[12*th February* 1838.]

James Hamilton, Appellant.—*Attorney General* (*Campbell*)—*Stuart.*

John Wright and others, Trustees of the late Thomas Wright, Respondents.—*Sir William Follett*—*Dr. Lushington.*

Writ—Rei interventus—Cautioner.—1. A bond of annuity was granted by three parties, and the signature of one of them, A., was duly attested; while the signatures of the other two (B. and C.) were attested by two witnesses, but of whom one only was duly designed in the testing clause; thereafter, on the faith of the bond, the price of the annuity was paid to A., through the hands of B., as A.'s agent, or at least in B.'s presence, and with his knowledge: Held (affirming the judgment of the Court of Session), that B. was barred by rei interventus from objecting to the error in the testing clause; and that this was not affected by the circumstance that C. had died in the interim, and that the rei interventus did not extend to him.

1st Division.
Ld. Corehouse.

By a bond dated 10th December 1817, the Hon. Thomas Bowes, John Buchan, writer to the signet, and James Hamilton, Esq., of Kames, in consideration of the sum of 2,000*l.* instantly advanced and paid to them by Mr. John Telford, bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors

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whatsoever, to content and pay Mr. Telford, his heirs and assignees, by half-yearly payments, a free yearly annuity of 221*l.* 13*s.* 4*d.* during the life of the Hon. Thomas Bowes. The annuity was declared to be redeemable on repayment of the 2,000*l.*

The testing clause was in these terms:—" Subscribed " by the said Thomas Bowes, at Edinburgh, &c. before " these witnesses,—Alexander Anderson, printseller in " Edinburgh, and George Nelson, tenant in the county " of Bute, and by us the said John Buchan and " James Hamilton, at Edinburgh, the said 10th day of " December, a year aforesaid, before these witnesses,— " George Simson junior, writer in Edinburgh, and the " said Alexander Anderson." One of the two witnesses to the subscription of Mr. Buchan and Mr. Hamilton signed William Simson, while the testing clause took notice only of George Simson. It was not alleged that Mr. Hamilton derived any advantage from the annuity, which was expressly for the benefit of the Hon. Thomas Bowes, or that he acted in any other capacity than as agent for him. The price (2,000*l.*) was paid through the hands of the appellant, Mr. Hamilton, or at least in his presence, to Mr. Bowes.

The annuity never was redeemed, but continued to be paid for many years through the appellant to Mr. Telford.

In 1822 Mr. Telford assigned the bond of annuity to Mr. Thomas Wright of Glenny, who is now represented by the respondents.

In 1832 the bond was registered by the trustees of Mr. Wright, and a charge was given to the appellant for the arrears of the annuity at and since Martinmas 1822.

Previously to this charge being given, letters of horning had been raised against Mr. Bowes, who had become Earl of Strathmore, on the bond of annuity, who having disobeyed the charge was denounced; and Mr. John Buchan, the other co-obligant in the bond, had died in bankrupt circumstances, unrepresented by any heir or successor under a lucrative title.

Mr. Hamilton presented a bill of suspension, alleging that the bond was a nullity as to him, on the ground that his signature was unattested, there being no such witness as the subscriber William Simpson mentioned in the testing clause; and he instituted an action for the reduction of the bond, which was conjoined with the suspension. The respondents also raised an ordinary action against Mr. Hamilton, concluding for payment of the arrears on the bond of annuity; and all these actions were conjoined.

The Lord Ordinary, on the 12th of May 1835, pronounced the following interlocutor: "Finds, that James "Hamilton, pursuer of the reduction, is barred, rei "interventu, from objecting to the error in the testing "clause of the bond of annuity libelled on; repels the "reasons of reduction; assoilzies the defenders from "the conclusions of that action, and decerns; and in "the ordinary action and suspension appoints counsel "to be further heard.

"Note.—It is clear that the bond of annuity, in so "far as Mr. Hamilton was an obligant, was originally "improbative, in consequence of the mistake as to the "witness's names in the testing clause, and he would "have been entitled to avail himself of that mistake, "although he acknowledged his own subscription, if "things had remained entire. But the price of the

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" annuity was paid to Lord Strathmore on the faith of " Mr. Hamilton's engagement, and Mr. Hamilton was " aware of that fact, as appears from his books as well " as his admissions in the record. As agent for Lord " Strathmore, he negotiated the transaction, and, if he " did not receive the price into his own hands, was " present when it was paid over to Lord Strathmore, " or to others for his Lordship's behoof. Further, for " a long period he was the person from whom the " annuitant received the termly payments of the " annuity. Being jointly bound with Lord Strath- " more, it is of no consequence whether the money was " applied to his use or to that of his co-obligant; for to " constitute a rei interventus, it is not necessary that " the party against whom it is pleaded should derive " benefit from what has been done. It is enough if " the party who pleads it is placed in circumstances on " the faith of the agreement, by which his interest " would suffer if it were not implemented. Neither is " a rei interventus pleadable merely to supply a defect " in written evidence; it also bars locus pœnitentiæ, in " cases in which a party might otherwise competently " resile. The distinction so much dwelt upon in " Mr. Hamilton's case, between a contract for a loan " and for the purchase of an annuity, does not appear " to the Lord Ordinary to affect the question in any " respect. Both contracts are legal, and when regu- " larly entered into may be enforced, for it is settled " that usury cannot be pleaded against a contract for " an annuity, although the purchaser for his further " security should insure the seller's life. It may " further be remarked, that there can be no dispute " here as to the terms of the bargain, because the bond

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" which Mr. Hamilton subscribed as a co-obligant is " confessedly binding upon Lord Strathmore, the " testing clause, as it applies to his Lordship's sub- " scription, being perfectly correct."

Against this interlocutor the appellant reclaimed to the First Division of the Court, and their Lordships pronounced the following interlocutor on the 22d January 1836; " adhere to the interlocutor reclaimed against, " refuse the desire of the reclaiming note, and remit " the cause back to the Lord Ordinary, to proceed as " shall be just; find the suspender, James Hamilton, " liable in the expense of the proceedings since the " date of the Lord Ordinary's interlocutor, reserving " all questions as to any other expenses in the cause " for future discussion and determination; and remit " the account of the expenses found due, when lodged, " to the auditor of Court, to tax the same, and " report."[1]

Against these interlocutors the appellant brought the present appeal.

Appellant.—The bond not being executed in terms of the act 1681, c. 5. must be considered null and void, and incapable of supporting the charge given by the respondent. That act imperatively declares, " that " only subscribing witnesses in writs to be subscribed " by any party hereafter shall be probative, and not " the witnesses insert not subscribing; and that all " such writs to be subscribed hereafter, wherein the " writer and witnesses are not designed, shall be null, " and are not applicable by condescending upon the " writer or the designation of the writer and witnesses;"

[1] 14 D., B., & M., 323.

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and the Court have strictly adhered to the statute.[1] In the case of a formal and solemn deed the want of the statutory solemnities cannot be supplied, even by the admission of the subscriber himself.[2]

Even supposing it were law that a formal deed, null under the statute 1681, may be kept alive and supported by homologation,—it is clear that that homologation must be of the most unequivocal kind, and that there must be a decided rei interventus by the act of the obligant which may operate as a bar to his getting free of his obligation by re-establishing the contract against him.[3] But none such have been established against the appellant. Until it is proved that the appellant, by some act, confirmed and homologated the bond before or since he was aware of the nullity, the principle of rei interventus cannot be held applicable to this case.

Respondents.—The principle of rei interventus renders it incompetent to challenge the bond as informal, for the money was paid by the original creditor, and received by the appellant, and the other obligants, on the faith of that deed. It never was intended by the statute 1681, c. 5. to declare that when any solemnity was neglected, such writing was to be ipso jure null, in

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[1] Abercromby v. Innes, 15th June 1707, Dalrymple 104, Fountainhall 2. 381, Forbes 179, Mor. 17022-3-4; Douglas v. Clerk, 28th Nov. 1787, Fac. Coll. 10, 11. No. 6. Mor, 16908; Archibald v. Marshall, 17th Nov. 1787, Mor. 16907.

[2] Gordon v. M'Pherson, 1686; Harcase 47. No. 207. Mor. 17021. Logie v. Ferguson, 4th Jan. 1710, Mor. 71620; Shiel v. Crosbie, 4th July 1739, Morr. 17032; Park v. M'Kenzie, 29th Nov. 1764, Morr. 8449; Rolland v. Rolland, 1st July 1767, Morr. 16857; Macfarlane v. Grieve, 22d March 1790, Morr. 8459.

[3] Erskine, b. iii. id. 3. sec. 48; Freswick v. Sinclair of Duntreath, 17th Feb. 1715, Mor. 5654; Liddell v. Dick, 20th July 1744; Elchies Homol.. No. 1.

the same way as if no such deed had ever been granted, but only to afford an exception or ground of reduction which the party might voluntarily pass from, or which might be elided by homologation.[1]

LORD CHANCELLOR.—My Lords, it is not my intention to move your Lordships finally to dispose of this case to-day, because two or three cases have been cited in the course of the argument, and referred to on both sides, which I have not had an opportunity of examining in the original reports, and I am anxious to have an opportunity of doing so before your Lordships finally dispose of the case; but unless, my Lords, upon examining those cases, the opinion which I have now formed and entertained is materially altered, I have no doubt as to the course which I shall recommend to your Lordships to pursue; and therefore, unless I have my opinion on the inspection of these cases materially altered, I shall not again trouble your Lordships on the subject. I will therefore now state to your Lordships how this case strikes my mind.

My Lords, by an annuity bond three parties became

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[1] *Authorities.*—Freswick v. Sinclair, 17th Feb. 1715 (5654); Tailfor v. Hamilton, 21st Jan. 1735 (5657); Earl of Fife v. Sir James Duff, 22d Dec. 1825, Shaw, vol. iv. p. 340; Beattie v. Lambie, 26th Dec. 1695 (17021); Milliken v. Foggo, 20th Dec. 1746 (16979); Auchinlack, 26th Nov. 1580 (12382); Deuchar, 19th Jan. 1672 (12387); Bell, 13th Nov. 1812 (F. C.); Smith, 25th Jan. 1821, 2 Shaw's Appeal Cases, 272; Crawford, 16th Jan. 1739 (9979); Niel, 28th June 1748 (10406 & 16981); Brown, 25th Nov. 1794 (17058); Sinclair, 3d Feb. 1795, Bell's Cases, (folio,) No. 59; Brebner, 18th Jan. 1803 (17060); Henderson, 5th Dec. 1765 (16986); Dunmore Coal Co., 1st Feb. 1811 (Fac. Coll.); Tweedie, 6th June 1823 (2 S. & D., p. 361, new ed. 321); Grant, 8th Feb. 1827 (5 S. & D., p. 317); M'Neil, 21st Jan. 1825 (3 S. & D., p. 459, new ed. 319); Laidlaw, 31st May 1826 (4 S. & D., p. 636, new ed. 644); Wilson, 3d March 1830, (8 S., D., & B., p. 625.)

bound for the payment of an annuity: Thomas Bowes, —who is stated to be the principal party, and who no doubt was the principal party for whose benefit the 2000*l.* was advanced, and therefore who was no doubt, as between himself and the other co-obligors, the principal party who ought to pay the annuity,—as between the grantee of the annuity and the party who advanced the 2000*l.*, those who have become bound to him were Thomas Bowes himself, John Buchan, and James Hamilton, the party who now disputes the liability upon that bond.

My Lords, it appears that in consequence of an informality in the attesting clause of that bond, under the provisions of the statute of 1681, it was not an instrument which, according to the provisions of that Act, would bind the obligant, James Hamilton.

My Lords, it appears that a great many years elapsed during which James Hamilton was not called upon on this bond; but probably the obligee, or those who stood in the place of the annuitant, not being able to obtain the payment of the annuity from other quarters, applied for and issued a process of horning against that James Hamilton, upon the supposition that the bond was formal, and that they had a right to issue that process according to the law of Scotland. Now, my Lords, the attestation of that bond not being under the provisions of the act of 1681, the parties were entitled to the benefit of that bond in another course of proceeding, but were not entitled to issue that process, and have the benefit of that process, and therefore that process has been suspended; and that process, so suspended, is one of the proceedings now in progress in the Court of Session.

My Lords, James Hamilton, being called upon to pay this bond, institutes a proceeding for the purpose of having that instrument reduced, that is to say, that he might be exonerated from any obligation which might be enforced against him by having signed his name to that document. The party claiming the benefit of the annuity here, and who stands in the place of the obligee, institutes another proceeding, by which he claims, independently of the question whether that bond was within the statute of 1681 or not, the benefit of the contract entered into by James Hamilton, in consequence of his having put his name to that instrument.

These, my Lords, are the three proceedings before the Court of Session, and they are united into one proceeding by an interlocutory order of the Court of Session, which your Lordships have now to consider as an interlocutor upon those proceedings by which James Hamilton sought to be relieved from this bond.

The ground upon which that claim on the part of James Hamilton is resisted is, not that the bond is attested according to the provisions of the act of 1681, for it is quite clear it was not so, but that such transactions took place under that instrument as precluded Hamilton from availing himself of that objection.

My Lords, a rule exists in the law of Scotland, and in the law of England there is another rule which is very similar, that although a party may not have been originally bound by law by the transaction which took place, yet if he has so conducted himself as to homologate the bond he shall not be permitted to take advantage of that objection, for if he were the instrument, instead of protecting the party from fraud, would be made an instrument of fraud itself.

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In our Courts of Equity, notwithstanding the statute of frauds would protect a party from being bound, unless by his act in writing, yet the party may so conduct himself as to be deprived of that benefit of setting up the protection of the statute, because his conduct may be such as to constitute a fraud in him in so insisting upon the provisions of the statute of frauds. There may be a case in which the party may partially perform the contract, and by so doing may put his opponent into a disadvantageous situation, owing to the confidence with which he entered into it, and Courts of Equity in such a case will not permit him to place his opponent in such a situation by taking advantage of the provisions of the statute.

Similar in principle appears to be the rule established by the law of Scotland, namely, that though instruments are not regular, or according to the provisions of the act, yet the party may so conduct himself as to make it unjust to take advantage of the objection; in which case it is not permitted to him to set up the provisions of the act; this is by homologation, which is more strictly applicable to this case than rei interventus.

Then, my Lords, it has been contended at your Lordships bar, which is not a point raised on the papers or in the reasons assigned by the case, that in the case of an instrument which is void under the act of 1681 that rule cannot be applied; and it cannot be objected to in respect of an instrument sought to be reduced, that the party has homologated it, or that there is that state of rei interventus which in other cases would prevent him from raising the objection.

I have endeavoured to find authorities in support of this position, but instead of that I find conclusive

authorities, which have been quoted at the bar, which show the contrary. What is the rule according to the laws of Scotland? I find in 2d Erskine, page 619, it is there stated, " A question hath been mooted whether " deeds intrinsically null can receive strength or validity " by homologation; as to this the following distinction " may perhaps be received." Then, my Lords, he goes on to state, the cases of persons naturally incapable as idiots, and so on, and then he proceeds, " for though " it be declared by several statutes that deeds destitute " of the written solemnities are null, that they cannot " be supported by any condescendence, and that they " shall bear no faith in judgment, these enactments " are made merely in favour of the grantor, that he may " the better be secured against the consequences of for- " gery, if they cannot be so interpreted as to deprive him " of the power of supplying the defect himself, quilibet " enim jure per se introducto remanere potest.

" Where the act of homologation is itself invalid the " defect of the original deed can thereby be supplied;" and then he goes on to discuss other matters.

My Lords, it is clearly laid down, and is not qualified by other cases which I have heard cited at your Lordships bar, that the effect of the statute making the instruments void must be subject to proofs of homologation, and a party may have placed himself in such a situation, as not to be permitted to take advantage of the provisions of the statute. That being so, my Lords, the only question is, whether that which has taken place in this case be that species of rei interventus which could prevent the party taking advantage of the provisions of the statute. Now, my Lords, in reference to the respondent's case, I find that rule not only laid

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down in the opinions delivered by the learned judges who decided that case, but accurately expressed in the words used by the Lord Ordinary. His Lordship says, "It is enough if the party who pleads it" (that is, rei interventus,) "is placed in circumstances on the faith "of the agreement by which his interest would suffer "if it were not implemented."

My Lords, this is very consistent with what is laid down in the case of Moodey v. Moodey, (in the Dictionary of Decisions, 419,) in which one of the grounds of decision is thus stated, "that the rule by which it is to be "judged is, whether there is a res integra or whether "there is a rei interventus, so as to exclude the locus "pœnitentiæ." It has been laid down certainly that where any thing has happened on the faith of a verbal agreement, and the parties put themselves in the same situation wilfully, there is no locus pœnitentiæ; and cases are quoted in which the party relying upon a verbal promise not binding according to the law of Scotland has been nevertheless held to the performance of his promise, and not entitled therefore to set up the legal invalidity of the instrument.

Now, my Lords, what has taken place between the parties here? Not at all referring to a part of the case which appears to be a mistake, there is no evidence of the fact of Hamilton paying the annuity; but we have the important fact established,—for it is not disputed between the parties, though not strictly proved,—that he personally received the 2,000*l.* Of that fact, my Lords, there can be no doubt, for we have his own account set out in the appellant's case, in which he charges himself with receiving 2,000*l.* from Mr. Jamieson, who was the individual who was to pay it; and he goes on and

discharges himself by various payments for Mr. Bowes; amongst others, by a payment to the same Mr. Jamieson of a charge for preparing the bond. My Lords, it is not at all material to consider whether there is evidence of Hamilton having received the money to his own use, —if he has received the money, having become the hand which actually received the money from the party now claiming the benefit of the obligation; and I think your Lordships will not have much difficulty in coming to the conclusion that there is evidence that such was the fact.

My Lords, it is beyond all question that the money was paid. It appears that the money was paid to Mr. Hamilton. It appears that he put his name, that he became a co-obligor for the purpose of inducing the party who had the 2,000*l.* to advance it, and that the 2,000*l.* was advanced on the faith of that bond. The definition of that which is necessary to constitute rei interventus is not the benefit which the one party may have received, but the injury to which the other party may be exposed by his conduct if that contract is not held to be binding. It is stated that there is no evidence of his having paid the annuity; that which constitutes the injury to the party is not the receiving back the purchase money, but the inducing the lender to part with the 2,000*l.* as a consideration for the annuity. That would, I apprehend, add very little to the strength of the case, except as evidence that he knew what was going on. It would not aggravate the injury suffered by the party who parted with the 2,000*l.* that he received part of it back again. Therefore, my Lords, this case comes within the definition, not only as it was laid down by the Court of Session in giving judgment in this particular case, but it comes also

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directly within the definition in the case of Moodey v. Moodey, and that which is to be found in page 608 of Erskine, where he says, that paying part of the purchase money is considered sufficient to prevent the party from setting up the annuity under the statute; that that is a sufficient rei interventus.

My Lords, in some of the cases which have been referred to at the bar it is so laid down. In Sinclair v. Sinclair the fact charged was payment of part of the purchase money, and it was held that payment of part of the purchase money was sufficient to defeat the omission of some of the statutory solemnities. My Lords, there is no authority the other way; there has been no case cited to show that payment of part of the purchase money is not sufficient to raise the question of rei interventus according to the law of Scotland. I was the more anxious to ascertain this, because I was aware that it has been a question of doubt in the law of this country, whether in these cases of part performance the paying of part of the purchase money was such a part performance as to take the contract out of the statute. I was anxious to find whether such a doubt existed in Scotland, and I find there does not; on the contrary, in all the cases that have been referred to it has been held that part payment of the purchase money is a sufficient part performance,—that which we in this country call a part performance, and which in Scotland they call rei interventus,—to preclude the party to the transaction from setting up the statutory infirmity of the contract, on the faith of which the purchase money was obtained.

Under these circumstances, my Lords, unless I find in looking into the other cases, which I have not yet had

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an opportunity of examining, that my view of this case is very materially altered, I propose on Monday next to move your Lordships to affirm the order of the Court of Session.

LORD CHANCELLOR.—My Lords, in this case I have taken an opportunity of referring to one or two of those cases which I had not before had an opportunity of examining. That examination has not only not altered the opinion I have expressed to your Lordships, but it has confirmed it in every point; and therefore I have no difficulty in advising your Lordships to affirm the interlocutor complained of; and as it is a question between debtor and creditor, and an appeal from the unanimous decision of the Court below, I should propose in this case to your Lordships to affirm the interlocutor with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That, unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANE & DUNLOP—RICHARDSON & CONNELL, Solicitors.