

No 64.

are the object of the statute 1621, are not supposed to be elicited by fraud and circumvention, but to be deliberate acts and deeds of the granter. The right of challenge is not there given to the granter, as supposing him to be circumvented, but to the creditors of the granter, who were meant to be defrauded both by granter and receiver. And all that is established by the statute is, that the foresaid remedy, introduced in favour of the creditors of the granter, should not be extended against an onerous purchaser. As the subjects did truly pass from the true proprietor by his own free and deliberate act and deed, the legislature, in giving this relief to the creditors, did not think it proper to cut down the right of a *bona fide* purchaser. And, indeed, there was no necessity for carrying the remedy so far; because, as the statute does suppose, and indeed does only support the right of a purchaser who paid a full and adequate price, it was equally beneficial to the creditors to give them access to the price as to the subjects themselves; so that there is truly no similarity between the cases mentioned in the statute, and such a case as the present; and there is no arguing from the one to the other.

Lastly, The civil law is improperly resorted to in cases that are clearly decided in our own law; at the same time, if this question were to be determined by the principles of the civil law, it would fall to be determined against the defenders. There was a plain distinction laid down in the civil law between the case of *dolus dans causam contractui*, and *dolus incidens in contractum*. In the first case, the contract was null and void; the property was not transferred; and, consequently, the right of a *bona fide* purchaser behoved likewise to fall.

It is clear, that, in this case, *dolus dedit causam contractui*; and, therefore, according to the decision of the civil law, the contract was null and void. The right was not thereby transferred from the pursuers to Carmichael; and, if so, he could never give an effectual right to the defenders. The rule of law must strike against them, that *nemo, plus juris in alium transferre potest quam ipse habet*.

‘THE LORDS adhered.’

Act. R. M^oQueen. Alt. Da. Dalrymple & Sol. Dundas. Clerk, Campbell.
Fol. Dic. v. 3. p. 247. Fac. Col. No 29. p. 75.

No 65.
An assignee to an English bond, transferable by indorsation, is affected by the frauds of his authors.

1786. March 9.

ABRAHAM DELVALLE, and Others, against The CREDITORS of the YORK-BUILDINGS COMPANY.

THE bonds issued by the York-Buildings Company being payable to one of the clerks, or his assigns by indorsement, passed from hand to hand by blank indorsation.

In 1731, after the affairs of the Company had gone into disorder, some of the bonds were given away in payment at a considerable discount, while others were deposited in security of sums greatly below their value; a proceeding which gave occasion to a parliamentary inquiry, and to several suits in the civil courts in England, against the managers of the Company.

Many of these last-mentioned bonds, however, having been transferred from the original holders, at the same price which the other securities of this Company yielded at the time, the question occurred, Whether the present possessors were to be ranked for the whole sums in the bond, or only for those truly received by the Company.

For the creditors to whose debts the objection was applicable, it was

Pleaded, The bonds in question being made negotiable by blank indorsation, the public was authorised to believe, that no exception which did not appear from the document itself could be available against the holders. Nor would it be at all just, that those who fairly acquired them, according to their current value, should thus suffer from defects occasioned by the frauds of former possessors.

Nothing indeed is more usual than to expose to sale at an under value the bond of such a bankrupt company as this. Nor was it ever imagined that the claim of the purchasers was to be restricted to the sums truly paid. The bonds here objected to, accordingly, have in England been viewed in this light. The complaints which were preferred in the House of Commons, and the prosecutions entered in the civil courts in England, would have been quite superfluous if in no case those obligations could be effectual for more than the Company actually received.

Answered for the creditors in general; No assignee to a claim of debt, the case of bills of exchange alone excepted, can, by the law of Scotland, stand in a different situation from that of the persons from whom his right was originally obtained, or through whose hands it has passed; Erskine, b. 3. tit. 5. § 10. And the law is the same in England, where the usual form of assigning is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt; Blackstone, v. 2. b. 2. c. 30.

Neither is it of importance that the bonds of this Company were negotiable by indorsation. In this manner the *mode* of transference was indeed rendered more easy and expeditious; but the *right* transferred, especially in a question not with the Company itself, but with its competing creditors, never could be thought more extensive; and although such bonds, issued by a public company, as have once regularly gone into circulation, may be afterwards legally transferred, at a price below the sums originally drawn for them, it does not from thence follow, that they can be at first issued at an under value. This never can take place, unless from gross mismanagement or fraud; and the consequences must be alike fatal to every one whose rights are derived from those accessory to it.

No 65.

By one interlocutor, the LORDS found, ' That the bonds of this Company, being passable and negotiable by indorsation, by the special nature thereof, so long as they continued personal, without any diligence being led thereon, the present holders thereof, who purchased for a valuable consideration, though under the amount of the sums in the said bonds, are intitled to be ranked for the full contents thereof, notwithstanding the said bonds may have originally been pledged or deposited as a security for sums below their amount, or issued originally by the Company, without any just or true value being paid for the same.'

But after advising a reclaiming petition, with answers, the following judgment was pronounced.

' Find, That the holders of the bonds in question must be considered as assignees ; and that every objection competent against the cedent is also competent against the assignee ; and therefore find, That the holders of these bonds can only be ranked for the sums really and truly advanced to the York-Buildings Company.' See a case between the same parties, No 73. p. 4525.

Lord Ordinary, *Montoddo.* For Abraham Delvalle, *Lord Advocate, Wight, Craig.*
 Alt. *Buchan-Hepburn, Elphinston, Blair.* Clerk, *Colquhoun.*

C.

Fol. Dic. v. 3. p. 247. Fac. Coll. No 265. p. 406.

1795. June 28. SHEPHERD against CAMPBELL, ROBERTSON & Co.

No 66.

THE challenge of fraud found good against an arresting creditor of a fraudulent purchaser. See APPENDIX.

Fol. Dic. v. 3. p. 247.

See PACTUM ILLICITUM.

See APPENDIX.

FREEHOLDER.

See MEMBER OF PARLIAMENT.