

Case 110. Margaret, Agnes, Mary, Marion, and Janet  
Kennedies, Heirs Portioners of the de-  
ceased Alexander Kennedy, of Glenour,  
their Brother, and their respective Hus-  
bands for their Interests, - - - *Appellants* ;  
Alexander Macdowall, of Garthland, - *Respondent*.

13th April 1724.

*Writ.*—A bond reduced as vitiated, where after the sum the word “ Pounds”  
was written upon an erasure, and the penalty was in merks, *effeiring* to a  
fifth part of the principal if it had been merks, but not if pounds, as it  
stood on the bond as claimed on. This bond had been allowed, as it then  
stood, for a compensation in an action, between the father of the persons  
founding on it, and a third party, upwards of thirty years before, but was  
not then produced.

*Costs and Expences.*—An affirmance, with 20*l.* costs to the respondent.

**T**HE late John Kennedy of Glenour deceased, the father of the  
appellants, being indebted to one Robert Linn in the sum of  
2500 merks, on the 24th of April 1672, granted a bond for that  
sum, blank in the creditor’s name, as was then customary in  
Scotland. And in 1682, the father of the appellants became  
further indebted to this Linn, in the sum of 1420 merks, for  
which he granted three several bonds to Linn.

It appears, too, that on the 20th of August 1674, Linn had  
executed a bond in favour of the appellant’s father: whether or  
not this was an existing bond, and whether or not it had been  
vitiating in the sum, is the subject of the present appeal.

Robert Linn died in 1683, leaving three children under age,  
and the respondent’s father, one of their tutors and curators. In  
1684, the children were confirmed executors to their father, and  
gave in an inventory bearing to be of the whole effects, and debts  
belonging to him, and also of the debts owing by him; and in this  
inventory no mention is made of the bond granted by Linn, to the  
appellant’s father in August 1674: in this confirmation, the ap-  
pellant’s father became cautioner for the executors.

In a short time after Linn’s death, one Captain Mac Culloch, a  
creditor of the deceased, in the sum of 7000 merks, arrested in  
the hands of the appellant’s father, and of another person in-  
debted to Linn, all sums owing by them; and afterwards brought  
an action of forthcoming against them in the Court of Ses-  
sion; in which (the appellants mention) Linn’s children were  
called as parties; but (the respondent states,) the minors did  
not appear. In that action the appellants father appeared by  
his counsel, and gave in a declaration signed by him, bearing that  
he was debtor to the deceased Robert Linn, in the four bonds  
above mentioned, except in so far as the said Robert Linn was  
debtor to him, by the said bond of the 20th of August 1674,  
which he stated to be for 1730*l.* Scots, with interest from the  
date;

date: this bond itself was not then produced, but Captain Mac Culloch in February 1685, took a decree against the appellants father for the balance, being 2041 merks, of the said four bonds, after deduction of the bond of August 1674.

After this period the said bond for 2500 merks was sued to execution by the children of Robert Linn, and their curator; and the appellants' father was thrown into gaol, where he continued a considerable time, and at last, with the assistance of a mob, broke prison about the year 1690: but no satisfaction of the debt was obtained.

The respondent in 1721, obtained the said four bonds, granted by the appellants' father to be conveyed to him, and brought an action thereupon in 1721, against the appellants as heirs or executors of their father before the Court of Session. In this action the appellants appeared and made defences, that these bonds were extinguished by compensation and payment of the balance to Mac Culloch in 1685; and for proof of this they referred to the decree of forthcoming, and to the bond granted by Robert Linn to the father of the appellants. The respondent having got this original bond produced in Court, from the record in which it had been registered; insisted that the bond had not been produced in the former action, and that neither he, nor the persons who had assigned to him had appeared in that action, and that he could, therefore, still object to that bond's being allowed as a ground of compensation, to extinguish any of the bonds upon which he sued: he further objected, that the bond was prescribed, not having been sued for within 40 years; and likewise that it appeared to have been vitiated, the word *pounds* being superinduced, or put in place of the word *merks*, and that therefore the bond was entirely void.

The Court on the 19th of July 1723, after defences for the appellants "repelled the prescription and sustained the compensation, and also repelled the objection proposed against the bond."

The respondent reclaimed, setting forth that he had clearly discovered by the help of glasses, that the bond had originally been for the sum of 1730 merks, and that the word *pounds* had been put in place of the word *merks*, with a different hand and different ink, and that the penalty still remained only 300 merks, which was a proportionable penalty to 1730 *merks*; and, that the presumption was, that the amendment, or vitiation was done after executing, unless the respondents could prove that it was so done before delivery and by consent of parties. After answers for the appellants, the Court on the 26th of November 1723, "found the bond vitiated and therefore declared it null."

The appellants having reclaimed, the Court on the 20th of December 1723, after answers for the respondent, "refused the desire of the petition, and adhered to their former interlocutor annulling the bond."

The

Entered  
27 Jan.  
1723-4.

The appeal was brought from “two interlocutors of the Lords of Session, of the 26th of November, and 20th of December 1723.”

*Heads of the Appellants' Argument.*

The compensation upon this bond for 1730l. was allowed by the Lords of Session in 1685, in the action of forthcoming at the suit of John Mac Culloch; and the persons who had then right to these bonds, were parties to that action, and ought to be concluded by the decrees and orders then made, and not left at liberty to dispute the justice of them, especially after such a distance of time.

As to the objection now offered, that the bond is vitiated, if any alteration appears to have been made, it was certainly made before delivery, and by consent of parties; and for this the presumptions are very strong.

The respondent's father, who was tutor to Linn's children, made no objection against this bond in the action at the instance of John Mac Culloch, though he certainly knew that this bond was then set up by the appellants' father as a good bond for the sum of 1730l. and was by the Court of Session allowed of in discharge of so much of the debt due by the appellant's father to this Linn; and Patrick Linn the writer of, and a subscribing witness to this bond was then alive.

The respondent's father was so conscious, that this was a good bond for the said sum of 1730l., that he never pretended to sue upon either of the said three bonds granted by the appellants' father to Robert Linn: and when he sued upon the said blank bond for 2500 merks, he filled up his own name in the bond, thereby to prevent the appellants' father's plea of compensation.

Neither the respondent nor his father ever sued upon any of the bonds in question, so long as any person was alive, who could prove or direct how to prove, that there was any alteration made in this bond at the time of the delivery; so that it is probable that the respondent and his father knew of the objection made against this bond, and purposely delayed bringing their action till it were impossible for the appellants to find any proof of the transaction at the time the bond was executed.

Neither the respondent nor his father ever demanded so much as any part of the interest due upon all or any of these bonds, now sued on, though one of them is granted 50, and the rest 40 years ago; and if the profits of compound interest be considered, it is not probable that either the respondent or his father, would have willingly sustained such a loss.

It is no argument against the bond, that the penalty still remains the sum of 300 merks. Penalties do not always bear a certain proportion to the principal sum; and the appellants humbly think this to be a very strong argument against any fraudulent alteration of the bond; for if any such fraudulent alteration had

had been made, the person committing such fraud would certainly have turned merks into pounds in that place, as well as in the other parts of the bond.

The respondent himself acknowledges, that this bond was originally for 1730 merks; therefore, granting that these *merks* had been fraudulently altered and made *pounds* by the appellant's father, the declaring it entirely void, is punishing the appellants most severely for a fault they were not privy to, and the punishment is the more grievous to them, in respect they are thereby stripped of their all.

*Heads of the Respondent's Argument.*

The bond in question can be the foundation of no claim or suit; in the form it now appears it certainly was not the deed of Robert Linn: the writing bears Robert Linn to have borrowed and received from the said John Kennedy the sum of 1730 merks, and then there is a hole in the paper seeming to be purposely worn out, and the letter "d" is written with fresh ink upon the side of the tearing to make it be believed that the word "pounds" had been there written.—And in the clause obliging to repay the money are these words "which sum of one thousand seven hundred and thirty," and then there is a blank not sufficient to have contained the word "pounds," and therefore those who made the vitiation, and inserted the word pounds have been obliged to run one half of the word above the line, so as to make an interlineation, and the straight part of the line below "pounds" still remains blank.—And this vitiation appears plain, and did so appear to the judges below; nor is it any objection, that is not obvious to every eye without the help of glasses; when deeds are falsified care is generally taken to do it in the most artful way.

The penalty on default of payment inserted in the bond is 300 merks, which according to the custom in Scotland, is a penalty suitable to 1730 merks, but no way suitable to 1730*l.*, nor is it usual to insert a penalty but in money of the same denomination with the principal sum.—A deed vitiated or falsified can have no credit at all in judgment; it is not the deed executed by the party; and no man or his heirs can be sued upon a deed not executed by him.—After the vitiation of a bond it is entirely uncertain what word or sum was originally inserted in it, or if any sum was mentioned in it.

But even supposing this bond were not so apparently vitiated, yet it must be presumed, that it had never been fully executed or delivered. For though it be dated in 1674, no suit has been brought or demand made upon it against Robert Linn, the pretended debtor, or his heirs to this day. And John Kennedy having been debtor to Robert Linn by bond, for a sum which with the interest exceeded the sum in this bond, at the time it is pretended to have been executed, there was no good reason why Robert Linn should have granted this bond, and not rather imputed the money towards satisfaction of the debt owing to him, and given John Kennedy an acquittance. And it is equally unrea-  
sonable

sonable to believe that John Kennedy would have executed the other to Robert Linn in 1682, if this bond had been then owing to Kennedy, without making any mention of it.

In 1684 Robert Linn's children were confirmed executors to him, and an inventory was given up not only of the debts, and assets of the said Robert Linn, but also of the debts owing by him; and, at taking out such confirmation John Kennedy became cautioner for the executors; yet no mention was there made of any debt owing to him, which it cannot be supposed he would have omitted if there really had been any debt owing to him. In 1690, the bond upon which the respondent claims, was so far put to execution against John Kennedy himself, that he was put in prison, and continued there for a considerable time, without any mention of this pretended counter claim, which had it been a true debt, would have afforded him a good plea, and saved him from imprisonment.

With regard to Captain Mac Culloch's action of forthcoming, he was only a creditor to Robert Linn, and his heirs; he could not know the circumstances of their affairs, nor whether the bond was a true one or not. There remained after allowance of this bond as much of the sums he then sued for, as was sufficient to answer his demand, and therefore he did not trouble himself to enquire whether there was such a bond or not; the bond was not produced in the action, nor were the heirs of Robert Linn, then minors, appearing as parties in that suit.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed: And it is further ordered that the appellants do pay or cause to be paid to the respondent the sum of 20l. for his costs in respect of the said appeal.*

For Appellants,

C. Wearg.

Will. Hamilton.

For Respondent,

Ro. Dundas.

C. Talbot.

Judgment,  
13 April  
1724.