

1775. August 4. MARGARET BUCHANAN against JANET BUCHANAN.

Margaret Buchanan brought an action against Janet Buchanan, as representing her deceased brother Dougal, concluding, *1mo*, That the defender should make up titles to a house in Glasgow, which had been built by Dougal Buchanan a little time before his death, and to convey the same to the pursuer, in terms of an agreement entered into between her and the said Dougal her husband, in June 1772; *2do*, To pay the pursuer the sum of £372 Sterling, contained in a bill granted by the said Dougal Buchanan to the pursuer, dated 11th November 1773; *3tio*, Without prejudice to her real security by the infestment on her contract of marriage, to pay her the annuity of £200, thereby stipulated, at Whitsunday and Martinmas yearly, and to lend £2000 Sterling onundoubted security, and take the rights thereof in favour of the pursuer in liferent, for the further security of her jointure.

The agreement upon which the *first* article of the libel is founded, is in the following words: "I Dougal Buchanan of Craigevairn, hereby acknowledge, by these presents, that the lot of ground lately purchased by me in that part of the Burgh of Glasgow, called Miller's Street, being No. 5. on the east side of the said street, and on which I am presently building a house or lodging for the accommodation of my own family, is the joint property of Margaret Buchanan my spouse and me equally, she having advanced one half of the purchase money, as also one half of the money for building said house and offices building thereon. As the rights of said property are all taken in my name, I hereby declare that it is my real design and intention, by thir presents, that if the said Margaret Buchanan, outlive me, then the said property, both land and houses thereon, with all the furniture of every kind therein contained, shall belong to her in property, and be at her disposal; and if she shall happen to die first, all the above subjects as narrated, shall belong to the said Dougal Buchanan, according to their verbal communing thereanent; and neither of the said parties have power to let or give away, on any account, any of the above mentioned subjects, without consent of parties. Consenting to the registration, &c. we have both subscribed this at Craigevairn the 18th day of June 1772, before these witnesses, James and John Burmane, both wrights in Blawfad."

There is also produced a receipt, holograph of Mr. Buchanan, of the tenor following: Received by me from Margaret Buchanan my spouse, bonds, bills, and cash, to the extent of £719 Sterling, to be employed by me in building a house in Miller's Street, for which I grant receipt, until a paper be made betwixt us, expressing the contents of an agreement anent said house; as no part of thir subjects belongs to me, I oblige myself to be accountable therefor in 10 days as witnesseth,

(Signed) DOUGAL BUCHANAN.

This receipt bears date May 17th, 1772, about a month before the date of the agreement, and it is addressed on the back, "To Mrs. Buchanan of Craigevairn."

No. 329.  
Whether the objection, that the writ is defective in solemnities, may be purged by relative writings, *et rei interventu*.

No. 329.

Objected by the defenders to the foresaid agreement, That the contract is null and void by the statute 1681, the writer of the deed not being designed ; and that it will not take off the objection, that the deed is holograph of Mr. Buchanan, because it is a mutual contract, which must bind both parties, or neither ; and, as it was not binding upon the pursuer, in respect of the foresaid objection, so neither could it be binding upon her husband's representatives ; and, therefore, pleaded, That the defender ought to be assoilzied from the conclusion of the libel respecting the house in Glasgow ; reserving to the pursuer to sue for the recovery of the £719 contained in the receipt, if she shall be so advised.

Answered : It is not disputed by the defender, that, in the case of an unilateral holograph deed, it is no objection that the writer is not specially designed ; and the reason is plain, viz. that there is no occasion to design the writer, when it appears, from ocular inspection of the deed itself, that the granter of the deed is the writer of it.

Now, the reason of the thing does equally apply to the case of a mutual contract, as to the case of an unilateral deed ; for, when the deed is written by one of the contracting parties, and which must appear from inspection of the deed itself, as the deed points out and particularly designs who the contracting parties are, so, with justice and propriety, the writer of the deed might truly be said to be designed in the deed itself ; and therefore, even upon this ground alone, the objection that is here made to the deed's being probative, falls to be repelled.

But, *2do*, There is no occasion for considering the deed in question as a mutual contract, in which both parties must be bound, or neither. The deed would have been sufficiently complete to answer the purpose intended, although the pursuer had not been a party to it ; nor was there any occasion for laying her under obligations by that deed as there was truly nothing to be performed upon her part. All that was truly necessary was a deed to be executed by Dougal alone, declaring the trust : And there cannot be a doubt that the deed in question is sufficiently expressive of such trust : And if the deed would have been complete to answer the purpose intended, although the pursuer had not been made a party to it, it surely cannot hurt the deed that she subscribed it along with her husband.

But there is a separate ground upon which the action must be sustained. It is a clear point in law, that although, in the case of heritable rights, to the completion of which writing is necessary, either party may resile from the bargain till writing is adhibited ; yet it suffers this exception, that, where there is a *rei interventus*, there is no room afterwards for resiling ; but action will lie for completing the transaction, although it stood entirely upon the footing of a verbal bargain, providing the terms of the bargain shall be ascertained by sufficient evidence.

Now, in the present case, although, on account of the foresaid objection, the agreement should not be held of itself as a valid mutual contract, binding upon both parties, yet it seems to be very clear, that the foresaid agreement, holograph of Dougal Buchanan himself, is sufficient evidence of the terms of the bargain ; and

the foresaid receipt, also holograph of him, is sufficient evidence of his having received full payment of the pursuer's share of the price; they are *partes ejusdem negotii*, and taken together make sufficient evidence of a bargain betwixt the parties, completed by a *rei interventus*, and from which neither party could therefore resale.

Objected, *2do*, to the payment of the bill for £372, That the bill, being a subject simply moveable, so, being granted to the wife, it belonged to the husband *jure mariti*, and cannot be made the foundation of a claim against his representatives.

Answered: The fact is, and it appears from a jotting produced in process, holograph of the pursuer's husband, that the £719 for which the aforesaid receipt was granted, did all arise from bonds and bills, the property of her brother William Buchanan, received from him as the price of her half of certain lands in the parishes of Hamilton and Blantyre, which belonged to the pursuer and her said brother jointly, and were sold by her to her brother with her husband's consent; and these funds being the price of her own lands, therefore did not fall under the *jus mariti*; and the bill in question was the balance which arose from that money, after giving credit for the pursuer's half of the price of the foresaid tenement.

*Lastly*, the defender objected to the pursuer's demand, for lending out £2,000 for security of the pursuer's annuity, as being rigorous and emulous; for that the pursuer is secured by her infestment in the lands of Craigievairn, to the extent of their rent, being about £120. All, therefore, she can reasonably ask is, that as much money should be lent out as will make up the difference betwixt £120 and £200, which is the whole of the jointure. To ask more, can proceed from nothing else but an unnatural and unprovoked desire to distress, as much as in her power, the heir and sister of her husband.

Answered: Allowing the fact to be true, it appears to the pursuer, that an estate of £120 yearly, and £2,000 of money, is but a very narrow security for £200 Sterling *per annum*, considering the risks, accidents, and burdens to which the rents were exposed. However, the fact is, the lands are only about £100 *per annum*, and the rents rather upon the fall; and, until some late improvements were made upon them, they did not yeild £80 *per annum*, and, besides, a considerable part of the lands are at present unset."

The Court " adhered to the Lord Ordinary's interlocutor, decerning against the defender conform to the conclusions of the libel.

Act. *M<sup>c</sup>Queen.*

Alt. *L. Advocatus Dundas.*

Clerk, *Ross.*