

## BONA ET MALA FIDES.

### SECT. I.

#### *Bona Fides non Prodest Acquirere Volentibus.*

1682. *March.* TROTTER *against* ALEXANDER YOUNG, Factor.

**T**HE cautioner for one Suttie, a factor in Flanders, being pursued for goods sent to him from Eymouth, seven days after he was depofed by the convention of boroughs at Glasgow;

*Alleged* for the defender; That he was free from the very time the factor was discharged from his office.

*Answered*; The lieges were *in bona fide* to correspond with the factor, till his discharge was intimated; and the goods pursued were shipped before the commissioners return from the convention.

*Replied*; That as he was named a factor without public intimation, there was no necessity to intimate his deposition; at least the cautioner is not to be burdened with the intimation.

THE LORDS assilzied the cautioner. This is hard.

*Fol. Dic. v. 1. p. 104. Harcarse, (CAUTIONER.) No 238. p. 57.*

1670. *June 11.*

MARGARET HUNTER *against* The CREDITORS of JOHN PETER.

THERE being a competition betwixt Margaret Hunter, the relict of umquhile John Peter and his creditors, apprisers or adjudgers of his lands, in *anno* 1658; the said Margaret produced an infestment by her husband, of a yearly annualrent of 700 merks, bearing to be for implement of her contract of marriage; which being also produced, by her regiftrate, bearing only to 4000 merks of tocher; and an obligation, that upon payment of the tocher, the husband should employ the same, and 4000 merks more for her in liferent; whereupon the creditors *alleged*, That her infestment behoved to be restricted to the annualrent of 8000 merks: And she having alleged that her contract was vitiated after the marriage, and did bear 7000 merks of tocher, and an annualrent thereof; and of other

#### No 1.

A factor's commission was recalled. Goods were sent to him a few days after. His cautioner was not liable, altho' no intimation had been made, that the factory had been recalled.

#### No 2.

The sum in a woman's contract of marriage was vitiated and diminished, after marriage, without her consent. Found, that creditors of the husband, who had adjudged, and who had trusted that

No 2.  
the contract  
was as it ap-  
peared, could  
derive no ad-  
vantage  
thereby to  
the prejudice  
of the wife.

seven for jointure, the seven was made four ; but that not being then instructed, the said Margaret was only preferred as to the annualrent of 8000 merks, but prejudice to her to prove any farther, to have been in her contract, and that the same was vitiated. She now pursues a declarator against the creditors, that her contract was altered, and vitiated after the marriage, and that she ought to have a pointing of the ground, for 210 merks yearly, the times bygone, wherein her infestment of 700 merks exceeded the annualrent of 8000 merks, and which she yet wanted, and for the whole 700 merks in time coming ; whereupon witnesses were adduced for proving of the vitiation, which they did prove. And it was now *alleged* by the creditors, That although the contract was altered, yet she could have no more in their prejudice but the annualrent of 8000 merks, because the contract was altered before it was registered ; and her infestment bears expressly for implement of her contract registered ; which must import, that it was an implement of the contract as it was altered after the registration, and not as it was before the registration ; seeing it does not mention the particular sum, either of 8 or 14,000 merks ; and the 700 merks, is but 50 merks more than the annualrent of 8000 merks at the time of the infestment. *2dly*, The contract was altered by consent of the father and the husband, contracters ; and, if need be, it is offered to be proven, that it was with the relict's own consent ; so that it was no vitiation, but a warrantable alteration. *3dly*, Albeit it had been unwarrantably altered, yet two creditors having lent their money to John Peter, *bona fide* ; and seeing an infestment granted by her husband, in implement of the contract of marriage registered ; and finding only in the register 8000 merks, and she having produced it, and made use thereof, and so homologated the contract altered, they could not be prejudged ; but she might pursue the heirs of John Peter. *4thly*, They having bruiked by their infestment and a decret, they cannot be liable for the repetition of bygones, and cannot suffer their ground to be pointed therefor : But this declarator can only take effect *a sententia aut lite mota*. *5thly*, Though the vitiation were fully sustained, John Peter was only obliged to infest her in an annualrent effeiring to the tocher, upon payment thereof ; *ita est* the tocher was never paid ; and so she can only claim the annualrent of 7000 merks, which the husband should have added to the tocher. And albeit ordinarily such clauses prejudge not the wife, where the tocher is not paid through the husband's neglect, who is obliged to do diligence for his wife ; yet here it is offered to be proven, that the relict's father was insolvent the time of the contract, and still thereafter ; so that no diligence could have recovered it.—It was *answered* for the relict, to the *first*, That albeit her infestment relates to the contract which was registered, yet not to the contract as it was registered ; and the husband having so great trust, the wife was not obliged to look to the register or extract, which was in her father's and husband's custody ; and, by the testimonies of the witnesses, it appears, that they have colluded to abate both the tocher and jointure, without her consent. To the *second*,

The father and husband not being sole contractors, but the wife, they could not, after the contract and marriage, without her consent, alter her right. To the *third*, The creditors lending their money, *bona fide*, cannot prejudge the relict's right; for *bona fides* operates only in payment made, and other necessary deeds, but not in voluntary acts, as lending money, wherein the lender must follow the faith and condition of the borrower, whose rights, though never so clear in any record, yet if thereafter they be improven or reduced, the creditors' *bona fides* avails nothing; and though the relict made use of the contract vitiated, yet it was with reclamation against the vitiation; and therefore in the decret, the same is reserved, which is the ground of this declarator. To the *fourth*, The relict craves not the repetition of the fruits uplifted by the creditors; but only that the ground may be pointed for what she wants of bygones. To the *last*, By no practice was ever a wife prejudged, by not payment of the tocher; and albeit the father's being insolvent, might have been a ground to the husband to refuse to infest his wife; in any more than the annual rent of 7000 merks, till the tocher were paid; yet where he has actually infest her in more, and even before contracting of the creditor's debt, her infestment must stand valid, seeing it was less than what was her right.

THE LORDS found the vitiation of the contract to have been after the marriage, and sustained the declarator, and ordained the ground to be pointed for what she wanted of her infestment of 700 merks for bygones, and for the whole in time coming, unless it were proven by the wife's oath, that she consented to the alteration of her contract.

*Stair, v. 1. p. 678.*

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S. E. C. T. II.

Private Knowledge of a Prior Right.

1582. June. STIRLING against WHITE and DRUMMOND.

PRIVATE knowledge of a prior assignation was so far found sufficient certification, as to put another in *mala fide* who obtained a second.

*Fol. Dic. v. 1. p. 105. Colvil, MS. p. 152.*

\* \* \* See The particulars *voce* INTERDICTION.

1627. July 21. HAMILTON against M'CULLOCH.

THOMAS HAMILTON having apprised certain lands from William M'Culloch of Myrton, in payment and satisfaction of certain sums of money owing by the said William to the pursuer: After his apprising, and long before the comprifer

No 4.  
An apprising upon which no diligence proceeded for many years, found

No 2.

No 3.