

1759. February 7.

THOMAS BOSWALL, Writer in Edinburgh, *against* MARGARET ARNOT.

## No 470.

Narrative of a deed *inter conjunctos* does not prove onerosity.

A personal bond, bearing an exclusion of assignees, cannot be gratuitously assigned.

ROBERT PATERSON, Commissary-clerk of Peebles, on the 6th June 1700, granted bond to Sir Hugh Paterson of Bannockburn for 2000 merks; and Sir Hugh, by his back-bond, declared, "That the bond was granted to him in trust, for behoof of Mary and Margaret Patersons. and obliged himself to make the same forthcoming to them, their heirs and executors, secluding their assignees."

Mary Paterson married Andrew Dick, and by him was mother to another Andrew. Margaret died unmarried.

Margaret, in May 1708, executed a disposition *omnium bonorum*, to and in favour of her sister Mary, and Andrew Dick her husband, and their heirs, executors, or assignees. This deed bore to be granted "for certain sums of money advanced for the granter by her sister Mary and her husband, and for certain other good deeds, onerous causes, and considerations, done and performed by them to her." It conveyed all the granter's effects, debts, &c. *per aversionem*, without any specification, and bore no reservation of a liferent.

Margaret lived about six years after granting the disposition, and upon her death, Mary, her sister, was confirmed executrix *qua* nearest of kin to her; but under express protestation, "That the confirmation should not be in prejudice of the aforesaid general disposition."

Soon after the confirmation, Sir Hugh Paterson, the son and representative of the original trustee, granted a retrocession of the bond above-mentioned to Mary Paterson, as having right to her sister's half as executrix to her. A process was then brought, and decret obtained, in the names of the wife, and the husband, for his interest, against Hugh Paterson, the son and representative of the original debtor; and in the 1718, Hugh granted to the wife and her husband a bond of corroboration, by which he conveyed, in security of this debt, an heritable debt belonging to him upon some houses in Canongate. But a few days after obtaining this additional security, Andrew Dick the husband did, without his wife's concurrence, grant a back-bond, restricting the debt corroborated to 2000 merks, and interest from Candlemas then next, by which a great many years' annualrents were discharged.

Andrew Dick, the husband, afterwards executed sundry deeds and settlements relative to this debt, in quality of absolute fiar of it. But after his death and that of his wife, Andrew Dick, their eldest son, made up a title as heir to his mother, and thereupon disposed the whole debt to Thomas Boswal. Margaret Arnot, as having right from Hugh Paterson, the debtor, to his heritable debt above-mentioned, burdened with the security he had given to Mary Paterson, insisted to have that security restricted in terms of Andrew Dick's back-bond.

*Pleaded* for Boswal; Dick the husband had no right of this debt vested in him; and consequently could not habily restrict it. For, *inno*, Mary Paterson

was originally creditor in one half of the debt, and upon her sister Margaret's death, she succeeded to the other half. Margaret's general disposition to Mary and her husband could not vest the fee of any part of the debt in the husband; because, by the tenor of Sir Hugh Paterson's back-bond, it was provided to the two sisters, secluding their assignees. Besides, *2do*, The confirmation of Mary, as executrix *qua* nearest of kin to her sister, with the subsequent deeds and diligence executed in the same style, abundantly prove the sense of the husband himself at that time, that he had no good right under the disposition; and such confirmation having at any rate vested the total right of the debt in the wife, which was afterwards made heritable in her person, her son properly made up his titles as heir to her, and effectually conveyed the whole to Mr Boswal, unaffected by the deeds of his father, whom he did not represent.

*Answered* for Arnot; *1mo*, Mary Paterson could at the utmost only have right to the fee of three-fourths of the debt, viz. two-fourths in her own right, and another fourth in virtue of the general disposition; which being a conveyance of a subject then moveable, vested the fee equally in the husband and wife, and consequently gave him right to the remaining fourth. The seclusion of assignees in Sir Hugh Paterson's back-bond, is no more than a mutual substitution, which might be defeated for onerous and even for rational causes; as was found in several cases collected in the Dictionary, Title, IMPLIED CONDITION; and 22d December 1752, Wauchope *contra* Gibson, No 57. p. 4404. The disposition proves itself to have been made for onerous causes, not only by the narrative, but by conveying the subjects *de presenti*, and bearing absolute warrandice; and consequently was a valid alteration of the substitution as to the last fourth of the debt.

*2do*, The confirmation of Mary Paterson, as executrix *qua* nearest of kin, did not imply any repudiation of the general disposition, as a protest to the contrary was therein contained. The title of executrix was taken out to the wife alone, as nearest of kin; because, according to the course of decisions at that time, (though since altered), the nearest in kin was in competition preferred to the office before a general disponee; and the deeds the husband afterwards executed, shewed his apprehension of the subsistence of his right as far, notwithstanding that confirmation.

*Replied* for Boswal; The general disposition having been granted *inter conjunctos*, its narrative does not prove the onerosity; and being a total conveyance of all the granter's effects, upon which nothing followed till her death, at the distance of six years, there can be no doubt of its having been gratuitous; and consequently not sufficient in law to avoid the seclusion of assignees in the original right.

THE LORDS found, " That the back-bond by Sir Hugh Paterson, bearing an exclusion of assignees, the right thereof was legally vested in the person of the two sisters, and could not be assigned gratuitously to the prejudice of Mary Paterson the surviving sister; and that the same right was carried to and pro-

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perly completed in the person of the said Mary Paterson, by the confirmation in her favour; and that therefore the obligation to Hugh Paterson, founded on by Margaret Arnot, could not be available to her in the present question."

For Boswal, *Rae.**Act. MacLaurin.**D. R.**Fol. Dic. v. 4. p. 167. Fac. Col. No 162. p. 288.*1760. *January 2.*

ELISABETH HART, Relict of Andrew Falconer, and DAVID LOTHIAN, Writer in Edinburgh, *against* ROBERT PRINGLE, Writer in Kelso.

No 471.

Bond taken to a trustee, and bearing value received from him, not reducible on the trustee's deponing that he did not know of any value being paid.

ELISABETH HART, in 1738, some time after her husband's death, granted a bond to James Shearer, for L. 1000 Scots of principal, with annual rent and penalty. The bond bore, "That she granted her to have received, from James Shearer, the sum of L. 1000 Scots; renouncing all exceptions of the law proponable in the contrary for ever." It also contained an assignment to Mr Shearer, in security of the debt, of her life rent-annuity of 400 merks, payable out of the lands which had belonged to her husband Falconer. This assignation was duly intimated, in March 1739, to the factor on Falconer's subjects.

In June 1740, Shearer assigned the bond to Robert Pringle; who, in January 1744, raised letters of inhibition upon it against Elisabeth Hart, and executed the same at her dwelling-house. In April 1745, he raised and executed a summons of adjudication against her, of her interest in Falconer's subjects; upon which two decernitures were obtained, in July 1746, and February 1747; but Mr Pringle dying in March 1747, decret was not extracted. A title to this debt was afterwards made up by his nephew Robert Pringle junior.

In 1755, a ranking and sale of Falconer's subjects was raised; and the above bond, and diligence upon it, was then produced as Mr Pringle's interest.

To this interest it was *objected*, by Elisabeth Hart and David Lothian, another of her creditors, That the bond was granted *sine causa*, notwithstanding its narrative, in so far as it was given *spe numerandæ pecuniæ*, or on the faith of a subsequent loan, which was never made; and therefore that the bond was void and null.

THE LORDS, before answer, examined James Shearer; who deponed, "That James Graham, writer in Edinburgh, (lately deceased), about twenty years ago, told the deponent, that William Montgomery was owing him considerable sums of money, and had offered to get him, from one Elisabeth Hart, a bond for about L. 100 Sterling, or L. 1000 Scots, in payment or security of what he owed him; and thinks Mr Montgomery was present when Mr Graham told the deponent the above, but cannot be positive thereof: That Mr Graham proposed to the deponent that he would take the said bond in the deponent's name; to which the deponent consented, provided he was put to no trouble or