

to me, which I discharge him of, in case of his not quarrelling, questioning, or reducing the said right, but consenting to and ratifying the same." The Lords found, That William Paton, by the foresaid clause, was bound not only to consent to and ratify Agnes Scot's disposition to Margaret Paton, her daughter, but also to assign and dispoise the debt in favours of the said Margaret Paton.

*Forbes, p. 445.*

No. 6.  
the same,  
found to im-  
port, that he  
should assign  
and dispoise  
that right.

1715. June 11.

JOHN FARQUHAR *against* MR. JAMES and ALEXANDER HUNTERS.

The deceased Alexander Hunter in Layhead, by contract of marriage with Margaret Farquhar, his spouse, having provided her to the half of the free goods and gear that should pertain to him at his death, (in case of no children), and he having both heritable bonds and other sums bearing annual-rent, and particularly there being a debt heritably secured upon the estate of Auchinhove, he disposed the same to Messrs. James and Alexander Hunters, but reserved a power to himself to alter; and Sir Robert Forbes having purchased the lands of Auchinhove, and thereafter made over his rights to Mr. James Fergusson, the creditor transacted the debt, and received a simple bond from Mr. James Fergusson, which bond he thus indorsed on the back with his own hand, "I desire you may transact the inclosed bond to the bearer, Mr. James Hunter, in his own name, for he has given me his receipt and obligation to pay to me the annual-rent and the principal when I seek it, after ye have paid him," &c. and at the same time delivered the bond to Mr. James Hunter. The question then being, Whether, by the conception of the contract of marriage, mentioning only goods and gear, the wife was excluded from any share of debts and sums of money? as also, Whether the new bond by Mr. Fergusson, though coming in place of an heritable subject, did become moveable, and so fall under the communion? it was alleged for the relict, and John Farquhar, her assignee, the pursuer,

No. 7.  
Effect of  
these words,  
"I desire you  
may transact  
the inclosed  
bond with the  
bearer in his  
own name."

*1mo*, That though the said bond came in place of an heritable subject, yet the husband having, by acceptation thereof, declared his intention that it should be moveable, and fall under the communion, he could not thereafter alter his intention to the prejudice of the relict, and evacuate the said clause of the contract of marriage; *2do*, That the transmission was not habile, as being by way of indorsation, which although allowed in bills of exchange, yet that is not the stile or method of transmission of bonds; *3tio*, That the indorsation as it stood was null, wanting writer's name and witnesses.

Answered for Hunters, the defenders: *1mo*, That as the relict could have no claim to the debt, while it stood heritably secured, so it is certain, that if the husband, at the time of the said transaction, would have taken the said bond in

No. 7.

either of the defenders' names, all the pursuer's pretensions would likewise have been cut off. Now, the method taken was equivalent to this, for the momentaneous taking the bond in the husband's name could never alter the case, and give a right to the wife, so as he could not dispose thereafter on the same, more than if he had had a landed estate, sold the same, and employed the same an hour thereafter towards making a new purchase, or given the same in specie to a friend. And although a husband cannot exclude his wife from a share of the moveables provided by contract of marriage, by any gratuitous deed, yet this was never extended to bonds granted *in liege poustie* without fraud, as is observed by the Lord Stair, Instit. Lib. 1. T. 4. § 15. which is parallel to the present case, and was so decided, 8th December, 1675, Thomsons *contra* The Creditors of Thin, No. 6. p. 3593.; and that the transmission was legal, doth appear from the above mandate on the back of the bond, and the obligation granted by Alexander Hunter to pay the annual-rent; and though there was a faculty reserved to alter at pleasure, yet the defunct not having exerted the same, and continuing the bond in Hunter's possession, makes his intention clear. And as to the want of witnesses, answered, That the indorsation was holograph.

Replied for the pursuer: *1mo*, That upon transacting with Mr. Fergusson, the debt became moveable, and therefore, though the indorsation were good, yet not being for an onerous cause, it cannot exclude the relict from her share; *2do*, This will hold, even though the new bond had been taken in the defenders' names, since even that could not be done (except for an onerous cause) in prejudice of the wife, who is a creditor by the contract; so that the comparison of selling land, and making a new purchase, cannot hold here; because, in that case, the purchase being heritage, could never fall under the division; but, in the present case, notwithstanding of the indorsation, the sum is still moveable; *3tio*, As to the passage in Lord Stair's Institutes, and the decision quoted, answered, That they speak only of disposing on moveables *in liege poustie* without fraud, when the wife is not provided by contract, but is claiming her *jus relictæ*, which never hinders the husband from disposing on moveables in his life-time, when he does it not palpably to the defrauding his wife; but when (as in the present case) the wife is provided by contract, she becomes thereby creditor, and therefore alienations in her prejudice, without an onerous cause, cannot subsist.

The Lords found, That the new bond, being moveable, and granted to the defunct in his own life-time, and not habilely transmitted to the defenders for an onerous cause, falls under the division, conform to that clause in the contract of marriage; and that the relict's assignee has right to the half of the sums contained in the said bond.

Act. John Forber.

Alt. Horn.

Clerk, Sir James Justice.

Bruce, No. 94. p. 113.