

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 decerned 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

decerned in place of the bond abstracted, the same were clearly moveable, and so not subject to an inhibition. *Answered*, The damages were but *surrogatum loco rei*, and so *ejus naturam retinent et sapiunt*, and must be heritable as the bond was. THE LORDS found that which came in place of the bond was heritable, as it was, seeing the heir's claiming the damages *loco facti impræstabilis*, shewed he had no intention to alter the nature of the debt, or render it moveable. *2do*, *Alleged*, Heritable bonds was *vox æquivoca*, having various significations; for, before the act of Parliament 1641, all bonds bearing annualrent were heritable; and though they were then declared moveable *quoad* the younger children, yet since that time bonds excluding executors, are reputed heritable as well as bonds bearing clauses to infest and precepts of sasine; and seeing *non constat* of what kind this heritable bond was, (seeing there is no more light to direct us than the decret of Privy Council designing it an heritable bond), it must be presumed to be only a bond excluding executors, in which case none will pretend that an inhibition will hinder the transmission and conveyance thereof. *Answered* for Oliphant, That writs must be taken in their proper and native signification, and the denomination must be taken *a nobiliore et famosiore analogato*; now, it will not be denied but the proper and genuine signification of an heritable bond is, where it bears an obligation to infest; and the other member of bonds secluding executors, is a novel invention, to prevent confirmation, and shun the commissaries dues, and to make it fall under a general service, which is a cheaper method of entry. THE LORDS found *in dubio*, an heritable bond was to be presumed to be a bond bearing obligation to infest. *3tio*, *Alleged* for Dr Irving, That *esto* it were so; yet so long as infestment was not actually taken upon it, inhibition was not the *habilis modus* to reach it, else all commerce and freedom of transmission of such debts would be marred, and people taking assignations to such bonds could never be in security, they never searching registers but when there was a sasine; and though the old style of inhibitions reached moveables, yet, because of the palpable inconvenience, custom has restricted them to lands; as appears by the style set down by George Dallas. As also Stair, Book 4. tit. 50. § 2. thinks inhibitions do not reach bonds; and Dirleton, *voce* INHIBITION, seems to incline the same way, seeing bonds are but *jura et entia rationis*. *Answered* for Oliphant, Inhibitions not only concern lands wherein infestment passes, but also other rights where no infestments are requisite, as reversions, tacks, &c.; and it is the creditor's advantage to have several remedies for securing his debtor's effects; and though the 51st act of Parliament 1661, declares such heritable bonds arrestable, before they are actually completed by infestment, yet it does not seclude other legal methods of affecting such bonds by adjudications or inhibitions. THE LORDS thought it would be too great a clog on the free transmission of such heritable bonds before infestment, if they were declared subject to inhibitions, therefore they found an inhibition could not hinder the disposing and assigning of such heritable bonds, and assoilzied Dr Irving from Oliphant's reduction *ex capite inhibitionis*.

No 115.
the bond.
Found that
the sum did
not thereby
become move-
able; but that
an inhibition
thereafter
served did
reach it.

No 115.

** Dalrymple reports the same case :

DR IRVING having right by process to a decret of Council against Newgrange and his Lady, for unwarrantable intromitting with, and cancelling an heritable bond, granted by the said Newgrange to the Countess of Southesk ; William Oliphant raises a reduction of the disposition and assignation of the said bond, *ex capite inhibitionis*, alleging, that the said decret of Council being *surrogatum* in place of the said heritable bond, was an heritable right ; and consequently was reducible, as being posterior to the pursuer's diligence ; for, albeit inhibitions do not reach alienations of moveables, notwithstanding of the style of the letters prohibiting the party to dispose thereof ; yet all heritable rights are affectable thereby ; and, though the 51st act, Parl. 1661, does provide, that heritable bonds shall be arrestable ; yet it declares, that such bonds shall remain in their own nature unchanged, as to all other effects ; and, before that act, and more especially before the 1641, no bond bearing annualrent being arrestable, all dispositions thereof were reducible *ex capite inhibitionis*.

It was *answered* ; Inhibitions relate only to rights of lands and moveables upon lands, which are *species* or *corpora*, but not to bonds or obligations, whether heritable or moveable, unless infestment had followed ; which is the opinion of my Lord Stair and Dirleton. Neither does the style prohibiting alienations, dispositions, &c. mention bonds, except in that part thereof where contracting of debt is forbidden ; and there bonds are expressly mentioned, because contracting of debts, and granting of bonds, are the foundation of diligence that might affect and carry away lands against the design of that prohibitory diligence, which, by style, reaches not the bond, nor, by custom, any moveables. *2do*, No purchaser of conveyances to bonds did ever search the Register for inhibitions ; because they were never understood affectable thereby ; neither does it import, as to the present question, whether such rights were arrestable before the 1641, or not.

“ THE LORDS found, That assignations to heritable bonds, whereupon no infestment followed, though containing a clause to infest, were not reducible *ex capite inhibitionis*.” See INHIBITION. *Dalrymple, No 45. p. 58.*

S E C T. XX.

Claim of Relief.

No 116.

1628. July 10.

CANT against EDGAR.

A CAUTIONER having paid an heritable bond before his decease, the LORDS found, that the benefit of the relief belonged to his executors, although he had