On the 10th January 1773, " the Lords remitted to the Ordinary to pass the bill," in whole altering Lord Kaimes's interlocutor.

*Act.* A. Crosbie. *Alt.* A. Lockhart.

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1772. *November* 20. PETER MACDONELL *against* DUNCAN CARMICHAEL and MESSRS BELL and RAINIE.

## PERSONAL AND REAL.

In personal rights *fraus auctoris nocet successori.*

[*Faculty Collection, VI.* 75; *Dict.*, 4974.]

THE Court had no doubt that Carmichael was guilty of a gross fraud. The only question was, as to the assignation for onerous causes by Carmichael to Bell and Rainie.

PITFOUR. When the question is as to the conveyance of heritable rights, after infeftment, fraud does not affect singular successors. Neither does it in the transference of bills, and of moveables; in the one case, from the security given to records, and in the other from necessities of commerce and society. But, in personal rights, I always understood that the exception of fraud is competent. This distinction is well laid down in Lord Bankton's *Institutes*, quoted for Macdonell.

KAIMES, Many grounds of exception are good against a purchaser. Rainie's right might possibly be sustained to the extent of the money actually advanced by him; but it is to be considered that he did wrong to have any concern in this affair, for he might have been satisfied, from the assignation, that Carmichael was merely a trustee, and he ought not to have dealt with him as proprietor.

MONBODDO. There is no doubt that an assignation of a personal bond is challengeable upon any personal exception.

PRESIDENT. In the assignation of personal rights one purchases *periculo et utitur jure auctoris.* Great fraud would ensue were another rule introduced.

COALSTON. Macdonell was a weak man, and did very rash actions, both in granting the factory and the assignation; but here the question is not with Carmichael, but with a singular successor. A creditor taking an assignation is liable, but not a purchaser. Our decisions are not uniform. There was a distinction in the Roman law between what was *labes realis* and what not; *here* no *labes realis* in the sense of the Roman law.

On the 20th November 1772, the Lords sustained the reasons of reduction, and found expenses due against Carmichael, but not against Bell and Rainie.

*Act.* R. M'Queen. *For Bell and Rainie,* D. Dalrymple, R. Stonefield.

*Non liquet,* Coalston.

1773. *January* 22. MONBODDO. It is said that this point has never been decided. Points never decided are the strongest and most certain in our law. I think that the Roman law differs not from ours in this question. The texts cited clearly respect moveables, though Voet has understood them in another sense.

KAIMES. The difference between the case of *nomina debitorum* and the other cases, is this, and it is mentioned by Lord Stair,—An assignee is nothing else than *procurator in rem suam.* Hence, in England, at this day, an assignee must pursue in the name of his cedent. With us an assignee is now held to have the total right. In that respect the law has changed. Why should not the effects of assignations also be changed? For want of this change, our law is, in one particular, a sort of hotch-potch; but we cannot help that. Be this as it will, here is no assignation; for the cedent never, in truth, granted, or meant to grant, the assignation to Carmichael.

PITFOUR. By the Roman law, when property was once transferred, the maxim took place *dolus actoris non nocet.* In the case of *Whitefoord of Dundaff,* the Court adhered unanimously to the opinion of that great judge, Lord Newhall, and reduced a disposition elicited from Kennedy of Balterson, when drunk, in so far as the property was not vested in a third party by infeftment. As to the rule in moveables; if you allow not the effect of *bona fides,* there can be no transactions between man and man. As to the bills, commerce requires the same security, from *bona fides.* There is nothing of this kind here. An assignation to a personal right gives no security: it is extinguishable by compensation, or by payment. In it the assignee wholly relies on the warrandice of the cedent. The case of a tack being found secure by a decision quoted, is right; for a tack is a real right *in suo genere.*

GARDENSTON. I think that the factory empowered Carmichael to assign. Though the factory is not mentioned in the assignation which he granted, yet every right in the cedent, even a supervenient one, accresces to the assignee.

MONBODDO. The factory was for the purpose of uplifting Glengarry's debt, or for borrowing; but, the debt being once uplifted, and vested in a bond, the factory would not have entitled Carmichael to uplift from William Fraser, the debtor in the bond.

PITFOUR. An executor may discharge, but he cannot assign.

JUSTICE-CLERK. The factory to uplift Glengarry's bond was no title to uplift Fraser's bond.

COALSTON. Had the factory been general, I should have had great doubt.

On the 22d January 1773, the Lords reduced, and adhered to their interlocutor of the 20th November 1772.

*Act.* R. M'Queen. *Alt.* H. Dundas.

*Non liquet,* Coalston.