

1670. June 25. ELIZABETH FINLAW against The EARL of NORTHESK.

ELIZABETH FINLAW and her children, as executors to Robert Beattie, did assign to the umquhile Earl of Eathie a bond, granted by the Laird of Dun to the said Robert Beattie, of L. 2200; and the Laird of Morphie standing infest under trust in Dun's estate, grants a bond of corroboration to Eathie, obliging him to pay all sums due by Dun to Eathie himself, or to which he was assigned by Dun's creditors. Thereafter Morphie grants a second bond of corroboration to Eathie, without derogation of the former bond of corroboration, obliging him to pay what sums were due by Dun to Eathie for himself, or as assignee; and that out of the superplus of Dun's estate more than paid Morphie himself. The Earl of Eathie transfers the bond of L. 2200, and both these bonds of corroboration, in favour of the said Elizabeth and her children, and the translation bears for sums of money paid by them to Eathie; and bears, that the second bond of corroboration was delivered, but bears not that the first was delivered; neither bears it the obligation to deliver the same; the translation also bears warrandice from Eathie's own deed. The said Elizabeth and her children having pursued Morphie upon the said second bond of corroboration, he was assoilzied, because he had no superplus in his hand. She now pursues the Earl of Northesk, as heir to his father, to deliver the first bond of corroboration transferred by his father, whereby Morphie was bound to pay the debt simply, without preference of his own debt, or otherways that Northesk should pay the damage and interest, which is the debt itself. The defender *alleged*, Absolvitor; because, by the transaction, his father was not obliged to deliver the first bond of corroboration; likeas the translation bears the second bond of corroboration delivered, so that the pursuer has acquiesced therein; and albeit the stile of the translation bears for sums of money, yet it is clear thereby, that it is but a retrocession of the pursuers to their own right, which they themselves had assigned, which doth presume that Eathie was but entrusted; and seeing he has reponed them in better condition than they were by the second bond of corroboration, he cannot be obliged to deliver the first bond, which Morphie freely granted as a favour to Eathie, unless it did appear such a bond was, and that Eathie had fraudfully put it away, whereanent he is content to depone; so that transferring the first bond must only import, if any such bond was the time of the translation, which would not oblige Eathie to deliver it, unless he had it, much less to pay the sum *pro damno et interesse*. *2dly*, Eathie having accepted the second bond of corroboration, with a limitation of preferring himself, it qualifies the first bond of corroboration; so that, though the pursuer had it, it could operate nothing more than the second, and so he has no damage. The pursuer *answered*, That Eathie having transferred the first bond of corroboration granted to himself, *hoc ipso* he is obliged to deliver the same, though the translation expressly bear not an obligation to deliver *quod inest*, neither can Eathie pre-

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Assignment to a bond, imports an obligation to deliver it, though not expressed.

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tend that there was not such a bond of corroboration, seeing the translation acknowledges that it was granted to himself; neither doth it appear that the translation was in trust, seeing it bears expressly that it is granted for sums of money; and although it had been in trust, Eathie having acknowledged that Morphie granted a bond of corroboration to pay the sum simply, it was contrary to his trust either to give back that bond, or to qualify it. *2dly*, The second bond of corroboration cannot restrict the first, because it bears expressly in corroboration thereof, and without derogation thereto.

THE LORDS sustained the summons, and repelled the defences, and found that the translation, in terms as aforesaid, did import an obligation to deliver the first bond of corroboration, or otherwise to pay the debt, as damage and interest, seeing Morphie was assoilzied from the second bond of corroboration.

*Fol. Dic. v. 1. p. 440. Stair, v. 1. p. 685.*

\* \* \* Gosford reports the same case:

IN a pursuit against the Earl of Northesk, as representing his father the Earl of Eathie, *super hoc medio*, that the Earl of Eathie being assigned to a bond, made by the Laird of Dun, for the sum of L. 2200, to the said Elizabeth in liferent, and her children in fee, did procure a bond of corroboration from the Laird of Morphie, who had a disposition of Dun's estate, for payment thereof; and thereafter did receive a new bond of corroboration from Morphie, bearing an obligation to pay the said debt out of the first and readiest of Dun's estate, after payment of the debts due to himself, and others wherein he stood engaged as cautioner. Of which bond granted by Dun, and the two bonds of corroboration, Eathie did make a retrocession, which did bear the delivery of Dun's bond, and Morphie's last bond of corroboration only; whereupon they having pursued Morphie, and referred to his oath, that he had in hands as much of Dun's estate as would satisfy this debt, he was assoilzied; and therefore, in this action, craved, that Northesk, as representing his father, should be decerned to deliver Morphie's first bond of corroboration, or to pay the debt as damage and interest. It was *alleged*, That the pursuer had accepted of the translation upon the delivery of the second bond; and albeit the first was narrated, which was simple and absolute, yet there was no obligation to deliver the same, whereas the second was instantly delivered, and the pursuer did acquiesce therewith. *2do*, The second bond did derogate from the first, and was an innovation thereof, which Eathie might do while the right was in his person; so that it could not in reason be supposed that he intended to transfer the right, but as he then had it in his power.—THE LORDS did notwithstanding sustain the pursuit for delivery of the first bond of corroboration, or to make payment of the debt; for they found, that the first bond being particularly assigned, *inerat de jure* that he should deliver the same; and the second bond being in corroboration of the first, and without derogation thereof, it was no innovation of the first bond.

*Gosford, MS. No 281. p. 120.*