

ney, to whom the said bond was conveyed by his wife and her sister; and therefore her discharge to the appellant could not invalidate the respondent's right, nor could it comprehend or acquit the appellant of his future actings, he having received the said sum twelve years after the date of that discharge. And that bond being secured by a real right, no general words in a discharge can be an acquittance of it.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutors therein complained of be affirmed: And it is further ordered, that the said appellant do pay, or cause to be paid, to the said respondent, the sum of 30l. for his costs in this House.*

Judgment,  
24 May,  
1716.

For Appellant,	Rob. Raymond.	Will. Hamilton.
For Respondent,	Nathan Lloyd.	James Steuart.

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Andrew Porteous in Deboig, - - - Appellant; Case 42.  
Thomas Fordyce, and Janet Scott his Wife, Respondents.

26th May 1716.

*Cautioner.*—A person who had, without confirming, intromitted with his father's effects, which were left to him by will for payment of debts, is, upon application of the creditors, ordained to intromit with the effects upon inventorying the same, and finding caution to make the same forthcoming: he accordingly finds caution, and upon a subsequent application for summary intromission with some of the effects, the Court refused the same, and ordained him to confirm the testament and prosecute in common form; but he neither inventoried the effects, nor confirmed the testament; the cautioner was liable for the whole goods intromitted with.

*Proof.*—A debt against this cautioner substantiated by the oath of the intromitter in another cause.

*Costs.*—40l. costs given against the appellant.

**R**OBERT Scott of Gillesbie, deceased, grandfather of the respondent Janet, by his will and testament, dated the 25th of December 1706, bequeathed all his personal estate to Thomas Scott his second son, with express directions to pay the several debts in the said will mentioned, and appointed the said Thomas his sole executor. Amongst other debts in the said will mentioned and ordered to be paid, Robert Scott charged himself as debtor to the respondent Janet in the sum of 4573l. 13s. 8d. Scots.

After the decease of the said Robert Scott, the said Thomas possessed himself of several of the goods and effects granted to him as aforesaid, but did not confirm himself executor to his father. The respondent Janet, and other creditors of the said Robert Scott, in July 1708, brought their action against Thomas for payment of their debts, and by a petition presented for them stated heir apprehension that Thomas Scott, his mother and brother Francis might confederate and waste the funds appropriated for the payment of their debts, and therefore prayed,

that Thomas Scott might inventory the said goods and effects, and find security for the due application thereof, in terms of the will. In answer to this petition Thomas Scott acknowledged the said will, and that he intended to execute the same, and pay all his father's debts; and that he was willing to find security for the due management and application of the trust funds. The Court accordingly, on the 31st of July 1708, "Authorized and ordained the said Thomas Scott to intromet with, sell, and dispose of the said goods upon inventorying thereof, he finding sufficient caution to make the same, or prices thereof, forthcoming to these who shall be found to have best right thereto." Accordingly, in these terms the appellant became cautioner or surety for the said Thomas Scott.

In November 1709 Thomas Scott applied by petition to the Court, praying that he might have a warrant for summary intromission with certain of the goods and stocking in the hands of the widow and youngest son; and on the 25th of that month, the Court "refused to allow Thomas Scott summary intromission with the goods and stocking; but ordained him to confirm his father's testament, and prosecute his right in common form as accords."

Thomas Scott, however, neither confirmed the testament nor made up inventory: And in June 1715 the respondents brought an action against the appellant as cautioner for the said Thomas Scott for payment of the said debt of 4573*l.* 1*2s.* 8*d.* Scots due to the respondent Janet by the deceased. The appellant made defences, that the sequestration could extend no further than the effects received thereupon subsequent to it, and before the same was withdrawn by the Court, when in November 1709 they ordained Thomas Scott to confirm his father's testament; and that the appellant could never be liable for the whole effects received before the caution given, much less for those in the possession of the widow and son, with which Thomas had never intromitted. This cause coming to be heard before the Lord Ordinary, his lordship, on the 22d of July 1715, "found that the appellant, as cautioner, must be liable for the hail goods intromitted with by the said Thomas Scott, as well before as after the sequestration; and found that by Thomas Scott's acknowledgment upon oath in the decree obtained at the instance of Crawford of Brocklock against him, as well as in the former decree in this process against the said Thomas it is sufficiently proved that he intromitted with goods, and gear of his father's to the value of the sums principal, and annual rents claimed by the respondents; and therefore found the appellant as cautioner for the said Thomas Scott liable to the respondents for the sums principal and annual rents libelled for, and decerned against him therefore."

The appellant reclaimed, and the respondents having given in answers, their lordships, on the 29th of July 1715, "adhered to the interlocutor of the Lord Ordinary, and refused the desire of the petition." The appellant presented a second reclaiming petition, stating, that Thomas Scott's oath in Brocklock's cause could

could not affect the appellant, since it was *res inter alios acta*, and besides contained this quality, that all he had received was applied in payment of his father's debts; and therefore the appellant prayed, that the Court would find that Thomas's intromissions were exhausted by payment of his father's debts, or by expences in making the funds effectual, and to assign the appellant a term for proving thereof. After answers for the respondents, the Court, on the 30th of July 1715, "refused the desire of the petition, and adhered to their former interlocutors."

The appeal was brought from "an interlocutor of Lord Kimmerghame Ordinary of the 22d of July 1715, and also from an interlocutor of the Lords of Session of the 29th of the said month, affirming the aforementioned interlocutor; and likewise from another interlocutor of the said Lords of the 30th of the same month."

Entered,  
23 Jan.  
1715-16.

*Heads of the Appellant's Argument.*

The appellant cannot be liable to the respondent's demands, because the bond that he entered into, pursuant to the said decree of the Court of Session of the 31st July 1708, was expressly annulled and made void by a subsequent sentence of their lordships on the 25th of November 1709, whereby the first decree was recalled, and Thomas was ordered to confirm or prove his father's will, in common form; which, by the known law of Scotland, requires him to find another cautioner or surety for his due administration.

Though the decree of the 31st of July 1708, allowing Thomas to intromet, be in general terms, yet the appellant, as surety for that intromission, cannot be construed to be liable for any other effects than what were then in some other person's possession; because neither the creditors nor Thomas could crave possession of what they or he was actually possessed of before. Nor could Thomas Scott be supposed to have applied for a compulsitor for the recovery of any goods, but what had not been formerly in his possession; and therefore the appellant can be liable for no more than what actually was or might have been received by virtue of the said sequestration: For, supposing that some other person than Thomas had been allowed to intromet with the goods for the use of the creditors upon finding surety, and that the appellant had been bound for that other person's due application of the money, certainly his bond could not have been extended to the money received before that time by Thomas, and applied in the terms of the disposition. And the appellant conceives that if Thomas had been called to an account by the persons allowed to intromet, it would have been a good defence for Thomas to have pleaded payment according to the disposition by his father to him.

It is true that Thomas had acknowledged upon oath in another cause that he had received 13,000 merks Scots out of the goods and effects conveyed to him by his father; but all of it before the appellant's becoming surety for him; and the oath itself particularly mentions, that the sum was wholly applied towards the pay-  
ment

ment of his father's debts, as by the said disposition is directed, which the appellant offered to prove below, but was refused.

The appellant insists and is advised, that he might have excluded the respondent's claim, by offering to prove and proving in the terms of his obligation, that the intromissions were made forthcoming to those who had best right, but the appellant was denied that benefit.

*Heads of the Respondents' Argument.*

The appellant was security for the said Thomas Scott's just application of the trust vested in him, and for making up an exact inventory, which must have contained the whole goods and effects bequeathed to him and the values thereof: For the creditors must have had most in view the due administration of what he was possessed of, since that was by far the greatest part. Nor did the Court ever re-call this power granted to Thomas, but only declined to give him an extraordinary power of immediate intromission against his father's debtors; this was justly refused, and he ordered to follow the rules of law. And if it should be admitted that this could have been interpreted as a re-calling of the power as to the effects in the possession of other people, it could make no alteration as to those Thomas himself was possessed of.

Thomas Scott having accepted of the trust, wherein the debts to be paid are particularly specified without proving the will or making any inventory, the law of Scotland presumes, that he had received as much as would pay the debts particularly specified. Nay, the law presumes by his acceptance in this manner, that he agreed to charge himself with the debts, and take his hazard of the extent of the effects bequeathed to him: For, otherwise the creditors in such cases might be precluded from recovering their debts, since they have no rule whereby to charge the executor in trust, and if Thomas was liable, the appellant was liable as his security. But further, the said Thomas in another action owned upon oath that he had received to the value of 12,000 or 13,000 merks Scots, and sets forth how he had disposed thereof, and charges the debt due to the respondent Janet as one of the debts he was obliged and intended to pay.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the several interlocutors therein complained of be affirmed: And it is further ordered, that the said appellant do pay, or cause to be paid to the said respondents, the sum of 40l. for their costs in this House.*

For Appellant,	Rob. Raymond.	Sam. Mead.
For Respondents,	J. Jekyll.	Da. Dalrymple,

Judgment,  
26 May  
1710.