

1783. July 29. *DOUGLASS, HERON, and COMPANY, against MARY CANT.*

MRS MARY CANT was the wife of William Hay, of whom Douglas, Heron, and Company, were creditors.

Soon after her marriage, her husband delivered to her privately a bond for an annuity, payable to her in the event of her survivorship. This bond she retained in her custody until his death; which, however, was the only circumstance whence her acceptance of the provision could be inferred.

Her husband died possessed of a landed estate then unincumbered by any heritable security; leaving debts, however, with which it became afterwards affected, to an extent beyond the value of his whole funds. As by virtue of the bond, therefore, she could have recovered nothing, she was, several years after her husband's death, served to her terce, and then demanded her proportion of the rents of his lands. To this claim the creditors objected, and

Pleaded, The bond in question, an irrevocable deed, undoubtedly became effectual from the moment of delivery by the granter, and of acceptance by the grantee. Mrs Hay was thus vested with a right, of which her not chusing to exercise it did not dispossess her; and of which, the effect is, on the one hand, to entitle her, as a personal creditor of her husband, to a conventional provision; and, on the other, to bar her claim to the legal provision of terce. In a different situation of her husband's affairs, in which she might not have been precluded by the heritable securities of creditors, she would have resorted to this bond with advantage; and in the event of his having sold his lands, she could not have looked for a provision from any other source. Her husband's onerous creditors must then have submitted to her claim. As matters now stand, the operation of the bond is in their favour; and Mrs Hay, in her turn, must of consequence yield her pretensions to the terce. For surely it cannot be maintained, that no effect is to be given to that deed, except such as is prejudicial to the creditors, and advantageous to Mrs Hay.

Answered, Mrs Hay has not done any act which could infer homologation of the bond in question. The circumstance of her simply receiving it from the hand of her husband, without offending whom, perhaps, she could not have done otherwise, is certainly not such. Thus far a regard to her duty must have enforced her compliance; and it would be hard were her reward to be the forfeiture of her legal claims.

The Court distinguished between formal marriage-contracts entered into with the advice and assistance of the friends of the parties, and private unadvised deeds, such as the one in question. Should these last, it was observed, have an effect, like the former, to the exclusion of the legal provisions, hurtful consequences might often ensue from the peculiar circumstances of persons entering into the married state. In this case, too, it was added, the creditors had no reason to complain of any deception being practised upon them.

No 139.
Whether the delivery, *sine arbitris*, of a bond of provision, by a husband to his wife, imports a dereliction of her legal provisions.

No 139. THE LORDS, on report of the Lord Ordinary, 'found that Mrs Hay was not barred from claiming her legal provision of terce by the bond of annuity above mentioned.'

Lord Reporter, *Branfield*. For Douglas, Heron, and Company, *Blair*. Alt. *Wight*,
Clerk, *Robertson*.

S. *Fol. Dic. v. 4. p. 124. Fac. Col. No 116. p. 181.*

S E C T. V.

Deeds in favour of a Wife or Children, whether presumed in satisfaction of Debts due to him.

1594. February 15. KYLE against LOGAN.

No 140.

Deeds granted in favour of a wife are, in general, presumed to be in implement of claims upon her contract of marriage.

ANE auld man called Kyle pursued ane woman called Elspeth Logan in Restalrig, to infest him in twa acres of land in Restalrig, conform to an obligation made to him be her father, to whom she was aire. It was *alleged* be the defender, That she aucht to be assoilzied, because her said umquhil father, within twa months after the date of the said obligation, infest this pursuer in twa acres of his lands in Restalrig, and sua behoved to be interpret *in duriozem sortem*, and to have been done for implement of the said obligation, unless the pursuer were able to verify another cause thereof; whilk allegiance the Lords fand relevant, albeit the infestment had na relation to the said obligation.

Fol. Dic. v. 2. p. 145. Haddington, MS. No 506.

1611. January 25. COMMON SEAL against TRAIL.

No 141.

In conformity with the above.

A MAN being bound by contract of marriage to bestow a sum of money upon land or annualrent to his wife in liferent, and thereafter conquest an house to himself and her in conjunct-fee; albeit that infestment make no relation to the contract of marriage, yet it will be interpret to satisfy the same *pro tanto*, not according to the price which he gave for the heritage, but as the yearly mail and duty of it may correspond to the profit of the principal sum of the wife's tocher-good, at the annualrent of ten for the hundred.

Fol. Dic. v. 2. p. 145. Haddington, MS. No 2111.