

1697. June 15. MARGARET HAY and JOHN LAWSON *against* MR ROBERT BANNERMAN.

I REPORTED the cause between Margaret Hay, and John Lawson, her husband, against Mr Robert Bannerman, late minister at Newton. She had assigned him to a bond of 3000 merks, granted to her by Alexander Hay of Monkton, her father; and, in the ranking of the creditors of Monkton, she compears, ALLEGING the assignation was only given him in trust for her own behoof, and craving he may denude. And the same being referred to his oath, he denied any promise; but thinks she had an implicit faith and confidence in him, and that he had it at first without onerous causes. The Lords, at advising this oath, found it proved a trust.

Then Mr Robert recurred to this DEFENCE, That he had obtained a general discharge from her of all she could ask or crave of him any manner of way, with exception of £1000 Scots; which confirmed the rule *quoad omnes casus non exceptos*.

Margaret made two ANSWERS to this :---1<sup>mo</sup>. That the general discharge could never comprehend the trust given him by the assignation to this bond, for it was only relative to debts owing by him to her; *ita est* this trust was no debt owing by him, and could no more be taken away by this discharge than a clause of relief could be. 2<sup>do</sup>. The discharge was null, and not obligatory *quoad* the husband, because granted by her after she had agreed on all the terms of her contract of marriage with Mr Lawson, her present husband; and to which Mr Bannerman was not only privy, but was the only *proxeneta* and tryster for her, and so ought not to have elicited such a discharge from her at that time; for, though she might have validly transacted with others, yet, *quoad* him, she was *tuta, exceptione personali doli*.

REPLIED for Mr Robert, to the *first*,---That the discharge was full, comprehensive, and ample, as if it had, *per expressum*, discharged this trust; seeing it bore “back-bonds, promises, and conditions of back-bonds;” and, though such general discharges do not cut off obligations for relief, yet [if] it bore all cautionaries and relief *per expressum*, it would extend thereto; even so here, discharging back-bonds and promises necessarily comprehends trusts. As to the *second*, REPLIED,---That our law has indeed secured wives from obliging themselves effectually, in imitation of the *S. C. Velleianum* introduced by the Roman law; and our practicks, in contemplation of their fragility and weakness, have extended it to two cases farther; that, either where there is proclamation of banns or a signed contract of marriage, she might be reputed as married *quoad* her incapacity of doing any deeds thereafter obligatory upon herself or husband. But it is altogether unknown to our law to make a third extension, that her deeds shall be null after a communing and treaty of marriage; for that may depend for several months, and be very uncertain: whereas it is the interest of commerce to be as little embarrassed as may be, and that fixed periods be set at which the lieges may know this prohibition begins. *Vide February 5, 1666, The Lady Bute.*

The Lords reasoned long on the *first* point about the extent of the general discharge, and thought it of dangerous consequence to loose such a security; especially seeing there were words that might take in trusts, though not *nomina-tim* discharged, such as clags, claims, promises, &c. On the other hand, it seemed strange, if Mr Bannerman designed to be discharged of this trust, why he might not as easily have named it; and that it could not fall under the word *promise*, because he denied, by his oath, he had ever made her any promise: and it was as little comprehended under the word *back-bond*; for that presupposed writ, (in which case there is a proper trust,) and here there was none. Therefore the Lords would not lay down a preparative to loose general discharges. And, on the other hand, suspecting this was not communed, treated, nor acted betwixt the parties at the time; and finding he had advanced her sums of money on the faith of this trust, without any receipt, which he might lose if the discharge were repelled; and that it seemed inconsistent at first to deny there was any trust, and then to allege it was discharged, seeing *non entis nulla sunt accidentia, nullæque qualitates*; therefore they took a middle way, before answer, to try if it was *actum tractatum* or *cogitatum* between the parties, that this trust should be comprehended in that general discharge, and either party to adduce what evidences they could to clear the same; as also that Mr Bannerman instruct, by the said Margaret's oath, or any other way he best can, what sums of money he has advanced to her for burying her first husband, during her viduity, or to out-reik her second marriage, &c. it being reasonable he should not denude till he be reimbursed.

As to the *second* point, The Lords superseded to give answer till the first were tried; in regard they thought, the discharge being prior to the subscribing the contract, (though it followed the next day,) there was no meith to secure the lieges in bargains, if treaties and communings were made a rule, seeing they may depend long; and, therefore, either the *sponsalia*, (which is a contract of marriage,) or else the *denunciatio bannorum*, must intervene, to put parties *in mala fide*; after which *scire et scire deberi equiparantur in jure*; and a party's own knowledge of a purpose and treaty of marriage, without thir legal marks, are not equivalent thereto. But this was not decided.

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1697. June 16. BRUCE of BORDIE against KEIRY of GOGAR.

In the count and reckoning between Bruce of Bordie and Keiry of Gogar, before Rankeilor, this point came to be questioned:---Keiry stated the price of the victual intromitted with by him as only received at the Whitsunday after the crop, so as to bear annualrent *ab eo tempore*. Bordie ALLEGED,---It ought to be from the Candlemass, seeing he had the ease of the Candlemas-fiars.

The Lords found, He could not be stated as debtor so as to bear annualrent sooner than Whitsunday after the selling of the victual; especially seeing several sell to a longer term, *intuitu* of a good price.

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