

foresaid, as one of the debtors. He excepts, that *confusione tollebatur obligatio, eo ipso momento quo jus eschatæ erat ei devolutum et quæsitum*.

ANSWERED,—The debt became not extinct by confusion, unless the superior had declared the gift in his own name, for no sooner was the dominion of the escheat goods established in his person: before that, he has only *jus ad rem*, like an executor's right in the executry goods before a sentence. *Vide supra*, a pretty decision in *Mr Arthur Gordon's* case against *Irving of Drum*, on the 8th December, 1671, No. 288. And in gifting it, he should have specially reserved and excepted his own debt; like as if it had been extinct, yet it reconvalesced by the general assignation. Yet *quod semel mortuum est nequit iterum revivisci*. See anent the *Town of Edinburgh's* imposition upon the ale, and their getting up their contract anent it from the Lords of Session, in March, 1676; in another paper-book.

Advocates' MS. No. 647, § 3, folio 303.

1677. November 8. BARBARA GRANT against JANET CUTHBERT.

WHERE a bond is granted payable to a man and his wife, and the longest liver of them two; yet the Lords have several times found, and particularly in the case of *Gregorie Grant* and *Bailie Fraser*, that the husband, as *dominus bonorum*, is in the power and freedom to uplift and discharge without his wife, and that she has no right nor interest to quarrel the same. And yet, on the 8th of November, 1677, the Lords decided the contrary, in the case of *Barbara Grant*, relict of *William Neilson*, merchant in *Invernesse*, against *Janet Cuthbert*, relict of *Archibald Neilson*, son to the said *William*. The case was this:—*William Neilson* grants a bond for 400 merks to his son *Archibald*, and *Janet Cuthbert*, his future promised spouse, (before their marriage,) in liferent and conjunct fee, and to the heirs of the marriage in fee; *William*, in his testament, recommends to his wife, *Barbara Grant*, whom he names his executrix, to pay this sum. Accordingly, she actually pays it to her son *Archibald*, and recovers his discharge of it, but not the bond: therefore, after *Archibald's* death, she convenes *Janet Cuthbert*, his relict and executrix likewise confirmed to him, to exhibit and give her up that bond as satisfied and paid. The Commissary of *Inverness*, before whom it is pursued, decerns her to give it up. She suspends upon this reason, that the Commissary had committed iniquity in decerning her to give up that bond, upon the pretence that her husband had received payment thereof; because it being a bond granted by the father to his son, and to the suspender, his daughter-in-law, before her marriage, and being made payable to him and her in liferent and conjunct fee, and so she being provided to the liferent of it; the same could not be uplifted, discharged, nor disposed upon by the husband alone, neither ought she to be prejudged by their collusion; and the charger was *in mala fide* to pay it to the husband, without she had seen it re-employed.

Whereunto it was ANSWERED for the charger, that the reason ought to be repelled as altogether irrelevant; because the husband's taking of the bond payable to himself and wife in liferent and conjunct fee, could never so state her in the right of that sum, as to impede the husband from uplifting the money at his pleasure and discharging it; in so far as the dominion of the sum remaining still *penes maritum* and the last termination being upon his heirs, and the wife being under the

power of the husband, this were to invert that order, and to put the husband *quoad* this sum under her power, and to state the propriety of the sum in her, and to hinder all commerce and freedom of bargaining between man and man. *Et quid juris*, if the husband had assigned the bond, or it had been affected by his creditors' arrestments or other diligences? The debtor would not have been heard to refuse to pay the assignee or arrester; and the adjection of the wife is but a personal quality, and not *accidens reale*; and the relict, suspender, has action against her husband's representatives, to get the said provision made up to her. And it not being due upon an heritable security, but a simple moveable bond, *quid impedit* why the husband could not validly discharge it, it being truly paid to him without any collusion? And as double payment is odious in law, so *solutio cum bona fide facta* is very excusable, and is privileged sometimes to operate liberation; especially where it is made by a simple and ignorant woman, in whom *ignorantia juris excusatur*; *præsertim ubi agitur de damno vitando*, as here, *L. 6, 7, and 8 D. de juris et facti ignorantia*. Besides, by the conception of the bond, *non apparet actum* that this was to be a part of her liferent provision, but is only a clause of style adjected of course, *hoc maxime attento*, that by a posterior contract of marriage she is competently provided *aliunde*.

This debate being taken to interlocutor, and reported by my Lord Orchardton, (Pitmedden ox,) as a part of his trial, the Lords found the wife had such a right to the liferent of this sum, that the debtor could not securely pay it, nor the husband alone lift it; at least, he had no otherways power to lift it, without it had been re-employed in the terms of the former bond, to be forthcoming for her liferent use, since it was granted to him and her before their marriage, and so could not be changed nor altered without her consent; for bonds taken by a man to himself and his wife in liferent and conjunct-fee during the marriage, they are presumed to be the husband's means, and so fall under the compass of *donatio inter virum et uxorem stante matrimonio*, though they flow from a third party, and are revocable *tacite vel expresse*; and the husband's lifting the money without his wife, and applying it another way, is a tacit revocation and declaration of his intention and mind to alter. See Dury, 21st December, 1638, *Laird of Craigmillar and Chalmers*. *Vide supra*, 9th February, 1672, *Laird of Balnamoson contra Jo. M'Intosh*, No. 321. And therefore the Lords suspended the charges upon the Commissary of Inverness's decret of exhibition of that bond *simpliciter*. *Vide Dury*, 15th January, 1634, *Hepburne and Seton*. *Vide* the beginning of this Number, [p. 186.] See Leidington, 16th June, 1551, *Arnot and Douglas*. *Vide* 19th November, 1679, *Ferguson and Weyms*; *item*, 14th July, 1681, *Tolquhon*.

Upon reporting of this answer of the Lords, I contended, that Janet Cuthbert behoved yet to exhibit and give back that bond; because I having paid it *indebite* to her husband, as I might have conducted and repeated the money from him, and have made him warrant his own discharge, so she behoved *præstare illius factum*, being executrix confirmed to him; *et frustra petis quod mox es restitutus, et quem de evictione tenet actio eundem agentem repellit exceptio*; and, therefore, as representing the husband, to whom it was *indebite solutum*, she behoved to warrant his deed, and give up the bond. Whereunto it was ANSWERED,—That she being absolved, there was no libel *in campo*, and it was not competent *hoc ordine* to convene as executrix; but, whenever they insisted against her in a pursuit *super eo medio*, then she would give them a good answer, which was this,—that the inventory of the testament and her intromission was exhausted, partly by debts she had taken course

with, and partly by what was owing to herself as creditrix by the contract matrimonial, or otherwise. This answer Craigie sustained, and would not receive our new libel *hoc loco*.

Then I offered to find caution for her liferent of the sum in the bond, (which was all her interest in it, for the fee of the sum was uncontrovertedly elided and taken away by the discharge; for the husband could dispose upon the fee of the sum at his pleasure, and his heirs cannot reclaim, but might not evacuate his wife's liferent in it,) upon her delivering up of the bond, reserving repetition *per conditionem indebiti*, as accords of the law. This the Lord Justice-Clerk granted.

Advocates' MS. No. 647, § 4, folio 302.

1677. November 8. BARBARA GRANT *against* JANET CUTHBERT.

THERE was also another suspension, depending betwixt this Barbara Grant and Janet Cuthbert, determined at the same time, whereof the cause was this. Barbara Grant gets a liferent tack of a house in Inverness from her husband, at least so long as she does not remarry. Janet Cuthbert is pursued by her before the Bailies there, for the maill and duty of it, as she who possessed it from 1670, and is decerned in L.20 yearly. Janet having suspended this decreet, Craigie turned it to a libel, in regard, 1^{mo}, The mandate of the procurator compearing for her was not mentioned in the decreet; yet that this is not relevant *separatim, vide supra, June, 1677, M' Mine against Newlands, No. 576. Vide 12th December, 1676, Christian Holmes and Marshall, No. 518.* 2^{do}, That she was decerned for years wherein her husband was living, viz. from 1670 till 1674, promiscuously and confusedly, without distinguishing what years she possessed herself, and what years clad with a husband; and the libel was wrong drawn, craving her to be decerned *nomine proprio* for all, whereas she ought to have been convened for these years *nomine executorio*, which was not done; and though we offered to adminiculate the decreet, by condescending how long her husband possessed, and how long herself since; but it was refused. 3^{tio}, That the term was not circumduced. Whereupon a commission was granted for proving the rent and her possession; who alleged, she behaved to have allowance for reparations.

ANSWERED,—She having right by a liferent tack, was not liable in reparations, but only the fiar.

This was repelled; only necessary reparations, and no other, were sustained.

Advocates' MS. No. 648, folio 304.

1677. November 8. MORISON of Prestongrange *against* His Tenant.

MORISON of Prestongrange sets a verbal tack of a muirland-grass roun he had to a tenant, for 1000 merks by year. In the winter 1673, the storm was so great and long that much cattle in Scotland died, and the labourers of such rouns near lost all their stocking. Amongst the rest, Prestongrange's tenant representing his