

No 96.

1676. December 15.

INGLIS against LAURY.

AN assignation of an heritable bond by a wife to her husband, *stante matrimonio*, was found revocable, as *donatio inter virum et uxorem*, and that even against a singular successor, acquiring *bona fide* from the husband for onerous causes.

Fol. Dic. v. 2. p. 70. Stair.

* * * This case is No 345. p. 6131. *voce* HUSBAND and WIFE.

No 97.

A donation by a wife to her husband, taken in name of a trustee, found revocable even against singular successors.

1677. July 17.

PATERSON against M'LEAN.

MARGARET PATERSON, by her contract with her first husband, being provided to six hundred merks yearly, she, with consent of her second husband, assigns her liferent right to Thomas M'Kenzie, who transfers the same to Sir George M'Kenzie advocate, who grants a back-bond, bearing, 'That his translation was for procuring payment to the wife and her husband of the liferent, except as to some debts due to the husband himself, and therefore obliges him to denude in favours of the husband, or any he would appoint.' The husband assigns the bond to Charles M'Lean, for security of a sum due by the husband to M'Lean, who thereupon pursues Sir George M'Kenzie to denude. The husband being dead, the wife pursues a reduction of this assignation, as being a donation by a wife in favours of her husband, which is null *nisi morte confirmetur*, and therefore is revocable at any time, during the life of the married person granter thereof, whether before, or after the death of the other. The defender *alleged*, That this reason is not relevant; *imo*, Because this is no assignation by the wife to the husband, but by both wife and husband to Thomas M'Kenzie, bearing, 'for causes onerous;' and it is beyond question, that a wife may not only dispone for causes onerous, but may gift her liferent right, in favours of a third party, without prejudice to the husband's *jus mariti* during the marriage; and if the husband consent, it imports his right by his *jus mariti*: And it is also unquestionable, that if the right be once so validly constituted, the assignee may transfer it to whom he will, even to the husband *qui utitur jure auctoris*; so that the wife can no more revoke it as to her husband, than as to a cedent. *2do*, Albeit the right were revocable, though not made to the husband, but to a third person for his behoof; yet if the husband or his trustee do transmit that right to a third party, for an onerous cause acquiring *bona fide*, the favour of commerce hath by positive law introduced, that the acquirer is secure, and the wife's power of revocation is not *vitium reale*, like theft or force affecting the matter *contra singulares successores*; for even fraud reaches not singular successors, *nisi participes fraudis*: So that M'Lean having gotten right to Sir George

M'Kenzie's back-bond, for onerous causes, he is secure; and the wife must pursue her husband upon her revocation, to make up her liferent. It was *answered* for the wife, That this being a just and necessary privilege for married persons, introduced by the Roman law, that at any time of their life they might revoke, and that upon a very good ground, *ne mutuo amore se spolient*. either party is secured against the insinuation of the other, which our custom hath constantly approved; and therefore it cannot be thought that the law can be eluded *per ambages*: So that it is alike to gift to the husband, or to any person to the husband's behoof; and in all personal rights, the assignee is in no better condition than the cedent, except as to his oath; as an assignee getting assignation to a clear bond, will yet be excluded by the cedent's back-bond or discharge, yea by compensation upon the cedent's debt, and will never be secured against the same upon the favour of commerce, though he acquire for a most onerous cause, *et optima fide*; so this privilege confirmed by law, is much more than a private back-bond: So that albeit the husband Sir George or Thomas' oaths were not competent against M'Lean the assignee to prove the trust, yet here the trust is clearly proved by writ, viz. Sir George M'Kenzie's back-bond to Thomas M'Kenzie the first assignee, bearing, 'the right to be to the behoof of the wife and husband, which back-bond being of the date of the assignation, granted by Thomas M'Kenzie to Sir George, and accepted by Thomas, it is not only probative against Sir George, but against Thomas the assignee acceptor of the same, who is as if he had subscribed the back-bond accepted by him; much more in this case, where M'Lean derives all his right from the husband, who had right from Sir George; so that M'Lean is excluded by the back-bond granted by his cedent Sir George, bearing the trust.

THE LORDS found, that the assignation made by the husband and wife to Thomas M'Kenzie, being to the behoof of the husband, was revocable, and is by this reduction revoked; and found the same to be proved to be to the husband's behoof, by Sir George's back-bond accepted by Thomas M'Kenzie; and that it was not a valid right *ab initio* in the person of Thomas the first assignee, returning to the husband *ut cuilibet*; but that it being in trust *ab initio* to the husband's behoof, it remains still revocable against all singular successors, against whom the trust were proved, by their cedent's writ anterior to their assignation or intimation; and therefore reduced the assignation by the husband and wife to Thomas M'Kenzie, and all that hath followed thereupon, except as to the years of the life of the husband who consented, whereby his right *jure mariti* was carried by his consent, and belongs now by progress to Charles M'Lean.

Fol. Dic. v. 2. p. 70. Stair, v. 2. p. 541.