

1755.

HILL

v.

GRANT.

[M. 2661.]

EDWARD HILL and CATHERINE CART-  
WRIGHT, his wife; Mrs MARY BUR-  
ROUGHS, Widow of Colonel Bur-  
roughs, and FRANCES CARTWRIGHT,  
&c., residing in England, and J.  
HAMILTON, W.S., their Attorney, } *Appellants.*

Sir ARCHIBALD GRANT, - - - *Respondent.*

House of Lords, 18th March, 1755.

COMPENSATION. — DISCHARGE. — FOREIGN ADMINISTRATOR. —

Compensation was pleaded against an heritable bond. Held this plea was barred by mutual general discharges granted of even date with the bond; and not competent to be pleaded against the party to whom the bond was assigned, although assigned in security. Also held that an English executrix is not liable to be called to account in the Courts in Scotland.

SIR ARCHIBALD GRANT being indebted to Lieut.- No. 110.  
Colonel Burroughs in the sum of L.3810, granted an heritable bond for the sum of L.2000, payable five years thereafter. This bond was granted as the result of an adjustment between them of mutual claims against each other, and of even date therewith a discharge was granted, referring to the debt of L.3810, and to this bond as having been granted in full satisfaction of this balance, and both parties mutually discharged each other. This bond for L.2000 was assigned by Colonel Burroughs to his father-in-law, Cartwright, who died, leaving the appellants, his daughters, Catherine, Mary (Colonel Burroughs' wife), and Frances, his only children and heirs.

Colonel Burroughs, the cedent, died in October 1742.

The three daughters raised action for payment

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of this bond. In defence, it was pleaded, That the bond was not assigned by Colonel Burroughs to Cartwright, his father-in-law, for an onerous cause, but merely to enable him to raise a fund of credit, or at most was merely in security of a sum provided to his daughter, the Colonel's wife, by marriage-contract with her. That this provision, if due to them as a debt, was partly satisfied by Cartwright's execution upon a judgment obtained, and partly by Mrs Burroughs' intromissions with the Colonel's effects, for which she was liable to account. Yet, assuming the assignation to be onerous, still the debt was extinguished by compensation by debts which the respondent had paid for Colonel Burroughs, the cedent. Being concerned in several contracts and leases of mines and woods along with the Colonel, the respondent had made considerable advances for him beyond his proportion. To this defence it was answered, That the assignment of the bond by Colonel Burroughs to Cartwright was purely onerous, being in implement of his wife's marriage-contract provisions: That no part of the debt was paid: That L.1607, 12s. 9d. had been recovered by execution on Burroughs' effects, but this had been applied to the discharge of his other debts. And as to the account of Burroughs' effects come into the appellant Mary's hands, she maintained that she was not liable to account for them in Scotland, she being an English executrix under the English will of her husband, proved in the Prerogative Court of Canterbury; and as to the plea of compensation, there were no grounds even for pleading it against the cedent, far less against the assignee, because the whole of the counter claims referred to were included in the mutual discharges granted of even date with the bond.

The Court of this date, *inter alia*, “found that  
 “ the pursuer, Mrs Burroughs, who adminis-  
 “ trate the effects of the deceased Colonel Bur-  
 “ roughs, her husband, in England, is not bound to  
 “ account here for her intromissions in virtue of  
 “ that administration.”

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On reclaiming petition on the whole points, the  
 Lords afterwards “found it competent to the said de-  
 “ fender Sir Archibald Grant, notwithstanding the  
 “ mutual general discharge, dated 26th September  
 “ 1733, of all demands preceding that date, to plead  
 “ retention on account of debts arising from copart-  
 “ neries, though contracted prior to the said 26th of  
 “ September 1733. 2d, Found that there is suffi-  
 “ cient evidence that the bond pursued on was con-  
 “ veyed to the deceased Mr Henry Cartwright for  
 “ security and in implement of the marriage articles,  
 “ settling the sum of L.3000 sterling upon Mr Bur-  
 “ roughs for life, and after his death to Mrs Burroughs  
 “ for life, and after both their deaths to the children of  
 “ the marriage; and failing issue of the marriage, to  
 “ the survivor, their executors, and administrators.  
 “ 3d, Found that there is no sufficient evidence that  
 “ the sum covenanted by the marriage articles was  
 “ satisfied, in whole or in part, by Cartwright’s intro-  
 “ missions with Burroughs’ effects, further than to  
 “ the extent of L.1040 sterling applied to the pur-  
 “ chase of L.1000 capital South-Sea stock. 4th, And  
 “ found it competent to the defendant to plead com-  
 “ pensation against the bond pursued on to the extent  
 “ of the *annual rents* during Mr Burroughs’ life. 5th,  
 “ But found it not competent to the defender to  
 “ plead retention on account of Mrs Burroughs be-  
 “ ing administrator of her husband’s effects in Eng-  
 “ land, and of the defender’s counter-action against

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“ her before this Court for recovery or allowance of  
 “ his claims against her deceased husband; and re-  
 “ mitted to the Lord Ordinary to proceed accord-  
 “ ingly.”

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Another reclaiming petition was presented but refused.

Against the interlocutor of 24th July 1752, so far as it finds compensation pleadable as regards the annual rent that fell due during Mr Burroughs' life, and also against the interlocutor of 11th July 1754, except that part of the same which found the respondent not entitled to plead compensation on account of Mrs Burroughs' intromissions with Colonel Burroughs' effects in England, an appeal was brought. The respondent also presented a cross-appeal against such parts of the interlocutor as were against him, and in particular the interlocutor of 24th July 1752, and against 2d, 3d, and 5th articles of the interlocutor of 11th July 1754.

*Pleaded for the Appellants:*—The mutual general discharges executed and signed by the parties, of even date with the bond in question, totally bars all claims of compensation or retention, and proves that all such claims existing prior to that date, were thereby discharged and extinguished. This discharge expressly releases “ all demands” against each other preceding that date, and it is now incompetent for the respondent to bring forward these old claims against the bond now sued for. Besides, that bond was assigned by Burroughs to Cartwright for a valuable consideration; namely, the securing performance of an obligation contained in an ante-nuptial contract of marriage, and having no notice at this time of any counter claim affecting the bond assigned, as existing prior to the assignation, the same is de-

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mandable by the appellants purified of all such pretended claims of retention against Burroughs the cedent, both as to principal as well as to annual rent falling due during Burroughs' life. Nor does the cause for which the assignation was granted, as pleaded in the cross-appeal, affect the validity thereof, or the rights of parties, or the question whether retention is competent or not, because it is clearly established that *that* cause was an onerous one; namely, the securing to his wife the marriage-contract provision, which he had previously become bound to secure. And in regard to the cross-appeal, it is quite clear in law, that an English administrator cannot be called to account for intromissions in the Scotch Courts. They have their suit against her in England but not here.

*Pleaded for the Respondent*:—That the mutual discharge, granted of even date with the bond, did not comprehend, and was not intended to cover, the transactions between them as joint partners in the mines. These were not then in consideration, and not then even known to the parties, as the debts due by the concern were not ascertained. To make the discharge therefore extend in these circumstances to the mining concern, would be a stretch of construction beyond what law permits. While in regard to the interest of this bond falling due, and payable during Colonel Burroughs' life, it is quite evident, that it was attachable by his creditors, who could plead retention against it, because the assignation, looking to the nature thereof, could not exclude retention to this extent. But, further, if Colonel Burroughs' effects were intromitted with, it is impossible to say how much of the marriage provision may have otherwise been recovered, so as to

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be imputed *pro tanto* of the claim, and thereby to affect the onerosity of the assignation. And as there can be no doubt Mrs Mary Burroughs is bound to account for the sums come into her hands of her husband's effects, and as action is raised against her for that purpose, she was liable to account for them; and it is no answer to this to say, that an English administrator is not liable to be sued in the Courts of Scotland. As she sues in this Court, so also ought she to be amenable to the jurisdiction to which she resorts.

After hearing counsel, it was

*Ordered and adjudged, that so much of the said several interlocutors as is complained of in and by the original appeal be, and the same is hereby, reversed. And it is further ordered and adjudged, that the said cross-appeal be, and is hereby, dismissed this House; and that the several interlocutors, and parts of interlocutors, in and by the said cross-appeal complained of be, and the same are hereby, affirmed.*

For Appellants, *W. Murray, Al. Forrester.*

For the Respondent, *Robert Dundas, A. Hume Campbell.*

*Note.*—In giving judgment, it was observed by the Judges of the Court of Session, on the point of international law:—"That Mrs Burroughs not only could not be properly discharged here, but how could she account here by the law of England? How could she show here what claims were against her in England, or what allowances she was entitled to by the law there; or how could she bring her husband's English creditors to account here?" Upon this point, which was made the subject of the cross-appeal, their judgment was *affirmed* in the House of Lords.—*Vide Ferguson, &c., v. Douglas, Heron & Co., House of Lords, 11th November 1796.* Appeal cases.