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perly completed in the person of the said Mary Paterson, by the confirmation in her favour; and that therefore the obligation to Hugh Paterson, founded on by Margaret Arnot, could not be available to her in the present question."

For Boswal, *Rae.**Act. MacLaurin.**D. R.**Fol. Dic. v. 4. p. 167. Fac. Col. No 162. p. 288.*1760. *January 2.*

ELISABETH HART, Relict of Andrew Falconer, and DAVID LOTHIAN, Writer in Edinburgh, *against* ROBERT PRINGLE, Writer in Kelso.

No 471.

Bond taken to a trustee, and bearing value received from him, not reducible on the trustee's deponing that he did not know of any value being paid.

ELISABETH HART, in 1738, some time after her husband's death, granted a bond to James Shearer, for L. 1000 Scots of principal, with annual rent and penalty. The bond bore, "That she granted her to have received, from James Shearer, the sum of L. 1000 Scots; renouncing all exceptions of the law proponable in the contrary for ever." It also contained an assignment to Mr Shearer, in security of the debt, of her life-rent-annuity of 400 merks, payable out of the lands which had belonged to her husband Falconer. This assignation was duly intimated, in March 1739, to the factor on Falconer's subjects.

In June 1740, Shearer assigned the bond to Robert Pringle; who, in January 1744, raised letters of inhibition upon it against Elisabeth Hart, and executed the same at her dwelling-house. In April 1745, he raised and executed a summons of adjudication against her, of her interest in Falconer's subjects; upon which two decernitures were obtained, in July 1746, and February 1747; but Mr Pringle dying in March 1747, decret was not extracted. A title to this debt was afterwards made up by his nephew Robert Pringle junior.

In 1755, a ranking and sale of Falconer's subjects was raised; and the above bond, and diligence upon it, was then produced as Mr Pringle's interest.

To this interest it was *objected*, by Elisabeth Hart and David Lothian, another of her creditors, That the bond was granted *sine causa*, notwithstanding its narrative, in so far as it was given *spe numerandæ pecuniæ*, or on the faith of a subsequent loan, which was never made; and therefore that the bond was void and null.

THE LORDS, before answer, examined James Shearer; who deponed, "That James Graham, writer in Edinburgh, (lately deceased), about twenty years ago, told the deponent, that William Montgomery was owing him considerable sums of money, and had offered to get him, from one Elisabeth Hart, a bond for about L. 100 Sterling, or L. 1000 Scots, in payment or security of what he owed him; and thinks Mr Montgomery was present when Mr Graham told the deponent the above, but cannot be positive thereof: That Mr Graham proposed to the deponent that he would take the said bond in the deponent's name; to which the deponent consented, provided he was put to no trouble or

expense thereanent. Accordingly the said bond was granted; and Mr Graham brought the bond, with an assignation thereof, wrote out in favour of Mr Robert Pringle, to the deponent, and desired him to sign the said assignation, which he did at his desire. And as to the deponent's being present at Elisabeth Hart's granting the said bond, he does not think he was present; and as to the bond's being delivered to the deponent, or having been any time in his custody, he remembers nothing about it further than he has deponed."

Mr Pringle did not allege, that either Shearer or Graham paid value to the granter for this bond; but *insisted*, That no advantage was taken of her; that it had been given in pursuance of an agreement between her and Montgomery; and that Graham's affairs having been in some disorder, was the reason of his taking the bond in the name of Shearer as his trustee.

Certain writs were produced for showing, that Montgomery had been, at the date of the bond, owing Mr Graham considerable sums; and that he soon after got credit from Graham for a sum corresponding to the contents of the bond, though without specially mentioning it. It likewise appeared, that Mr Graham was indebted greatly to Mr Pringle; that Mr Pringle had got this bond assigned to him in security of those debts; and that he was bound to re-convey it to Mr Graham, if his debts were otherwise cleared between and a certain term, but which they were not.

William Montgomery was also examined as to the cause of granting the bond. He acknowledged sundry transactions both with Elisabeth Hart and James Graham; but deposed, "That he never solicited Elisabeth Hart to interpose her credit for him to James Graham, so far as he remembered: That he never desired or prevailed with her to grant a bond to James Shearer for L.1000 in 1738, or any other time; nor did he remember to have heard that such a bond had been granted till the 1756 or 1757; and that he never got from Graham any receipt for such bond, or saw or heard of any such receipt's being granted.

Pleaded for the objectors to the bond; *1mo*, The circumstance of this bond's being taken in Shearer's name, the assignment to Pringle, and the letting it lie over for so many years, without insisting for payment, till all the parties to the transaction were dead excepting Shearer, Montgomery, and the granter, render this bond highly suspicious; *2do*, The onerous cause of borrowed money assigned in the bond itself, is disproved by the oath of Shearer, the original creditor. Montgomery has denied the whole transaction; and the creditor having not been able to bring evidence of any other reason for granting it, it must be reduced as granted *sine causa*; *3tio*, At least it is incumbent on Mr Pringle, in a question with Mr Lothian, an onerous creditor of Elisabeth Hart, to prove an onerous cause for her granting this bond; otherwise it must be presumed gratuitous, and, as such, give way to her more onerous debts.

Answered for Mr Pringle; *1mo*, Every step was taken that could be available for making this debt effectual by a series of diligence. And the taciturnity of

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the granter, for such a course of years, when that diligence was repeatedly notified to her, must presume her sense of the justness of the debt; *2do*, Mr Pringle being an onerous assignee, the oath of Shearer, as his cedent, cannot be good against him; far less can the oath of a trustee, such as Shearer was for Graham, his real cedent. Further, the oath of Shearer does not disprove the cause of granting expressed in the bond; because it only imports, that he paid no money to the granter; which must be true in every case where a bond is taken in a trustee's name, though the money be truly advanced by the real creditor. And as to Montgomery, he is no better than a single witness, whose oath cannot take away a written obligation; *3tio*, It is sufficient for the assignee to the bond, especially in a question with the granter, that he proves the onerous cause by the bond itself, duly executed. Nor can her creditor, Mr Lothian, be in a better case. Neither of them have proved, that the bond was granted *spe numeranda pecunie*, and that the money was never paid; and, supposing the narrative had been proved false, that would only give ground for presuming the bond gratuitous; which would not annul it, or lessen its effect, as still a debt is thereby established, if no fraud is proved to have been committed in the obtaining it.

Replied; It has been admitted by Mr Pringle, that no value was paid to the granter either by Shearer or Graham; which, *per se*, clearly disproves the onerous cause mentioned in the bond; and neither Mr Pringle nor his uncle ever were properly onerous assignees, but only assignees in security; and now this competition is carried on in his name by the heir of Graham his debtor.

This case appeared to be attended with a good deal of difficulty; and the Court, by one interlocutor, found the bond not binding; but it afterwards carried to sustain it.

“THE LORDS repelled the objection to the bond.”

For the Objectors, *Pat. Murray, Hamilton-Gordon*. For Pringle, *Dav. Rae. Clerk, Justice*.
D. R. *Fol. Dic. v. 4. p. 168. Fac. Col. No 207. p. 370.*

S E C T. II.

In what cases a Private Deed not probative against the Heir.

No 472.
Found that a
bastard could
not prejudge

1623. December 9. & 10. — against ALEXANDER.

THE donator of the bastardy of George Hill pursued the defunct's debtor to pay to him the sum of 100 merks, which he was obliged by bond to pay to the