

the question of their validity, which was thoroughly considered in the case of Johnston against Home, a decision which has been uniformly followed since that time.

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The present case, however, is attended with no difficulty whatever. The debt to the bank was contracted in March, and the heritable bond was not granted till May. During this interval, Messrs Jollie and Duncan had only a personal claim of relief against Brough; the heritable bond, therefore, being clearly a further security, falls under the act 1696.

THE LORDS unanimously sustained the objection.

A reclaiming petition was refused, without answers, on 2d July 1793.

At advising this cause, it was also observed, that if a statute was to be made explanatory of the act 1696, it should fix the interval of time within which infestment must follow on a *novum debitum*, in order to place it beyond the reach of the statute, as it would be very disagreeable for Judges, even if they were not tied down by the decisions of the Court, that every question of *mora* should be left arbitrary to their decision; and that it would also be an improvement on the act, if the sixty days were only to run from the registration, and not from the date of the sasine.

Lord Ordinary, <i>Dreghorn</i> .	For the Personal Creditors, <i>Solicitor-General, Patison</i> .
For Messrs Duncan and Jollie, <i>Dean of Faculty, Cullen</i> .	Clerk, <i>Mitchelson</i> .
<i>Davidson</i> .	<i>Fol. Dic. v. 3. p. 60. Fac. Col. No 56. p. 123.</i>

1795. July 8.

WILLIAM KEITH, Trustee for the Creditors of JOHN SYME, against JOHN MAXWELL.

No 217.

ON a settlement of accounts between Mr Constable and the late John Syme, writer to the signet, his agent, there was a balance of L. 6000 against the latter, for which it was concerted, that he should grant a bond to John Maxwell, one of Mr Constable's commissioners, which he accordingly did, on the 3d December 1779.

Maxwell, a few days after, granted a back-bond to Mr Constable, declaring, that the bond, though *ex facie* simply in his favour, was truly granted to him in trust for Mr Constable.

And on the same 3d December 1779, Syme likewise granted an absolute and irredeemable disposition of the lands of Barncaillie, and others, to Maxwell; who, on the other hand, on the 6th of that month, granted a back-bond to Syme, declaring, that the disposition was granted only in security of the bond for L. 6000; and therefore he obliged himself, whenever it was paid, to redispone the lands to Syme.

Maxwell was infest on the disposition, 17th February 1781; and his sasine recorded 17th April thereafter. But Syme, till his death, remained in possession of the house and parks of Barncaillie.

A debtor disposed his estate absolutely, under a back-bond to redispone, upon payment of the debt. The extent of the debt came to be notour, by means of an action in Court regarding it. Being rendered bankrupt; found he could not discharge the back-bond, so as to diminish the reversion, to the prejudice of his creditors.

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Soon after this transaction, Syme's affairs fell into disorder; and on 12th June 1781, he was obliged to retire to the sanctuary.

Upon this, one of his creditors brought a reduction of the disposition and infestment in favour of Maxwell; and in this process, in which the pursuers ultimately failed, the back-bond, granted by Maxwell was produced, and the whole transaction laid open.

The whole debts on which the diligence against Syme had proceeded, were afterwards paid, and he continued till his death to do business on a narrow scale, but he was never again solvent.

Maxwell having, on 31st December 1788, become cautioner for Syme in a cash-account for L. 500, the latter, of the same date, executed in his favour a bond of relief, in which he narrated the disposition granted by him to Maxwell, and the back-bond he had received from him; and declared, that the said disposition should subsist not only in security to Mr Constable, of his debt of L. 6000, but also in security to Maxwell himself, for the consequences of his cautionary obligation; and to that extent, he discharged the back-bond.

Maxwell having, after Syme's death, paid a large balance due on the cash-account, he claimed a preference for it over the subjects contained in Syme's disposition, in virtue of the restriction of his own back-bond.

The trustee for Syme's creditors brought a reduction of his security on the act 1696, c. 5.; 1<sup>st</sup>, Because the restriction of the back-bond was obtained several years after Syme had been rendered bankrupt; 2<sup>dly</sup>, Because it was granted in security of a future debt.

In defence, Maxwell

*Pleaded*: Syme's bond of relief being of the same date with the bond of credit, the defender's debt is a *novum debitum*, to which the act 1696 does not apply.

Neither does his security fall under that statute, as being for a debt to be contracted in future. It arises from an absolute disposition, qualified by a back-bond; and securities, although for future debts, when taken in that shape, are not affected by it; 16th February 1782, Riddel against Creditors of Nible, No 211. p. 1154.

Besides, it is not the disposition and infestment which is now sought to be reduced, but the restriction of the defender's back-bond, which being a personal deed, in no shape falls under the act 1696, the enactments of which are directed only against infestments in security of future debts.

*Answered*: An absolute disposition, qualified by a back-bond, is supported; because, *ex facie* of the records, the disponent is wholly divested of the property, and no creditor will contract with him on the faith of it. But this will not hold in the present case, where Syme was not only allowed to remain in the house of Barncaillzie, but where the back-bond, before the defender obtained the restriction of it, had been judicially produced, which made it publicly known that the lands were held in security only for a specific debt of L. 6000, and that the re-

reversionary value still belonging to Syme himself, was consequently a fund on which his creditors might rely for payment.

Besides, as the defender originally held the infestment solely in trust for Mr Constable, he could not invert the nature of his right, so as to make it a security for a private debt of his own, to the prejudice of Syme's other creditors, especially after his bankruptcy, as from that time he was not entitled to give partial preferences.

*Replied:* As the disposition and infestment were sustained in the process where the restriction of the back-bond was produced, the defender, so far from conceiving himself to be put in *mala fide* by it, was confirmed in the belief that he was safe in accepting the security which that right afforded. If Syme's other creditors discovered his reversionary interest by means of that action, they ought, if they counted upon it, to have immediately secured it, by inhibiting Syme, or adjudging the back-bond.

Neither will it avail the pursuer, that the infestment was originally granted only in security of a debt due to Mr Constable. The defender, from the beginning, had an unqualified feudal right to the lands in his person. Mr Constable's interest was secured by a separate back-bond from him, which he might have destroyed without the consent of Syme or his creditors; Syme might have sold the lands to the defender; and if he had done so, the sale would have been completed by a simple discharge of the back-bond. And if a total discharge of it would have effectually vested him with the full property, the discharge which he obtained, must give him an effectual right, corresponding to its extent.

THE LORD ORDINARY, in respect that the bond of relief 1788, discharging, *pro tanto*, the former back-bond, was granted *undo contentu* with the bond of credit for L. 500 to Sir William Forbes and Company; found, That the foresaid deed is not struck at by the first clause in the statute 1696; and in respect that the deed 3d December 1779, is, *ex facie*, an absolute and irredeemable disposition of the lands, but qualified by a relative back-bond, found, That that disposition and infestment does not fall under the second clause of the statute 1696, but must subsist in favour of Mr Maxwell, until he is relieved of his engagements for Mr Syme, whether prior or posterior to the date of the infestment; and, therefore, upon the whole, absolved Mr Maxwell from the reduction.

On considering a reclaiming petition and answers, the Court, thinking the case attended with difficulty, ordered memorials.

When the cause came to be advised, it was

*Observed on the Bench:* After the judicial production of the back-bond, it was just as well known to Syme's other creditors, that the disposition was granted solely for the purpose of securing Mr Constable's debt, as if a clause to that purpose had appeared *in gremio* of it. From thenceforward, therefore, the disposition is to be considered in no other light than as a security; and, consequently, Mr Constable himself could not have covered, by means of it, any future advances he might have made to Syme, and far less could the defender, whose only

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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