

No. 324.

A bond of corroboration narrating the original bond, but omitting the sum in the obligatory clause.

1749. July 12.

COULT *against* ANGUS.

The deacon and corporation of fleshers and candlemakers in Canongate, granted a bond of corroboration in the year 1743 to Margaret Smart, which, after narrating the original bond granted in 1732 by the then deacon and the corroboration for 1000 merks to said Margaret Smart, and that the foresaid principal sum and annual-rent since Martinmas 1742 was resting unpaid, proceeds thus ; “ Therefore we the present deacon, box-master, and remanent members of the said corporation particularly above named, in farther corroboration and fortification of the said bond, and sums therein contained, and but prejudice thereto in any sort, *sed accumulando jura juribus*, bind and oblige us conjunctly and severally, &c. to content, pay, and again deliver to the said Margaret Smart, &c.” (here the sum was omitted to be mentioned) “ And that at and against the term of Whitsunday next to come in the year 1744, without longer delay, with penalty, &c. together also with the due and ordinary annual-rent of the said principal sum from and since the foresaid term of Martinmas last, and termly thereafter, &c.

Oliver Coult, assignee by the said Margaret Smart to this bond, brought an action for payment against Barbara Angus, daughter and heir to one of the obligants; for whom it being alleged, that the obligatory clause in the bond, making no mention of the principal sum, was an essential omission, which rendered the obligation void, the ordinary, after advising with the Lords, “ repelled the defence ;” and on advising bill and answers, the Lords “ Adhered.”

But upon advising a second petition, the Lords “ Found the defender not bound, there being no sum expressed in the obligatory clause in the bond ; and of this date, on advising a petition for the pursuer, with answers for the defender by a narrow plurality, “ Adhered.”

The minority much disapproved of this decision. Though defects in point of solemnity cannot be supplied, the case was thought to be very different of defects in point of consent ; and as here the intention of the obligants to become bound was clear, how could it be avoided to give effect to the bond ? For on what other foundation was an assignation sustained, which bore date in the year 1609, in place of the year 1709, and an execution of a messenger bearing that the messenger had delivered the *said*, but not adding the word *copy* ? Or upon what other foundation has a disposition of lands been found to import also a disposition of the teinds ? Yet these several points have been so determined.

Kilkerran, No. 16, p. 612.

* * Lord Kames reports this case :

The incorporation of fleshers and candle-makers in Canongate being indebted by bond 1000 merks to Margaret Smart and her children, did, to obtain a delay of payment, grant a bond of corroboration, in which Robert Angus was one of

the obligants, who was not an obligant in the original bond. The words of the bond of coroboration are what follow: "And seeing the foresaid principal sum of 1000 merks, and interest thereof since the term of Martinmas last 1742, is still justly resting unpaid; and that the said Margaret Smart and her children are willing to supersede payment thereof until the term of payment under-written, under our granting the corroborative security after-mentioned; therefore we the present deacon, box-master, and remanent members of the said incorporation particularly above named, in farther coroboration and fortification of the foresaid bond and sums therein contained, and without prejudice thereto in any sort, *sed accumulando jura juribus*, bind and oblige us conjunctly and severally, our heirs, executors, successors, and intromitters with our goods and gear whatsoever, and also our successors in office, as also the proper means and effects of the said incorporation, to content, pay, and again deliver to the said Margaret Smart in life-rent, and to Smart, Jane, and Jean Tenants, only children now in life procreate betwixt the said Andrew Tenant and Agnes Smart, equally amongst them; and failing of any of them by decease, to the survivors, their heirs or assignees, in fee; and that at and against the term of Whitsunday next to come in the year 1744, without longer delay, with 200 merks money foresaid of penalty in case of failzie, together also with the due and ordinary annual-rent of the said principal sum, from and since the foresaid term of Martinmas last to the foresaid term of payment, and yearly, termly, and proportionally thereafter, during the not payment."

Barbara Angus being sued for payment as representing her father Robert, made this defence, that the obligatory part of the bond does not contain any sum; and therefore, that no action could lie upon this bond against Robert Angus, who is not taken bound to pay any sum. It was answered, that though no sum is mentioned in the obligatory clause of the bond, which is plainly an oversight of the writer, yet no doubt is left about the sum being evidently the same sum that is contained in the original bond, as is implied in the very nature of a bond of coroboration. The Lord Ordinary first, and then the whole Court, repelled the objection to the bond of coroboration, and decerned against the defender conform to the conclusion of the libel. In a reclaiming petition for the defender, the following topics were insisted on. When writing was first introduced in law matters, it was made use of as evidence only, or as a private minute of acts and deeds passing among parties. Sir Henry Spelman the learned antiquary, speaking of charters and infestments, observes, "That in times past, deeds were but notes, or subsequent remembrances of the livery precedent, and of the witnesses to the same." And this is evident from the stile of charters, which, to this day, run in the preterite tense, *dedisse, concessisse, &c.* The same was the stile of bonds, though, for a reason that shall be mentioned, they are commonly now made to run in the present tense.

In the course of time as writing became more common, and was found a more commodious sort of evidence than that of witnesses, writing came to be consider-

No. 324. ed as an essential solemnity to many deeds ; particularly to every transaction about land, grants thereof, conveyances, sasines, &c.

With regard to personal obligations, though writ may not be essential, yet it is an established rule, that wherever they are agreed to be reduced into writing, there is no legal obligation till the writing be completed in due form of law. However direct the verbal engagement may be, the law affords no action ; there is still *locus pœnitentiæ* till the writing be perfected.

From this there arises another rule, that if an obligaton, or other deed, be reduced into writing, the writing is the only thing that is considered, whether in point of evidence or of obligation. If the writing be formal, process is sustained upon it ; if, informal, the pursuer will not be allowed to prove an antecedent agreement by witnesses, or even by oath of party ; for this evident reason, that the agreement being *de facto* reduced into writing is a legal evidence, that there was to be no binding obligation but by writ ; and therefore, that no verbal agreement, supposing it to be proved, can be obligatory.

Hence it is, that wherever an agreement is reduced into writing, such writing is now considered as the binding act or deed of the party. His consent is understood to be interposed by the act of subscribing the paper. It is this act which forms the obligation, just as much as the emission of word in a verbal bargain ; so that a bond, strictly speaking, is *literarum obligatio*. It does not derive its effect from any antecedent agreement, but merely from the subscription and consequent delivery, where delivery is necessary. Thus, with regard to a bond of cautionry, the granter must have agreed verbally to become cautioner, without which there could be no occasion to write the bond ; but then this antecedent consent is not what binds him ; for, even after the bond is subscribed, he may draw back at any time before actual delivery. And accordingly the stile of bonds presently in use, is adapted to the sense of the law. The preterite tense is universally in disuse ; the obligatory clause is always put in the present tense, as in the bond of corroboration now under consideration ; “ Therefore, we the present deacon, boxmaster, &c. in further corroboration, &c. bind and oblige us conjunctly and severally, &c.”

And this in an special manner is true as to bonds containing a clause of registration, which are in the strictest sense *literarum obligationes*, deriving their whole force and effect from the subscriptions of the parties. And so true this is, that such bonds have an effect which no verbal obligation can have. *1mo*, They not only constitute the essence of the obligation, but at the same time are complete evidence of the nature of the obligation. These are said by the English lawyers to prove themselves, and to admit no averment against the truth of them. *2do*, By registration, execution and legal diligence directly follow, without the necessity of any intermediate process.

Taking now the bond of corroboration, which is made the foundation of this process, as a *literarum obligatio*, it is not seen how action can be sustained upon it. It is not sufficient to constitute an obligation that a man becomes bound to pay :

Such a vague and undetermined obligation is good for nothing. He must further become bound to pay a certain sum, without which no execution can pass upon the bond, nor a process be sustained upon it. It is true, the party subscribed the bond, and that subscription is a consent to pay and perform whatever is expressed in the bond; but, as it is not expressed what sum he shall pay, this in effect is no obligation: in a word, as the obligation depends entirely upon the bond, the Court must take it as it stands, and can neither grant execution, nor sustain process but in the very terms of the bond.

And this will afford a ready answer to the only argument insisted on by the pursuer in support of it, which is, "That as a bond of corroboration was *de facto* granted, it is extremely clear from the bond itself, that the sum contained in the original bond, which is declared to be resting owing, was the precise sum intended to be corroborated." It is probable the thing was so intended, though far from being certain, because the intention might have been to corroborate only a part, or to corroborate by accumulating the principal sum and by-gone annual-rents into a capital. But however this be, the plain answer is, that intention is not sufficient to supply the defect of the bond. It is no better than collateral evidence by witnesses, or perhaps by letters passing betwixt the parties, signifying what was *actum et tractatum*. Nothing antecedent nor even concomitant to the bond, can be brought in evidence to supply any essential in the bond. It is a *literarum obligatio*; Robert Angus was not bound, if he was not bound by the bond itself. The intention of parties is nothing in cases of this kind, where the rule is *quod voluit non fecit*.

The law is different in questions about limiting the effect of a writ from presumed will or intention; and the reason of the difference is this. In every deed to which writing is essential, two things must concur to create a right, first, the will of the granter, and next, a writ expressing that will. Therefore a clause, however express, gives no right if the granter's intention be different; as on the other hand, however clear the granter's intention may be, it will not avail in cases where writ is essential, unless it be expressed. For this reason, a grant, though absolutely expressed and without any condition, may, from the presumed will of the granter, be restricted as to its extent, as to the time of its taking place, and as to conditions implied. But where a clause is expressed short of what must be presumed to be the will of the parties, there can be no latitude to extend the clause beyond what is expressed; which would be giving an action without writ, where writ is essential. All that can be said is, that *quod voluit non fecit*. This is the reason why the Court never supplies any defects in charters or in sasines; and the very same reason is applicable to all deeds that require writing as an essential solemnity.

And hence clearly appears the foundation of the statute 1681, and of many decisions upon that statute. By the statute the writer must be designed, and the witnesses must be designed and also adhibit their subscriptions. These formalities are required under the certification of nullity; and the Court strictly adheres

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to the certification, by declaring every bond null and void which is defective in the minutest of these solemnities. Now, if this practice were taken up upon the footing of evidence only, it would be hard to say, why a bond should be reckoned no sort of evidence of a debt, because by inadvertence it happens to want the designation of one of the witnesses; for, supposing the evidence less complete upon that account, still there might be place for supplying that defect by collateral evidence, perhaps of the most pregnant sort. But taking the matter upon its just footing, that a bond is *literarum obligatio*, constituting the essence of the obligation, the reason of the statute and of the decisions comes out clear and conspicuous. The want of any solemnity required in the execution of such a deed, is an intrinsic nullity: The objection against the bond amounts to this, that the bond is imperfect, that it is not a *literarum obligatio*; and therefore that no action can be sustained upon it, more than if it were not subscribed by the party. Yet, according to the pursuer's pleading, such a bond should be effectual; for, notwithstanding its wanting the designation of a witness, which must have been by inadvertence, the intention of the parties may be extremely clear.

If the Court be in use to deny action upon bonds where the most trifling solemnity is wanting, how is it constant with this practice to sustain action upon the present bond where the most essential solemnity is wanting, viz. the sum which the subscribers of the bond are to pay: It is not sufficient that the will of the parties may be gathered from collateral circumstances, even supposing these collateral circumstances to be expressed in the bond itself. The intention of parties is nothing where the question is about *literarum obligatio*: It is confessedly so as to a bond defective in the meanest solemnity, and the argument concludes *a fortiori* to the more essential solemnities.

This chain of reasoning may be brought within narrow bounds. Writing is essential not only with regard to land-rights, but also with regard to every promise and contract which is agreed to be reduced into writing. Such writing is not singly considered as evidence, but truly constitutes the essence of the obligation to be strictly what is called in the Roman law a *literarum obligatio*. Such *literarum obligatio* must be perfect in all its parts, otherwise action ought not to be sustained upon it. A defect in the smallest solemnity unhinges it from being a *literarum obligatio*; and a defect in the more essential solemnities must have the same effect. The intention of parties, however clear, can never be sufficient to supply such defects, because the intention of parties cannot make a *literarum obligatio*.

The Lords altered, and found the bond of corroboration null.

Rem. Dec. No. 108. p. 206.

* * * D. Falconer reports this case:

The incorporation of fleshers in the Canongate granted bond to Margaret Smart, relict of Andrew Tenant, and her children, for 1,000 merks Scots; and

the deacon and box-master, with Robert Angus, and other particular members of the incorporation, 30th September, 1743; " Seeing the foresaid principal sum, and interest thereof since the term of Martinmas last 1742, was still justly resting unpaid, and that the said Margaret Smart and her children were willing to supersede payment thereof until the term under-written, on their granting the corroborative security after-mentioned; therefore they, in further corroboration and fortification of the foresaid bond, and sums therein contained, bound and obliged them, conjunctly, and severally, their heirs, &c. and also their successors in office, as also the proper means and effects of the said incorporation, to pay to the said Margaret Smart in life-rent, and to ——— Tenants, only children then on life procreated betwixt the said Andrew Tenant and Margaret Smart equally amongst them, and failing of any of them by decease, to the survivors, their heirs and assignees, in fee and that at and against the term of Whitsunday then next to come, in the year 1744, without longer delay, with 200 merks money foresaid of penalty, in case of failzie, together also with the due and ordinary annual-rent of the said principal sums, from and since the foresaid term of Martinmas then last, to the foresaid term of payment, and yearly, termly and proportionally thereafter during the not-payment."

The bond was assigned to Dr. Oliver Coult, who pursued Barbara, daughter of Robert Angus, and her husband.

Objected, That the bond of corroboration was null, as containing no sum which the granters became bound to pay.

The Lord Ordinary, 4th June, 1748, on advice, " repelled the objection, proposed by the defender, to the bond of corroboration; and sustained action thereupon at the instance of the pursuer."

Pleaded in a reclaiming bill: When any necessary solemnity of an obligation is omitted, it is void; but here the omission is of the thing prestable itself, which cannot be supplied; and there is the less reason for supplying the subject of the obligation, that it is merely a civil obligation of cautionry. It cannot with certainty be gathered what was the sum intended to be bound for, as it might have been agreed to grant the surcease of payment, for a partial corroborative security.

Answered: The bond narrates the former bond for 1,000 merks, and obliges to pay with 200 merks of penalty, together with the ordinary annual-rents of the said principal sum since Martinmas, and during not-payment, so that the sum is expressed; at least it is sufficiently clear, and cautionry is by no means a merely civil obligation, especially when, on account of the interposition, the debtor is indulged with a delay of payment.

The Lords, 18th January, adhered.

On bill and answers,

They found, 2d June, that the cautioner was not bound, there being no sum expressed in the obligatory clause of the bond; and on another bill and answers, adhered.

Act. Ferguson & Murray.

Alt. H. Home & Garden.

Clerk, Justice.

D. Falconer, No. 82. p. 88.