

1747. February 19. and June 30.

MARGARET BEATSON and LUMSDEN her Husband *against* BEATSON.

BEATSON now of Kilrie, upon a transaction with his mother, granted bond to Margaret his sister for the sum of 3000 merks payable to her, her heirs or assignees, secluding executors, at the first term of Whitsunday or Martinmas after her marriage, but with the following provision: ' That in case of her decease, without children of her body existing at the time of her decease, the sum should return to the granter, his heirs and successors.'

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Caution must be found to repeat, when the party demanding the money is bankrupt.

Margaret the creditor, in her contract of marriage with George Lumsden shipmaster in Dysart, in consideration of the provision made by him in her favour, assigned this bond to him; and Lumsden having thereupon charged the granter, he suspended on this ground, that by the quality of the bond, the sum was to return in case of no children; that as Margaret the wife was pretty far advanced in years, and had no prospect of children, the husband, as assignee, could not uplift the money unless caution should be found that, in the event of her predeceasing without children, the sum should be repeated; and, in support of this reason of suspension, observed, that though clauses of return in bonds of provision granted by a father, may, in respect of the natural obligation he is under to provide his child, be no otherways considered than as simple substitutions, and that in other cases, where clauses of return are understood to be onerous, they may be thought only to restrain from gratuitous alienations; yet, where such clauses are made conditions of a grant, they must have their full effect, and cannot be disappointed by any deed however onerous.

Alleged for the charger, That whatever may be the operation of this clause, so as to afford action against Margaret's representative in case of her decease without issue, yet, the debtor must in the mean time pay, in respect the bond is payable to the creditor, her heirs or assignees, at a term certain, whereby the granter has trusted her in the mean time with the use of the money; and as she may uplift it herself, so, by the terms of the bond, may her assignee; and the utmost length the Lords have ever gone in such a case is, to give the creditor option, either to re-employ the money, or to give bond to re-pay it in the event of the condition's existing, provided he have as much free estate over and above the payment of his debts; which was the judgment given, December 29th 1725, Daughters of Alexander Irvine of Drum *contra* their Brother, Sec. 6. *b. t.*

Answered for the suspender, That it is admitted that Margaret is absolute fiar of the money; that she may uplift and dispose of it, and so may her assignee; but what is contended for is, that in a certain event she is under an obligation to repay, and all the question is, Whether as she has conveyed the bond without taking the assignee bound to relieve her of this obligation, and

No 35. who therefore is not bound to repay, she must find caution before the assignee be allowed to uplift; and in a case very similar, determined the 11th June 1740, Napier and Johnston *contra* Johnston, No 34. p. 4344., the LORDS found, that upon payment the pursuer ought to find caution to repeat.

On this debate, the LORDS, February 19th 1747, on report, found, ' That the charger is not obliged to find caution to the suspender to repay the 3000 merks in question, upon the death of Margaret Beatson his spouse, without issue of her body existing at the time of her decease; but found that the charger must grant his own bond to the suspender to repay the sum to him in the fore-said event.'

Against this interlocutor the suspender reclaimed; and as the interlocutor supposed the obligation to repeat, argued, that although Margaret the cedent's credit was relied on, that she would repeat when the event should happen, and that no further security could be required of her, were matters in the same state they were in when the bond was granted, yet, as she is now become bankrupt by the assignation made to her husband, the suspender cannot be obliged to part with the money till security be found for performance of her part of the contract, in case the event should happen; and that upon the same principle that in other cases retention will be competent against a bankrupt-creditor that would not be competent were he solvent. For example, where compensation has not been proponed before decree, it will not be received in the second instance by suspension; yet if it can be qualified that the charger is bankrupt, or *vergens ad inopiam*, it will be sustained as a reason of suspension, that the suspender is not bound to pay unless the charger find caution to make good the counter-claim: Which was said to be thoroughly analogous to the present case.

And as to the bond which the charger is by the interlocutor found obliged to grant, if it is to be qualified in terms of the fore-said judgment in the case of the Children of Drum, it would be, as in that case it was, an useless unmeaning thing; and if it is intended as a cautionry obligation that the cedent should repeat, as the suspender is willing to understand the interlocutor, he would take no exception to it, were the husband solvent; but as it was said to be notorious, that he was in such circumstances that he could not get L. 20 upon his credit, to oblige the suspender to pay upon his bond, would be the same as if he should be obliged to pay without any security at all.

And no satisfying answer being made to this petition, the LORDS, on the 30th June, found, ' That the money could not be uplifted without caution.'

Fol. Dic. v. 3. p. 217. Kilkerran, (FIAR, ABSOLUTE AND LIMITED) No 3. p. 195.