

1707. December 9.

The LORD and LADY PITMEDDEN *against* SIR ROBERT GORDON of Gordonston.

No 47

What title
sufficient to
sue upon an
assignation
to a back-
bond?

Alexander Farquhar, merchant in Aberdeen, having assigned to Mr. Robert Forbes, one of the regents of the College there, a back-bond granted to him by Sir Ludovick Gordon of Gordonston, Mr. Robert by his back-bond owned that he was only a trustee for the behoof of the cedent's creditors, and obliged himself to employ what sums he should recover, in satisfaction of the expenses to be debursed in prosecuting the affair *primo loco*, and for payment of Mr. William Lauder, &c. *secundo loco*, and to the cedent's other creditors, according to their respective ranking in the back-bond; and in case he should refuse to do diligence, obliged himself to denude in favours of any person named by the major part of the foresaid creditors. Mr. Robert Forbes obtained in his cedent's name a decret against Sir Ludovick Gordon, for implement of his back-bond, who raised suspension and reduction thereof. During the dependence of this process, both Mr. Forbes and Farquhar having died, it was transferred at the instance of the Lady Pitmedden active, as heir and executor to Mr. William Lauder, the creditor preferred in Mr. Forbes's back-bond, and transferred *passivè* against Sir Robert Gordon of Gordonston, as representing Sir Ludovick his grandfather.

At the calling of the cause, it was alleged for the defender, That the process could not go on in the Lady Pitmedden's name, because Mr. William Lauder had no direct right to the subject in question, Mr. Robert Forbes not being denuded by the back-bond in favours of Alexander Farquhar's creditors, but only under a personal obligation to denude in their favours; so a back-bond was not found equivalent to a Retrocession, January 18, 1706, Chaplain against Henderson, (Not reported;) for, as the creditors contained in a donatar of escheat's back-bond, have an interest in any process carried on by him for recovering the escheat goods, who yet could not at their own instance prosecute any such action; so Mr. Robert Forbes's back-bond not being equivalent to a translation to Farquhar's creditors; and the Lady Pitmedden in the right of Mr. Lauder, not being the major part of those creditors by whose consent Mr. Forbes was to denude; she is not the proper contradictor in this process, and no sentence against her could terminate the plea, or secure the defender as a *res judicata* against the representatives of Farquhar and Forbes, or such of the other creditors mentioned in his back-bond, as shall make up a right thereto by confirmation or other habile diligence; besides, her interest being only ranked in the second place, the preferred interest must be first satisfied.

Answered for the pursuer: Seeing back-bonds qualify all personal rights, the case here is the same, as if the names of Mr. Farquhar's creditors and Mr. William Lauder in the first place had been expressly ingrossed in the assignation to Forbes, and he declared only manager, with the burden of paying the debursed expenses; yea, Mr. Lauder being *nominatim* inserted in the back-bond, had right to the sub-

ject without any assignation, February 5, 1678, Mackenzie, No. 24. p. 10188. where the back-bond was found to exclude a third party arresting, whose case was more favourable; as process and diligence at the instance of an executor, do accresce to, and may be carried on by any of the creditors or legatars. Again, To plead no process against a creditor upon an estate, because all the rest are not concurring, or to say, that because the executors of Mr. Robert Forbes do not insist for the expense of his process, none of the creditors in the back-bond could pursue thereon for payment of their debts, is most absurd; and the defender may secure himself against any danger that way by a multiple-poiniding. *2do*, There is no affinity betwixt the practick of Chaplain and Henderson, which relates to a competition of rights, and the present question, Whether a person having interest in a subject litiscontested betwixt two parties, may compear and repete his interest in that process, and crave preference in the terms of a clear back-bond.

The Lords sustained the Lady's interest as sufficient to entitle her to insist in the process, she finding caution to pay what shall be found due to the representatives of Mr. Robert Forbes.

Forbes, p. 205.

1609. June 24.

GEORGE BROWN, younger of Thornidikes, and Others, *against* ALEXANDER BROWN, second Son to Alexander Brown, of Thornidikes, Elder.

Mr. Alexander Brown of Thornidikes, in his second son's contract of marriage with Mistress Betty Swinton, daughter to Mersington, disposes to him his lands of Bassindean in 1706. His creditors taking alarm, raise a reduction on the act of Parliament 1621, as done in defraud of their anterior debts, *inter conjunctissimas personas*. Answered *1mo*, The creditors, pursuers of this reduction, are only personal, not one of them having affected the lands of Bassindean by adjudication, or other real diligence, till which be, their personal bonds afford no title to quarrel his disposition; and as the lands are not really affected, so neither was Thornidikes, the disponent, incapacitate by horning, inhibition or otherwise, before the disposition he made of the lands of Bassindean, at the instance of any one of these creditors now pursuers. *2do*, The act of Parliament 1621, takes only place in deeds done by persons insolvent to the prejudice of their anterior creditors; but where the disponent has a sufficient visible estate, able to pay all his debts at the time, subject to the creditors diligence, the Lords have always sustained that as relevant to support the right. The Children of Douglas of Mousal against the Creditors, No. 60. p. 934. and No. 80. p. 961; and 30th June 1675, Clark against Stewart and Watson, No. 46. p. 917. And it is offered to be proved, that Thornidikes, after disposing the lands of Bassindean to his second son in his contract of marriage, had an heritable or moveable estate far exceeding the debts now pursued for, which the creditors ought to affect *primo loco*, before they can disturb

No. 47.

No. 48.

Personal bond not a sufficient title to the creditor to reduce upon the act of Parliament 1621, a disposition of lands granted by the debtor, although no infertment had followed thereon.