

No 16.

1746. July 30.

LADY INVERAW *against* The EARL of Breadalbane.

A purchaser of an estate bound himself to pay a certain price, and to relieve the disponent of his predecessor's debts, which he was to subject himself to, by entering heir, and of which debts a list was to be given. Found that the purchaser was liable for no debts but those contained in the list.

MR CHARLES, son to Lord Neil Campbell, disposed, 8th July 1693, to the Earl of Breadalbane, the estate which had fallen to him by his father's decease; and the Earl gave bond to him for L. 20,000 Scots, and to relieve him of all his father's debts; "and particularly, but prejudice of the generality aforesaid, of all clags, claims, actions, processes, or pursuits, intended, or which any ways thereafter might be intended against him at the instance of Dame Susannah Menzies his mother-in-law, and his brethren and sisters of the second marriage." There was also a provision in this bond, that Mr Charles should, before Martinmas 1694, give in to the Earl, a list of his father's debts, the effect whereof was not determined at this time.

Lord Neil had, 15th January 1692, granted a bond to Captain James Menzies of Comry for L. 7000 Scots, and another, 29th January, to Colonel James Menzies of Culdares for 2000 merks Scots; and, 6th June 1693, Culdares assigned his bond to Comry, who was brother to Dame Susannah Menzies, then become relict of Lord Neil, and he, 20th June, conveyed both the bonds to a blank person, and delivered them to Colin Campbell of Carwhin, writer to the signet, for the behoof of his sister, for whom they had been originally intended.

These bonds and assignations came some way or other into the possession of Daniel Campbell, cashier to the Royal Bank, who delivered them to the Lord Monzie, one of the Earl's commissioners for managing his affairs, and thereon the Earl, with the Lord Glenorchy his son, gave bond to the Lord Monzie for L. 800 Sterling, bearing interest from Whitsunday 1731; and it would seem that this bond was granted for a security for what sum his commissioners could transact these debts at; for there is posterior to it, a letter from Daniel Campbell to Lord Monzie, advising, that what could be recovered of the bonds, he should lay out on charitable uses.

Jean Campbell, Lady Inveraw, only child surviving of Lord Neil and Dame Susannah Menzies, brought a process, with concurrence of her husband, to have it declared that these bonds belonged to her, in right of her mother, and for payment, in which it was finally found, 2d December 1742, 'That it was to be presumed, that the bonds and blank assignation in question came accidentally into the hands of Daniel Campbell, and not as his property, and that the same remained the property of Mrs Susannah Menzies, at the time of her death, and that, therefore, the pursuers, as executors to her, had now right thereto.'

Inveraw and his Lady proceeded against the Earl in their conclusion for payment; when, 1st, was *objected* prescription.

Answered, Interruption; 1st, By minority; 2dly, By the transaction made with Lord Monzie.

Replied, The Earl of Breadalbane was not debtor in the bonds granted by Lord Neil; and he cannot be considered as an adpromissor, being not obliged to pay all Lord Neil's debts, but only such as should be contained in a list to be given in to him; so that, supposing this debt, if not prescribed, could, by an argument of law, be fixed upon him, yet he is not formally an adpromissor, and his deed, therefore, will not operate an interruption. My Lord Monzie, also, was not the creditor, as the LORDS have found the bonds to be the property of the pursuer.

Duplied, Interruptions, by innovations of the debt made by the debtor, though in favour of a person not truly in the right, or by such persons using diligence, accresce to the debt itself; and to this purport the decisions have gone; 26th July 1637, Lawyers against Dunbar, *voce* PRESCRIPTION; and 28th Feb. 1666, Lauderdale against Oxford, *IBIDEM*.

Observed on the Bench, That Lord Monzie was in the right, being possessed of the blank assignation; and, if he had filled it up with his own name, the LORDS would not have ordered it to be scored out, but decerned him to assign, so that he was author to the pursuer.

Objected, 2dly, These bonds being granted by a husband, in favour of his wife, are presumed to be the produce of his own money.

Answered, A bond, by a husband to his wife, is a donation revocable, indeed, during his life, but not null.

A difficulty was here started, whether this interpretation ought to be put on the deeds, as they were not granted directly to the wife, but to another person, who might have got money from her to advance for them, without the husband's knowledge.

Objected, 3dly, The bonds were granted on death-bed.

Answered, 1st, It is denied.

2dly, The reduction is prescribed; for, though the saving the ground of debt from prescription will save any defences that can be made by exception against it, yet reduction must be brought by action, and the action is prescribed.

THE LORDS, 24th July, repelled the defence, that the contents of the bonds in question were presumed to have arisen from money advanced by the wife which belonged to the husband, *jure mariti*; and sustained the transaction between the Lord Monzie and the Earl of Breadalbane, relevant to elide the defence of prescription; and likewise found the pursuer's minority relevant to interrupt the prescription; and found it competent to the Earl of Breadalbane to quarrel the said bonds, upon the head of death-bed; and repelled the objection, that the action on the head of death-bed was prescribed. And this day refused a bill, and adhered.

Reporter, *Elchies.* Act. *R. Craigie.* Alt. *Ferguson & Ch. Campbell.* Clerk, *Kirkpatrick.*

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1746. *December 23.*—THE title of the pursuit in this cause is narrated in the decision 30th July last, between the same parties; but besides the defences on which a determination was then given, there was another proponed, which was by the Lords ordered to be argued at the bar, founded on a clause in the Earl's obligation, in these terms: ' It is also hereby declared, That the said Mr Archibald shall be obliged to give in an exact account of all the debts due by the deceased Lord Neil Campbell his father, either by bonds, heritable or moveable, contracts, tickets, decreets, accounts, conditions, pactions, or any other manner of way whatsoever, betwixt the date of these presents and Martinmas 1694; with certification, that we nor our foresaids shall not be bound nor obliged to relieve him or his foresaids of any debts, but such as shall be given up to us betwixt and the said term of Martinmas 1694, we and our foresaids always being at, and debursing, the whole charges and expenses of a process and action of exhibition and declarator against the said deceased Lord Neil's Creditors for that effect; and the said Mr Archibald Campbell to raise, carry on, deduce, and conclude the said process at his peril, we debursing as said is.'

No list was given in within the time limited; and the Earl, by a writing, 17th December 1695, superseded the presenting it till Martinmas 1699, a little before which a list was given in, containing among others, the Lady's liferent annuity and provisions to the younger children, but no mention of these bonds.

Afterwards, in the 1700, Mr Campbell charged the Earl with horning on his bond, and the charge took notice of the terms of the obligation and the list given in, as being implement of the condition.

On 24th May 1705, another list was made out and signed by both parties, and duplicates thereof left with them; and of that date, Mr Campbell granted a new disposition of the lands, narrating the former, with the terms of the agreement, and that the Earl had paid off several debts, and was to pay the remainder in that list; therefore disposing the estate with absolute warrandice, excepting therefrom the obligation in the back-bond, which was to remain in force, ' until all obligations, debts, &c. that were yet unpaid, unpurged, and unperformed, should be all actually paid, purged and performed, and he the said Mr Archibald Campbell freed and relieved thereof, conform to a list, whereof two duplicates were subscribed.' And lower, declaring, ' That the Earl, and estate disposed, were not to be further burthened than to the value of the true debts contained in the said list, in as far as the same were not already satisfied and paid.'

From these clauses a defence was offered, that the Earl being only obliged to pay such debts as Mr Campbell should give him in a list of, and this not being contained in any list given in, and more especially the last disposition conveying the estate for payment of the particular debts then condescended on in the

list, in which this was not contained, it did not fall under the Earl's obligation, nor was he bound to pay it.

Pleaded for the pursuer, That the import of this clause was not to be so strictly taken; the intent of the bargain was, that the Earl should have the estate, and for that he should pay Lord Neil's debts, and give L. 20,000 Scots free to his heir. It was agreed for the purchaser's conveniency, that the extent of the debts should be endeavoured to be discovered; but as there was no method in law by which personal debts could be certainly found out, it was not to be supposed, that if any debts should emerge after the term appointed for giving in the list, these were not to be paid; that the bargain was *emptio hæreditatis*, the natural consequences whereof were, the undertaking the payment of debts; and although the original contract was not produced by the defender, it appeared by the backbond relative to it, that it was not a disposition of particular subjects, but generally of the succession of the Lord Neil. It had made over the right which stood in Mr Archibald's person; at the same time providing that it should not be extended to any thing that might accrue to him by the decease of any of his brethren, a quite needless clause, if the disposition had been of a special subject, but of use, as it was of his father's succession, as it might have been interpreted to carry what he took by succession to him, though mediately through his brethren; that although a purchase of particular subjects, for the undertaking the payment of debts, would have been sufficient for the pursuer; yet this conception of the bargain exceedingly strengthened her claim; and therefore it was observable, the Earl had in the second disposition obtained a variation of the stile; but it behoved to be noticed in answer to any argument that could be drawn from this, that there were two distinct rights constituted by the original bargain, one in favours of the seller, and one of his father's creditors, and that he could not by any after transaction defeat them of their *jus quæsitum*; and supposing the condition of giving in a list, were to be considered as an irritancy, which was the utmost that could be made of it, that irritancy could only affect his claim, but not defeat the right of the creditors; according to which doctrine, it was found in the case, Baillie against Carmichael, *voce* TAILZIE, that an irritancy might have its course against the heir of tailzie's right, without affecting the interest of the creditors; that as there was no method in law for discovering the extent of the debts, the import of the condition was no more, than that Mr Campbell should allow the Earl to use his name in a process for discovering them as far as possible; the expense of which was all to fall on the Earl, and therefore he was naturally to have the managing thereof; and on this account no irritancy could be incurred, unless Mr Campbell being required, had refused to allow the Earl to carry on any such process; that this debt fell not under the condition, there being a particular obligation to pay all debts due to the Lady; but supposing it did, here was a condescendence of the creditor's name, and the extent of the debt might have been discovered by a process against her, which it was the Earl's

No 16. business to have raised and insisted in; and therefore he could not make the objection of its not being condescended on, especially as there was no probability of his being ignorant of such a claim; and the delay of prosecuting it, which might otherwise have been objected, was accounted for by the oath of the trustee in the bonds, viz that the Lady gave them to Carwin her doer, who was also doer for Brealalbane, and told her he was only liable for heritable debts.

Pleaded for the defender, The question was to be determined by the backbond, the conception whereof was express, that he was to be liable only for such debts as should be presented to him in a list, which this was not; that he had not insisted rigorously on the condition, but had voluntarily granted several prorogations, and at last, in the year 1705, the bargain was finished, and he undertook to pay a list then given in, being the remainder of debts already paid upon the estate; and for this he got a disposition, in no respect different from the former which it recited; nor could any argument be drawn from the backbond of any such difference; and the reason of the saving to Mr Campbell the succession to his brothers, was this, that the Earl becoming bound to relieve him of their provisions, might have pretended upon his succession to them that he was relieved, the debt being extinct by confusion; that the bargain was sufficiently hazardous as it stood, but it would have been most irrational for the Earl to have subjected himself to a vague obligation, without knowing when it would be determined; that there appeared to have been a hazard either way, great debts beyond the value of the estate might have cast up, or there might few have appeared; in either of which cases, a court of equity would have perhaps interposed, and redressed the lesion; but the Earl had already paid a high rate for the purchase; and though perhaps if the matter had been questioned in the year 1694, Mr Campbell would not have been strictly concluded by the term, but it might have been prorogued, yet voluntary prorogations had been granted beyond what any court would have indulged him with, and at last the matter was closed by paction, as undoubtedly it might have been by a declarator, which would have concluded the Creditors, as their interest was only consequential of his; that it was incumbent on Mr Campbell to have raised the necessary processes, and therefore he could not object any failure to the Earl, unless he had demanded money for that effect, and been refused.

Pleaded for the pursuer, That for the Earl not to have undertaken the whole debts, would have been unequal; he had an inclination to have the estate and in order to convey it to him, Mr Campbell was to serve himself heir, and subject himself universally, which at that time he needed not to have done; that by the Earl's bond he was to be relieved of all obligations of cautionry and warrandice, a sort of debts which might not emerge till after the time limited; and therefore it were absurd this obligation should depend on their being condescended on within a certain time; that it was a maxim in the civil law, when-

ever an impossible condition was adjected to a contract, the parties were supposed to have been in jest, and the bargain void, but in a testament, *habebatur pro non adjecto*, the reason whereof was, that it was impossible the subject could remain in its former condition, being conveyed by the death of the testator, and therefore the condition was not regarded, that this reason obtained in the present case, where the lands were disposed; and the bargain could not be annulled on the non-performance of the condition adjected to the payment of the price; and therefore it behoved to be held *pro non adjecto*, it being really impossible to give in a list of debts, as there was no method in law for making the discovery; that to consider the matter in the view of an irritancy, it was a settled point, clauses irritant could not be rigorously insisted on, but had only effect where there was a damage by the failure, and here there was no damage, for the Earl was bound to pay the whole debts, if given up in the list; and now that the demand was made so late, was so far from being a damage to him, that it was an advantage, from the interest lying dead in the mean time.

Pleaded for the defender, That here there was no impossible condition, since it was not contracted that a list should be given up of all the debts affecting the estate, but that the Earl should pay such as should be contained in a list given up, and that an action should be raised for the discovery, which was surely possible; that the delay of the demand was a real damage, as thereby the means of defence might be lost; that in this case it was very probable Lord Neil was on death-bed when he granted the bonds, though it might now be impossible to prove it; and the claim was otherwise very suspicious; his Lady was otherwise provided; he had given large provisions to her children; he was in great debts, and his estate was sequestrated shortly after the time of this purchase; in these circumstances, so great a gift to the prejudice of his heir was highly irrational; and the Lady seemed to have been sensible a defence might lie against it; for though she pretended ignorance of the Earl's being liable, she must have known that Mr Campbell was, and had a visible fund of L. 20,000, for which he was secured on Breadalbane's estate; that the Earl had paid a high rate, and with regard to the equity of Mr Campbell's being relieved, the parties had made the bargain with some sort of view of the circumstances of the estate, the debts whereon were coming out, and adjudications leading, which was the reason no process was carried on for discovery, as it did not appear necessary; and if any unexpected debt, such as this, afterwards appeared, it was most reasonable it should fall on the natural heir; that the bargain could not be looked upon as containing a penal irritancy, but as an equal bargain, in which if the purchaser had made any advantage by a list not being given up in time, it was to be considered as the price of the risk he had already run, of a great load of debts appearing against him.

“ THE LORDS, on the 3d instant, in respect of the dispositions by Mr Archibald Campbell to the deceased Earl of Breadalbane, in 1705, and other circumstances of the case, found that the Earl of Breadalbane was not bound to

No 16. relieve the said Mr Archibald Campbell of the debt not contained in the list, referred to in the said disposition, reserving to the parties to be heard on the other points in the cause, viz. whether the pursuer could claim the benefit of the transaction betwixt the Earl and the Lord Monzie, and whether the Lord Monzie could pass from the said transaction?"

On a bill, craving the original agreement to be produced, a time being allowed for making a search, Breadalbane's doer declared, he could not find it amongst such papers as were at Edinburgh, and the petitioner not insisting for further search,

" THE LORDS refused the bill and adhered."

Act. *R. Craigie, Lockhart, R. Dundas, et J. Grant.*
Ch. Campbell et Ja. Erskine.

Alt. *W. Grant, Haldane, Fergusson,*
Clerk, Kilpatrick.

1747. *January 20.*—IN the action between these parties, in which the pursuer founded on two bonds that were found to belong to her mother, to whom she was executrix, and which the Earl was alleged to be liable in, prescription being objected to the bonds, and interruption by minority answered, the LORDS, 24th July 1746, ' Found the pursuer's minority relevant to elide the ' defence of prescription.'

Pleaded, in a reclaiming bill, That, during part of the time in which the pursuer was minor, she had brothers and sisters living, who had an equal interest with her in the bonds in question, and who being majors, the prescription run against them for their proportions, the pursuer's own interest being only saved to her by her minority; that it was not the minority of the person who happened at last to make up titles was reckoned, but that of the person in the right of apparency for the time, as was found in a case of executry, 23d February 1714, Earl of Marchmont against Home, *voce* PRESCRIPTION; and, if there were in the apparency at the same time one major, and another minor, the prescription behoved to run against the one, and not the other.

Answered, That this might obtain in heritable, but not in moveable rights; for, in heritage, the apparent heir was entitled to the possession and profits of the right; but, in executry, it was otherwise; the confirmation connected with the death to which it was drawn back, and carried the profits of the intermediate space; and, therefore, the executor confirmed ought to be regarded, as having been all the time in the right; so that his minority could alone be regarded.

THE LORDS found, That the minority of the pursuer could save only the interest that was in her during her minority. See PRESCRIPTION.

1747. *January 21.*—THE ground of this action is related in the decision 30th July last, and in that of the 23d December last, in the determination of a question, how far the Earl was liable in the bonds pursued on, they not being contained in any list given in to him; and now comes to be narrated the de-

termination of this question, Whether the pursuer could claim the benefit of a transaction betwixt the Earl and the Lord Monzie, and whether the Lord Monzie could pass from the said transaction? the state of the fact relating to which appears by a declaration emitted by the Earl in this process; to wit, That, in the winter 1731, being in England, he received an information from his commissioners of these bonds appearing in the possession of Daniel Campbell, and that it did not appear to them, from any writings in their custody, but that he might be made liable; and, therefore, as Mr Campbell seemed to be in a dying condition, and his children infants, it was proper a transaction should be made concerning them; that, accordingly, a bond for L. 800 Sterling, by himself and Lord Glenorchy, was made out, payable to Lord Monzie, and sent down to the commissioners, to be the fund of an agreement; but, at the same time, his Lordship wrote to them, to look for a list of debts; but none being found, the bonds were by Mr Campbell delivered up to the Lord Monzie, under trust, that what could be recovered by them should be employed in pious uses; that two years interest, from Whitsunday 1731 to 1733, was paid the Lord Monzie, on this bond; subsequent to which payments, Mr Calderwood of Polton delivered up to the Earl's doer a bag of papers, amongst which was the disposition by Mr Archibald Campbell, relative to a signed list; and, upon a more narrow search into the late Lord Polton's papers, there was found the list itself, he, who was then a Lawyer, having been employed, both by the late Earl and Mr Campbell, in adjusting the purchase; that, upon perusal of these papers, it appearing the debts could not affect the Earl, the bond to Lord Monzie was cancelled, with his consent.

Pleaded, for the pursuer, That Lord Monzie, in taking the bond for L. 800, was to be considered as *negotiorum gestor*, for the benefit of the true creditor in the claims, to whom he became bound by that act, notwithstanding he might apprehend he was then acting for Mr Campbell, *l. 5. § 1. D. De negotiis gestis*; and this obligation of his, *quasi ex contractu*, arose from his taking the bond prior to Mr Campbell's letter to him, mentioned in the case, 30th July last, directing the application to charitable uses, as he received annual rent that fell due before the date of that letter, which was 9th March 1732. Nay, further, if a person, intending to act for his own behoof, should really do the business of another, he was to be held as *negotiorum gestor*, *l. 6. § 3. eod. tit.* That a *negotiorum gestor* could not relinquish a business he had undertaken; and thus the Earl had transacted the question with the *negotiorum gestor* of the pursuer, which he could not resile from, on the pretext of an *instrumentum noviter repertum*, supposing the list could be considered as such, which was all the time in the hands of the Lord Polton, one of his own commissioners; that this question had, in effect, been already determined, as it had been found the pursuer could avail herself of the transaction, as an interruption of prescription.

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Pleaded, for the defender, That the granting this bond could not be considered as a transaction, as neither was Mr Campbell or Lord Monzie the true creditor in the claims, nor the Earl debtor; that no transaction could subsist, unless both parties were bound; and the pursuer, by insisting for her whole demand, had renounced any benefit she could have by the agreement which was entered into, to redeem the defender from the hazard and expense of disputing for the whole; neither was the subject of the transaction, the defender's being liable, which was then taken for granted; but certain objections to the validity of the bonds, which might have been made by the principal debtor; but, it being afterwards found, that they did not affect the defender, he was not precluded from that defence: That the true case was a *solutio indebiti*, where there was no natural obligation, proceeding on an ignorance in fact; to wit, That the debt was not contained in the list, and, therefore, repetition was competent; that the question, whether the true owner of a subject could take advantage of a transaction made with a supposed owner, was determined in the negative, *l. 3. § 2. D. De transactionibus*; and, if the pursuer were to be allowed the benefit of the bond granted to the Lord Monzie, she behoved to take in the terms thereof; to wit, he got it in trust for the defender; for, it was not intended the whole sum should be paid, but so much as could be agreed on with Mr Campbell, who, at the same time, gave Lord Monzie a mandate, *cum liberrima potestate*; so that it yet remained for him to determine what sum should be paid, to be applied to pious uses, according to the intent of Mr Campbell, for whom the transaction was made; and with this the pursuer behoved to be satisfied.

Pleaded, for the pursuer, That it was *res dubia*, whether the Earl was liable, as the original disposition did not appear, which, perhaps, would have subjected him; neither was it certain that these bonds were not contained in a list given in, though none such had been recovered; and, therefore, this part of the cause was the proper subject of a transaction; and the pursuer could not be said to have repudiated, as the transacted sum was never offered her, and refused.

Observed on the Bench, That the pursuer could not be said to have repudiated the transaction, as she knew not of it when the process was raised; and, afterwards, she might doubt how far it was binding, but that Lord Monzie was not *gerens negotium* for her; on the contrary, he was entrusted to take up a demand upon the Earl, which it was then thought he might be liable in, and where the claimer trusted him to settle the sum to be exacted, and application thereof; and that, upon finding nothing to be due, he might lawfully pass from the security he had taken, and repose the Earl.

THE LORDS found, that the pursuer could not claim the benefit of the transaction between the Earl of Breadalbane and the Lord Monzie.—See PRESCRIPTION.

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Act. *R. Craigie, Lockhart, & R. Dundas,*

Alt. *W. Grant, Haldane, Ferguson, & J. Erskine, jun. Clerk, Kirkpatrick.*

Fol. Dic. v. 3. p. 304. D. Falc. v. 1. No. 136. p. 167. No. 150. p. 189.

No. 157. p. 202. No. 158. p. 203.

* * See Kilkerran's report of this case, *voce* PRESCRIPTION.

1750. February 22.

DAVID HENDERSON *against* JAMES SMITH *and* GEORGE GRAY.

DAVID HENDERSON, tenant in Buitlandhill, by his contract of marriage, in consideration of 1700 merks Scots of portion, became bound to provide, against a term, 2000 merks; and to employ these sums, making 3700 merks, 'upon land, or bond bearing annualrent, or other sufficient security, in favour of himself and spouse, and the longest liver of them two, in conjunct fee and liferent, and the children to be procreated of the marriage, in fee;' and to re-employ how often the sum should be uplifted: Providing that execution should pass on the contract, in so far as it was conceived in favour of the wife and children, at the instance of James Smith of Bradshaw, and George Gray in Easter Cairns.

David Henderson survived his wife, and married again; whereupon the persons, at whose instance it was provided execution should pass, charged him to employ; of which he offered a bill of suspension; for that, notwithstanding the terms of the contract, it were unjust to oblige him, a farmer, to give over his business, and lay out his money on security, which would be greatly to his prejudice, at the instance of his children, who could only claim to be his heirs; and this step would also be highly to their prejudice; for, thereby he would be disabled from alimentering them. The bill was passed, and suspension expedite, without caution or consignation.

The trustees arrested his effects, and he gave in a complaint; to which they answered, the suspension was never intimated to them, so they could be in no contempt; but, supposing it had, a suspension does not hinder arrestment; and the respondents having done what they thought their duty, submit the import of the contract to the Lords.

Observed, That, in ordinary cases, after an expedite suspension, arrestment may be used; but here the suspension proceeded upon there being no ground for a charge.

THE LORDS ordained the arrestments to be loosed, without caution.

Act. *Millar.*

Alt. *Lockhart.*

Fol. Dic. v. 3. p. 305. D. Falc. v. 2. No 133. p. 151.

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A farmer bound himself, in his contract of marriage, to settle a certain sum, 'upon land, or bond bearing annualrent, or other sufficient security, in favour of himself and spouse, and the longest liver of them two, in conjunct fee and liferent, and the children to be procreated of the marriage, in fee;' Found, that he was not bound to fulfil the contract, by selling the stocking of his farm, though he was otherwise unable to implement it.