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LORD ARBUTHNOT *v.* SPOTTISWOOD.

JOHN, LORD VISCOUNT of ARBUTHNOT and OTHERS, Creditors of WILLIAM MORISON, late of Prestongrange, Esq. deceased, } *Appellants;*

JOHN SPOTTISWOOD of Spottiswood, *Respondent.*

22d April, 1740.

RES JUDICATA.—An extracted judgment of the Court of Session in favour of a pursuer not held to be *res judicata*, on the ground of its having been obtained by collusion on the part of the defender.

No. 56. HENRY MORISON conveyed, by an *ex facie* absolute assignation, certain bonds and securities to the late Sir Alexander Morison of Prestongrange. Of the same date, Sir Alexander granted a back-bond, declaring that the object of the assignation was to relieve him from an obligation he had entered into jointly with Henry Morison for the payment of certain annuities, and he bound himself, upon the death of the annuitant, or upon being freed from the obligation, to pay back the sums contained in the bonds assigned.

It was provided in a marginal note, that in case Henry Morison had no heirs of his own body, the said settlement should operate only to secure payment to Henry Morison, or his assignees, of one half of the sums so assigned. This note was signed by Sir A. Morison, but it was not attested, nor did it mention the writer's name or designation, nor was reference made, in the body of the deed, to this addition.

Henry Morison had no heirs of his body; but he conveyed to John Spottiswood in March 1701, (the father of the respondent,) all his estates, both real and personal, and *inter alia*, the back-bond above-mentioned. After Henry Morison's death, his assignee, John Spottiswood, (July 1701,) raised an action against William Morison, the son of Sir Alexander Morison, for payment of the above sums, with interest. The libel, however, was restricted *pro loco et tempore*, to the sum of 10,000 merks; the pursuer admitting that one half did belong to the said William Morison.

In defence, William Morison pleaded that his father had made regular payments of the annuities, many of the vouchers of which he alleged were in his possession; and that, in virtue of the back-bond, the half of the sums belonging to him was intended to be free of all deductions.

John Spottiswood then insisted that the condition in the back-bond, not being contained in the body of the deed, but added in a marginal note, which was defective in the statutory solemnities, was therefore null and void; and he claimed the whole sums contained in the libel. Considerable delay took place, and the first decision upon the effect of the marginal note was not pronounced till the year 1719, when the Lord Ordinary found (25th November,) 'that the marginal note in the 'back-bond not being signed by the witnesses, it 'cannot be probative.' Willliam Morison reclaimed, and pleaded that, as it had been produced by the pursuer himself, he could not be allowed to claim under the deed, and reject the condition.

The Lord Ordinary adhered, (January 26, 1720.) and sustained the nullity of the note; but super-

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seded giving judgment upon the other point,—how far the pursuer could be allowed to make that objection, in regard the back-bond had been produced by himself.

In 1724, the case having come before another Lord Ordinary, a decree *in absence* was pronounced for the whole sums contained in the libel.

William Morison represented, and answers were given in, and the case having been called in Court, and the defender's counsel having declined to debate, the Lord Ordinary adhered, and the decree was extracted.

Thereafter, Mr. Spottiswood obtained a decree of adjudication in absence, and he afterwards assigned these decrees, and the sums contained in them, to his son John Spottiswood, (the respondent.) William Morison having become bankrupt, other decrees of adjudication were obtained by creditors, among whom were the appellants, who instituted an action of ranking and sale of the debtor's estate. In this process all the creditors appeared.

The respondent produced his decrees of constitution and adjudication, and insisted for the whole sums contained in the bond.

The other creditors (the appellants) objected to the decrees, as obtained by collusion; and insisted, *(inter alia,)* upon the effect of the marginal note.

The respondent answered, 1st, that this marginal note was in itself null and void; and, 2dly, that the question with regard to its validity was *res judicata* by the interlocutor of the 26th January 1720.

The appellants replied, 1st, that the marginal note was evidently written by the same person

who wrote the body of the back-bond, and was signed by Sir A. Morison, and the witnesses to the deed must be presumed to have been witnesses also to the note. 2dly, That the respondent could not challenge the conditions contained in his own title; besides, his father had admitted the validity of the marginal note in the original process, and this admission could not now be retracted; and,

3dly, That there could be no *res judicata*, as the decree was pronounced in absence, and must have been obtained by collusion; the debtor's counsel having declined to debate.

The Lord Ordinary sustained the objection to the marginal note, (12th January 1734.)

Afterwards, upon advising a representation and answers, the Lord Ordinary reported the case to the Lords, who found, (23d November 1734,) 'that the question with respect to the marginal 'note was *res judicata*.'

Their Lordships afterwards adhered, (9th January 1735,) and the Lord Ordinary found, (28th November,) that the adjudication subsisted for the whole sums contained in the bond.

The appeal was brought from the interlocutors of the 12th January 1734, 23d November 1734, and 9th January, and 28th November 1735. Entered Feb. 19, 1739.

After hearing counsel, "it is declared that the "question with respect to Sir A. Morison of Prestongrange's back-bond ought not to be deemed "*res judicata*, by reason of certain circumstances "of *collusion* appearing in some of the proceed-"ings in the former case: and it is therefore, or-"dered and adjudged that the several interlocu-"tors complained of be, and they are hereby re- Judgment, 29th April, 1740.

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" versed ; and it is further ordered, that the said " Lords of Session are to proceed to determine " touching the validity of the marginal note on " the said back-bond, and the merits of this cause, " in such a manner as shall be just."

For the Appellants, *Wm. Hamilton, Alexander Lockhart.*

For the Respondent, *Charles Areskine, W. Murray.*

When the case was afterwards brought before the Court of Session in consequence of the above judgment, their Lordships found, " that the marginal note was good against the user." (Kilk. p. 606, Brown's Supp. V. p. 709.)

PATRICK DAVIDSON of Woodmiln, *Appellant;*
ALEXANDER WATSON of Glentarkie, *Respondent.*

4th December, 1740.

PRESCRIPTION.—ACT 1579, c. 83.—Found that the act does not apply to actions for the aliment of minors.

[Clerk Home, No. 135; Kilkerran, p. 415; Mor. Dict. p. 11077; Brown's Supp. V. p. 200.]

No. 57.

ALEXANDER WATSON of Glentarkie had issue by Jean, his wife, one daughter, Margaret. Failing her and the heirs of her body, he settled his estate upon Alexander Watson the respondent (second son of Watson of Aithernie,) and he appointed Aithernie tutor to his daughter.