond, prior to their diligence by arrestment, neither of which he could subsume on; and they were not obliged to know Steil's latent backbond, and so it can never be called Black's money, but Steil's, whose faith Black followed, and so must take himself to him. *Replied*, The backbond clearing that Steil was only Black's trustee, for applying the sum in the precept towards extinguishing and paying Black's proportion of the debt due by them to Provost Cheisly, the same can never be reputed Steil's money, so as to be open to his creditors' arrestments; and it is a great mistake to think Steil's backbond is only effectual against the granter, for our law has made them real, and to subsist against third parties, as was expressly decided, 5th February 1678, Mackenzie *contra* Watson and Stewart, *supra*; and the same holds in appraisings or adjudications, where many creditors assign their debts to one in whose name the adjudication is to be led for all their behoofs, and they get backbonds from him as their trustee, and which backbonds militate against the adjudger's singular successors, and qualify the right within the legal, ay till it be real by infestment. THE LORDS found that Steil's backbond affected the money, so as it could not be arrested for his debt. Though our registers are a great security in many cases, yet here they are defective; and it were to be wished, that a register were appointed for such personal backbonds, to certify the lieges thereof, that they may be no longer ensnared by such latent deeds, which may be contrived so as to make it next to impossible for creditors to know. But the LORDS thought a backbond of this nature was *pactum ex incontinenti adjectum*, being of the same date, and so *pars contractus*; and that Steil's Creditors could

have no more right to this sum than he had himself; however there is an inconvenience to purchasers and creditors, which registration would prevent.

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Fountainhall, v. 2. p. 285.

1710. November 8. MONTEITH *against* DOUGLAS and LECKIE.

THE Lord Dun probationer reported Monteith against Douglas and Leckie. Kennedy of Culzean being debtor to Captain Andrew Douglas in L. 500 Sterling per bond, the Captain assigns it to Mr Alexander Leckie of Dashers, and takes his back-bond, narrating, that he had received it for paying L. 160 Sterling the Captain owed him; and *quoad* the superplus assigned, he should either retrocess, or refund it, if he received payment of the same. Leckie, upon shewing his assignation, and concealing that he was under back-bond, borrows money from Walter Monteith merchant in London, and others, they relying on the faith of that right, which Monteith causes arrest in Culzean's hand, and pursues a forthcoming, which forces Culzean to suspend, where Captain Douglas compares, and produces Leckie's back-bond of the same date, and before the same witnesses with the assignation, and craves preference, in so far as concerns the remanent above the L. 160 Sterling, wherein Leckie was creditor to him, and was the sole onerous cause of the assignation. *Alleged* for Monteith, and the other creditors of Leckie, That they finding a total assignation of the whole sum in their debtor's person, they could never *per rerum naturam* know of any latent clandestine back-bond contrived betwixt Douglas and him, and which bore *per expressum*, that it was for sums advanced equivalent to those assigned, and not a bare general narrative of onerous causes, which plainly shows a design and contrivance to defraud and ensnare; and that Douglas has been *socius et particeps fraudis*, and *nemo debet lucrari ex suo dolo*; and the LORDS have been in use to discourage such sinister practices, as Thomson *contra* Henderson, No 28. p. 4906. where a discharge of a bond of the same date with it, was found not to militate against an onerous assignee, seeing it could admit of no other construction but to have been done *animo decipiendi*; and that famous decision, Street and Jackson *contra* Mason, No 32. p. 4911. where an infefiment given by him to his son, did not hinder their access to affect that estate; and the like was found, Reid against Reid, No 33. p. 4923. *Answered*, All accession of fraud on Captain Douglas's part is denied, and is there any thing more usual than for creditors to assign their debts to one person in order that he may adjudge for them all, to save expenses, and he grants each of them a back-bond; will his creditors pretend the whole sums in the adjudication to be his; *nullo modo*, so it is *juris indubitati*, that personal back-bonds affect personal rights, restricting and qualifying them, ay till they be made real by infefiment, after which the back-bonds have no effect.

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An assignation qualified with a back-bond of trust to a certain extent, found to give absolute right to the assignee, only to the extent of what he had actually paid.