

No 217.

interest in the disposition was in the character of Mr Constable's trustee. The restriction of the back-bond, therefore, falls to be reduced, and that without at all infringing on the doctrine fixed by the case of Riddel against Nibblie.

The Court, accordingly, by a considerable majority, 'reduced, decerned, and declared in terms of the libel, in so far as respects the security therein-mentioned, granted in favour of John Maxwell.'

And on advising a reclaiming petition and answers, they unanimously, 'adhered.'

Lord Ordinary, *Justice-Clerk.*

Act. Rolland, Hay, Morison.
Clerk, *Pringle.*

Alt. Geo Fergusson, Mat. Ross.

Fol. Dic. v. 3. p. 58. Fac. Col. No 182. p. 431.

Davidson.

SECT. VI.

Securities granted in consequence of Anterior Obligations.

1745. *June 14.*

MACKINTOSH against HERIOT.

No 218.

A bankrupt, who held a bond in trust, of which he was bound to denude, found not entitled to execute an assignation of it, in prejudice of the trust.

LAUGHLAN MACKINTOSH merchant in Inverness, owed Duff of Culbin 2000 merks, and the Trustees for Culbin's creditors having exposed all his effects to roup; he employed John Shaw writer in Edinburgh, to purchase this bond for his behoof, which Shaw did for 2000l. Scots, a sum within the principal and interest then due, and took the conveyance to himself, giving bond to the trustees for the agreed price, conjunctly and severally with Mr William Duff of Cromby, advocate, who interposed at the desire of Mr Mackintosh.

Mr Mackintosh remitted to Shaw L. 90 Sterling, to apply to the payment of this bond, which he interverted to his own use.

John Shaw had also engaged Thomas Heriot, merchant in Edinburgh, to be cautioner for him to the Bank of Scotland, in the sum of L. 250 Sterling; and he having paid it, and pursuing Shaw for his relief, Shaw assigned to him this of Mackintosh's, to the extent of L. 2000; Scots so that on the one hand Mackintosh, if found still liable in the debt, had lost his L. 90, and was bound to relieve Mr Duff of Cromby; and, on the other, Heriot had engaged with Shaw to borrow the sum from another hand to pay the Bank, which Shaw having also interverted, he had been obliged to pay it besides; and none of them could expect any relief from Shaw.

Mackintosh raised a process against Heriot and Shaw for declaring a trust in Shaw's person, and went on these grounds, That the purchase being made for his

behoof, no translation could be effectual to his prejudice; and this fact appeared from Shaw's letters in process, at least, it plainly appeared Shaw stood obliged to denude in his favours; and therefore this exception must not only be good against him, but his assignee pursuing for the debt; and that Heriot was *in mala fide* to take the assignation.

Mr Heriot *alleged*, That the debt stood made over to Shaw, who had it therefore in his power to dispose upon it; and he was his most onerous creditor, and took the assignation *bona fide*; and behaved equally to be at a loss, if it were not sustained, as the pursuer, if it were.

There was a good deal of arguing in the papers, whether this were a trust or no; or if it was, whether it could be proved otherwise than by an explicit back bond; or if the letters were not equal to one; or whether a trust of this sort, which was not a deed vesting a right in the trustee for the granter's own behoof, fell under the statute, and might not be proven by circumstances: But what weighed most with the Lords was, that Shaw was under an obligation to denude; and therefore, if he had pursued for the debt, this would have been an answer, which must also meet his assignee: So that this case is of the same nature with the decision of Glendinning's Creditors against Magbyhill; Kilkerran, p. 44. and *D. Falconer, v. I. p. 99. voce BILL OF EXCHANGE.*

Observed also, That there was a difference betwixt Mr Mackintosh's employing him to buy his own debt and another man's; for that the bond to the trustees was payment, which must be good against an assignee.

THE LORDS decerned in the declarator.

Reporter, *Lord Tinwald.*

Adv. H. Hume.

Adv. Lockhart.

Clerk, *Gibson.*

D. Falconer, v. I. p. 100.

1762. *January 7.*

JAMES COWAN, Tanner in Tranent; *against* The TRUSTEES of the deceased JAMES MANSFIELD, Merchant in Edinburgh.

WILLIAM REID, merchant in Edinburgh, drew a bill upon William Williamson, merchant in Altona, for L. 500 Sterling, payable to William Bruce merchant in Edinburgh.

Bruce indorsed this bill to James Mansfield, who again indorsed it to Roger Hogg his correspondent at London.

The bill was accepted by Williamson; but, he having failed before it fell due, it was protested for not payment, and returned upon Mansfield, who was obliged to make good the contents, with the interest, exchange, and charges.

Mansfield demanded reimbursement from Reid and Bruce; and, upon the 2d of November 1749, they granted to him their joint acceptance for the contents of the former bill, with interest, re-exchange, and charges, amounting in all to

No 219.

A person liable for a debt in a bill, granted in a state of bankruptcy; a new bill, including interest and charges on the former: Not reduced.