

1765. November 14.

JAMES HILL of Inchmichael, *against* JAMES HUNTER and JOHN HILL, Tutors to AGNES HILL, and MARGARET HUNTER, Widow of CHARLES HILL.

In 1757, a contract of marriage was entered into between Charles Hill and his father John Hill, tenant in Balrudrie, on the one part, and Margaret Hunter and her father James Hunter, on the other part.

By this contract, James Hunter became bound to pay Charles Hill, his heirs, executors, or assignees, the sum of £.1000 Scots as Margaret Hunter's tocher. "For the which causes, Charles Hill binds and obliges him, his heirs, executors, and intronitters with his goods and gear whatsoever, to ware and employ the sum of 3,000 merks Scots, upon good and sufficient security for annual-rent, to be provided to himself and the said Margaret Hunter, and longest liver of them two, in conjunct fee and life-rent, for the said Margaret Hunter her life-rent use allenarly, and to the child or children to be procreated of this marriage in fee; whom failing, to the said Charles Hill, his own nearest heirs, or assignees whatsoever in fee, and to take the writs and securities of the said 3,000 merks, conceived in the terms foresaid."

There are other provisions made in favours of the bride, in the event of her surviving her intended husband; and it is declared, that the foresaid provisions shall be in full satisfaction to Margaret Hunter of her terce, and third of moveables; and to the children of the marriage, of their legitim, and bairns part of gear.

John Hill, the bridegroom's father, in contemplation of this marriage, assigned his farm of Balrudrie and stocking, in favours of Charles Hill, his heirs, executors, or assignees, in consideration of which, Charles discharged his father of every claim, either legal or conventional; and the contract concludes with the following clause: "And, *lastly*, it is agreed, of consent of parties, that all execution necessary shall pass upon this present contract, at the instance of the said James Hunter and Charles Hunter his son, and James Hill of Inchmichael, or any of them; and failing of them, at the instance of their heirs, or the heirs of any one of them, for seeing the provisions made in favour of the said Margaret Hunter, and the children of the marriage, implemented, after the form and tenor of this contract in all points."

The marriage was solemnized, and of it there was one child, Agnes.

Charles Hill increased his original stock, but did not lend out the 3,000 merks in terms of the marriage-contract; and, in 1760, he executed a deed, whereby he disposed to Margaret Hunter his wife, and Agnes Hill his only child, equally betwixt them, and, failing Agnes Hill before majority or marriage, without heirs of her body, to Margaret Hunter, her heirs, executors, or assignees, his whole means and effects, with the burden of his debts, and a small annuity to his father and mother, and then follows this clause: "And further, providing and declaring

No. 80.

Whether persons, at whose instance it is provided by a marriage-contract that execution shall pass, have a title to insist in an action, after the death of the husband, for having the provisions of the marriage contract implemented?

No. 80. hereby, that in case of the death of my said daughter before majority or marriage, without heirs of her body as said is, and that the whole of my means and effects shall, in that event, fall and accresce to my said spouse, then, and in that case, I hereby burden and oblige her and her foresaids to content and pay to my nearest in kin, at least to such of them as my said spouse shall think proper, £.1000 Scots, at the first term after the decease of Agnes Hill, with interest from the term of payment."

By the same deed, Margaret Hunter, the wife, is burdened with the aliment and education of her daughter, until she attain the age of 18; but, in consideration thereof, she is appointed to uplift the annual-rent of her daughter's share of the effects, until she attained the foresaid age of 18; and, by an after clause in the deed, Charles Hill nominated as tutors and curators to his daughter, Margaret Hunter his wife, James Hunter his father-in-law, John Hill younger, and James Hill, both in Inchmichael, his brothers, Alexander Miller, and Robert Hunter, the husbands of his two sisters; and declared the major part of them accepting to be a quorum.

Charles Hill died in two days after executing this deed. The subjects belonging to him at the time of his death were, his plenishing, his lease, and stocking of his farm, of which James Hunter the grandfather of Agnes Hill, and John Hill her father's brother, two of the tutors nominated, after applying to the other tutors named, but who declined to act, took up inventories, and entrusted Margaret Hunter the widow with the management of the farm, and she having afterwards married another husband, the tutors disposed of the farm, and roused the stocking, and made a division of the proceeds between the widow and daughter, in terms of Charles Hill's settlement 1760; and afterwards tutorial inventories were made up.

James Hill, the immediate elder brother of Charles, and his heir both of line and conquest, failing the daughter Agnes, took no management as tutor in his niece's affairs, but in character of one of the persons, at whose instance it was provided execution should pass upon the marriage-contract, after the widow's marriage, brought an action against her, libelling upon the marriage-contract, particularly the clause for employing the 3,000 merks on security, for behoof of the widow in life-rent, and children in fee, whom failing, to Charles Hill, his nearest heirs or assignees; and concluding, that Margaret Hunter should be decerned as intromitter with Charles Hill's effects, "To provide and employ the said sum of 3,000 merks to herself in life-rent, and to the said Agnes Hill, the only child of the marriage, in fee; whom failing, to the nearest heirs whatsoever of the said Charles Hill in fee."

This action was brought before the Sheriff of Perthshire; but, after some proceedings, was removed into this Court by advocation. Margaret Hunter appeared as a defender. James Hunter and John Hill, the two accepting tutors, also appeared for their pupil Agnes Hill, and disclaimed the pursuer's process, and concurred with Margaret Hunter in her defences, and objected to the title of the pursuer to insist in such an action. The cause came before Lord Barjarg as

Ordinary, who, at first, sustained the pursuer's title; but afterwards made *avisandum* to the Court, and ordered informations.

Pleaded for the defenders: The pursuer has no title to insist in this action. The intention of providing by a marriage-contract that execution shall pass at the instance of certain persons, is, that a husband may be compelled to fulfil his obligations to his wife, while under coverture, and a father to his children, while the *patria potestas* subsists. Were it not for this clause of execution, a man might neglect to infest his wife in her jointure, and thereby suffer his other creditors, though posterior, to obtain a preference over his estate, or he might squander his substance, and leave his children destitute, although, by his marriage-contract, he was bound to infest his wife in a jointure, and grant provisions to his children. An obligation to grant infestment or provisions, points out a legal remedy, an action of implement; but this is a remedy a wife cannot properly use against her husband, nor children against their father. The clause of execution points out the proper persons by whom this legal remedy may be made effectual. Persons, who are the friends of both parties, and will not, without necessity, insist for explicit implement to the prejudice of the husband, nor permit the obligation to remain unperformed, to the prejudice of the wife and children; but, on the husband's death, the cause ceases which rendered such interposition necessary; the obligation, if not performed by the husband, remains as a debt upon his representatives; his wife, and his children, have *personam standi*. The wife always, the children when of age, may sue for implement in their own name; and, if the children are under age, the tutors, curators, or administrators in law, may sue in their name.

By the deed 1760, the pursuer was nominated, with others, as tutor to the only child of the marriage; he neglects the office of tutor, and, in character of one of the trustees by that marriage-contract, appears not only in opposition to Margaret Hunter, the widow of his brother, but also in opposition to John Hill, one of the accepting tutors, and to James Hunter, the father of Margaret, and grandfather to the child, the other accepting tutor, and also a trustee for the execution of the marriage-contract; and insists to have that money laid out for the pupil, which is already in the hands of the pupil's tutors, legally invested in that office, which the pursuer might have shared with them, had he inclined. He pretends to act for the infant; but they are the persons whom the father of the infant, and the law, intrusted with that office: If they fail in their duty, they may be removed as suspect; but, while their office subsists, no one has a right to act for their pupil independent of them.

When a husband and father, who is bound to lend out money, in his marriage-contract, for behoof of his wife and children, dies prior to his so lending it out, the obligation to provide does in effect fly off, or, more properly, is converted into an obligation of debt, capable of an immediate action for payment and satisfaction, without the intervention of any person named in the contract to sue for execution. If the money, in this case, had been lent out in terms of the contract, the wife

No. 80. would have had immediate access to the annual-rents, but the children could have no right to the fee, until served heirs of provision ; but, when the money is not lent out, the *jus crediti*, and right of action against the father's representatives, vests in the children, and transmits to their successors, without the necessity of their being served heirs on the marriage-contract, as has been determined in many cases ; PROVISION TO HEIRS AND CHILDREN, Sect. 6. Mrs. Porterfield against John Gray, 9th December, 1760, No. 32. p. 12874 ; therefore, if any action was competent to this pursuer, it must be an action to force payment to the pupil, and not an action to force implement of the marriage-contract, by lending out the money, which is inept, and tends directly to divest the pupil of a right already vested in her ; for, if the money is lent out, in terms of the contract, a service would be necessary to vest the right in Agnes Hill. The nomination of persons in a marriage-contract, at whose instance execution may pass, is determined by the death of the husband and father, and such has been the universal understanding of the nation ; for no instance will be found of any action carried on by a person, named in a marriage-contract, suing for implement against the representatives of the husband, after his decease.

Answered for the pursuer : The defenders have affected to consider the nomination of persons in a marriage-contract, at whose instance execution is to pass, as a device calculated for obtaining justice to wives, while under coverture, and children *sub patria potestate* : But such nominations ought not to be viewed in so limited a light. Children *sub patria potestate*, and wives under coverture, may compel execution of the obligations due to them from their parents and husbands. Curators *ad lites* will be named by the Court, who may as effectually procure justice, as a person authorised by a contract to sue for execution ; and many instances have occurred of such actions ; it is not, therefore, necessary for obtaining justice to wives under coverture or children *sub potestate*, that such nominations in marriage-contracts should be made. Such nomination may be expedient for them, but is not necessary ; and it may be equally expedient for them, in other situations. An infant, after the death of its father, is in as helpless a situation as during his life. It is not *sub patria potestate*, but is as unable to procure justice as if it was. If it has no tutor, nothing can be done for it. If it has, in all probability, the tutors are of the choice and nomination of the father ; and, therefore, if the father was disposed to frustrate the provisions of the marriage-contract in favours of his children, no reliance can be had on tutors named by him. And no good reason can be assigned why the same remedy that had been provided against the father, should not be effectual against the tutors named by him, if they should act in such a manner as to make it proper to make use of that remedy. There is nothing in the words of the marriage contract to limit the powers of those authorised to sue for execution to the lifetime of the father only ; neither do any principles of law require such limitation ; on the contrary, agreeable to the general rules of law, the powers to put a deed in execution, must extend to every case where execution is competent. The obligation, in the contract of marriage, is not personal to Charles Hill the husband, but transmits

against his heirs, executors, and intromitters with his effects; therefore, the heirs and successors of Charles Hill were as much bound by the contract as himself, and the obligation as valid against them after his death, as it was against him while alive; and that being the case, an action for execution must be competent after his death, as it would be absurd that the obligation should subsist without its being practicable to force execution of it against the heirs, &c. in the same manner as could have been done against Charles Hill himself while alive.

The defenders argued, that, if such action is competent, it can only proceed at the instance of the tutors, who are by law invested with the exclusive right of carrying on actions for behoof of their pupil; but such argument would resolve into this: That at no time was an action, such as the present, competent. A father is as much entitled to the administration of the affairs of his child while under age, as a tutor is after his death; he, therefore, is intitled to sue all actions in the name of his children, and has as good a claim to an exclusive title, in this respect, as a tutor. Hence, with equal propriety, it might be argued, that during his lifetime, the pursuer could not have insisted in such action as the present; yet no intention could have been paid to such a plea in the lifetime of the father, being directly in opposition to the terms of the contract; and, as such action must have been competent, during his father's life, it must now be so against the intromitters with his effects, against whom the obligation in the contract must be effectual.

It has been said, that, if any action was competent at the pursuer's instance, after the death of Charles Hill, it was an action for payment, but the terms of the obligation, in the contract of marriage, stand in direct opposition to such an argument. By the contract, Charles Hill binds himself, his heirs, &c. not to pay a sum, but *ad factum præstandum*, to secure a certain sum of money in a particular manner. It is admitted, that, during Charles Hill's lifetime, he could have been compelled to employ that sum, in terms of the contract; and, as the obligation in the contract must be effectual against his heirs, executors, and intromitters with his effects, agreeable to the express words of the contract; of consequence, the present action must be as competent against them, as it would have been against Charles Hill himself, had he been now alive; and, it is clearly for the interest of Agnes Hill the pupil, that the money should be secured in terms of the contract, which will prevent its being dilapidated or wasted by mismanagement.

The Lords sustained the pursuer's title, and found that the defenders were bound to lay out the 3000 merks, in terms of the contract of marriage."

And adhered on advising a reclaiming petition, with answers.

For the pursuer, *Andrew Crosbie, and William M'Kenzie.*

For the defenders, *James Montgomery, and David Dalrymple, jun.*

A. E.

*Fac. Coll. No. 19. p. 231.*