

## S E C T. XIX.

*Surrogatum.*

1668. December 11. SCOT against AYTON.

## No 114.

The wife's father having taken a discharge of the tocher, upon the narrative of payment; and of the same date having granted an heritable bond to the husband, bearing to be in place of the tocher, and the wife predeceasing within year and day, her heir claimed the heritable bond, as coming in place of the tocher. Her executor contended, that the tocher was discharged, and no longer subsisting; that the heritable bond belonged to the husband *jure proprio*; and that he was only bound to repay the tocher, which, being moveable, belonged to the executor, which was at first found, but not finally decided.

MR JAMES AYTON having disposed the lands of Grange with the burden of 12,000 merks to be paid to his daughters, John Scot having married one of the daughters, in their contract of marriage, the daughter, Anna Ayton, assigns her part of the 12,000 merks to her future spouse, and in the same contract he acknowledgeth the receipt of the money from Mr Robert Ayton the debtor; and therefore, with consent of the said Anna, discharges the said Mr Robert by a contract of the same date, betwixt John Scot and Mr Robert, relating the contract of marriage, but acknowledges there were no sums paid for the discharge contained in the said contract, but that the security contained in this contract was granted therefor; and therefore he gives a new heritable security to John Scot. The marriage dissolves within year and day, by the death of the said Anna, without children; she in her testament names the said John Scot, her husband, her executor and universal legatar. George Scot, as representing his father, pursues Ayton of Inchdornie, as representing his father, for the sum contained in the contract, who *alleged* absolvitor, because the pursuer's, and her father's right flowing from the marriage, and it dissolving within year and day, his right ceaseth; and farther *alleged*, that all things were now in the same condition as before the marriage, so that the contract of marriage was void, and the discharge granted in the first security was void; and the first security being heritable, belongs to Anna's executors, from whom the defender has right by assignation. The pursuer *answered*, That the defence is noways relevant; because, though the marriage dissolved within year and day, and that thereby the tocher and jointure became void, yet what was acted in relation to Mr Robert Ayton, who was a third party, viz. the discharge and renunciation of the first security, stands valid as to him; for, if the lands burdened had been sold to any other, that burden being once discharged and renounced, could never affect them; so that whatever is in a contract matrimonial, extrinsic and relating to third parties, is valid, and the acknowledgement of the money contained in the contract, is at least *acceptilatio*, which extinguisheth the first security in the same way as if real payment had been made; in place of which payment standeth the new security granted to the husband; so that now there is neither *debitum* nor *creditum* betwixt Anna Ayton and umquhile Mr Robert Ayton, or their representatives; but, by the dissolution of the marriage, the husband and his heirs become liable to pay the tocher, but not to the wife's heirs, but to her executors; for the tocher being paid or satisfied, and the old security taken

away, the husband's obligation to pay is clearly moveable, and so belongs to the pursuer as executor and universal legatar to his wife, and not to the wife's heirs, or the defender who has right from them. The defender *answered*, That the tocher never having been uplifted, but remaining in the same debtor's hands as before the marriage, *omnia redeunt in pristinum statum*, and the discharge granted to the debtor in contemplation of the marriage, is also void; so that if the husband had died and the wife survived, if she had pursued Mr Robert Ayton upon the first security, and if he had defended upon the discharge contained in the contract of marriage, he would have been excluded by this reply, that that discharge being granted in contemplation of the marriage, is now void by the dissolution thereof within year and day; especially seeing the debt yet remains in the debtor's hand. *2dly*, The defender *alleged* that the discharge, though it were valid, was not *habilis modus* to extinguish the first security, being a real right. *3dly*, That the new security granted to the husband being heritable, and the husband's right or interest therein ceasing, it accresceth to the wife, as if it had been granted to her; and so can only belong to the defender, as having right from her heirs, and not to the pursuer, as being her executor. The pursuer *answered*, That the first security was totally extinct by acceptilation, and by the discharge thereof granted to the debtor in the contract of marriage; and though the wife had survived and pursued the debtor, and he had excepted upon the discharge, her reply upon the dissolution of the marriage would not have been sustained to annul the discharge; because whatever might have been done, if the debtor could pretend no damage or interest, yet where the debtor had granted a new security to the husband, which could never be taken away without the discharge and renunciation of the husband's heirs, the debtor could never be decerned to pay the wife so long as the security to the husband stood; which security could never accresce to the wife, at least could never so accresce as to make it an heritable security to the wife, but she could only have right of repetition against the husband; and the question being here concerning the changing of the condition of a sum from heritable to moveable, as a requisition or charge during the marriage would have made the sum moveable, *multo magis*, an innovation and acceptilation by a discharge and new security; and whereas it was alleged that the discharge was not *habilis modus*, it was *answered* that this sum not being secured by an infestment of annualrent or wadset, but only by a provision, burdening another infestment of property with the sum, there needed no resignation, but the discharge and renunciation is sufficient.

THE LORDS found the first security to be wholly taken away by the discharge contained in the contract of marriage, which they found valid as being granted to a third party, notwithstanding of the dissolution of the marriage; and therefore found it to belong to the husband, as having right to the new security, and as executor to his wife, and not to the defender as having right from the heirs.

No 114.

\* \* Gosford reports the same case :

ANNA AYTON having right to the sum of 2400 merks, wherewith the lands of Overgrange were burdened in the disposition made to the Laird of Inchdairny, the said Anna, by contract of marriage, did assign the same to John Scot her husband, and they both did grant a receipt of the said sum from Inchdairny ; and, in place thereof, Inchdairny, by a new obligation, became bound to pay the same after the death of the liferenter. The marriage being dissolved by the death of the said Anna, within year and day, she did leave her husband her executor ; and Mr George Scot succeeding to him, did pursue the heir of Inchdairny for payment, who *alleged* that the sum craved being heritable, as said is, and being only made moveable by the said new security granted to John Scot as having right by a contract of marriage, the marriage being dissolved, that new security became extinct, and the sum being heritable before the contract of marriage, did belong to the heirs of the said Anna, and not to her executors ; likewise Inchdairny had satisfied the heirs, and had got an assignation from them. This allegiance was repelled, and the Lords found that the executor had right notwithstanding, because the said Anna and her husband had granted the receipt of the sum which was heritable, and taken a new security, albeit the dissolution of the marriage took away the husband's right, yet it did not take away the new bond given to the husband which was moveable, no more than if they had uplifted the sum due upon that heritable security and taken a new bond. This was done *me reclamante* upon this reason, that if the husband had died before the wife, the wife or her heirs, upon the first security, would have forced Inchdairny to pay that sum, and the husband's heirs or executors could not have competed as having right by the new bond ; and the sum not being truly paid but transacted as said is, they were not in the case as if the money had been truly uplifted. This cause being again heard, and the new security being found to be heritable, both parties submitted ; and so the whole business ended by a decret-arbitral.

Gosford, No 59. p. 21.

1703. December 31.

OLIPHANT *against* IRVING.

No 115.  
An heritable bond in a process before the Privy Council was proved to have been abstracted by the debtor, and he was decreed to pay the sum contained in

MR JOHN ADAMSON having right to an heritable bond due to his sister ; and the same being abstracted by Ogilvie of Newgrange, the debtor, he pursues him before the Privy Council for the riot, either to restore the bond, or to be liable in the damage ; whereupon the Council finding the libel proved, decern Newgrange for the sums contained in the bond, and which is there expressly designed an heritable bond. Adamson being debtor to William Oliphant merchant in Edinburgh, he serves an inhibition against him ; after which inhibition, Adamson assigns his decret and bond to Dr Irving. Oliphant raises a reduction of this assignation against Irving ; who *alleged, imo*, That damages being