1671. *February* 16. MARION DODS *against* LAURENCE SCOT.

No 475.
Payment of a tocher by a wife, presumed by the parties living together 22 years, and the husband in his testament acknowledging that it was paid.

BY contract of marriage betwixt James Scot and Marion Dods, Marion is obliged to pay in tocher L. 1000 to the said James at the next Candlemas, and the said James is obliged to employ the same to him and her in conjunct fee, and to the heirs of the marriage, which failing, to her heirs; and James having died without children, the said Marion pursues Laurence Scot as his heir, to employ the sum conform to the said obligement; who *alleged*, Absolvitor, because the pursuer has yet the tocher in her own hand, unless she can shew a discharge. It was *answered*, 1*mo*, That the parties having lived together 22 years, it must be presumed that the husband was paid, and had the custody of the discharge; 2*do*, The husband by his testament acknowledges that the sum was paid. It was *answered*, That this written obligation cannot be taken away by such a presumption, and the assertion of the defunct in the testament has been procured by the wife's importunity in her husband's weakness, and however cannot prejudge the heir, and can import no more than as *legatum liberationis*, which can only affect the dead's part of the free gear.

THE LORDS found the presumption, with the acknowledgment in the testament, a sufficient payment of the tocher, against all parties having interest.

Fol. Dic. v. 2. p. 255. Stair, v. 1. p. 722.

*** Gosford reports this case:

1671. *February* 15.—IN a reduction of a decreet obtained at the said Marion's instance against Laurence Scot, as heir to his father James Scot, husband to the said Marion, for payment of L. 1000 provided to her by contract, failing of heirs of the marriage, upon this reason, that by the contract of marriage, the said Marion was obliged to pay in the first place the sum of L. 1000 in name of tocher, in contemplation whereof her husband was obliged to employ the said sum to him and his wife in liferent, and to the heirs of the marriage in fee, which failing, to return to the said Marion; but so it is, that the said tocher was never paid, therefore the said James's heirs nor executors cannot be liable, seeing a provision that the tocher should return, pre-supposes necessarily, that it should be first paid. It was *answered* for the defenders, That the reason was noways relevant, and that they were not now obliged to prove payment of the tocher, which the law necessarily presumes to have been paid, albeit no discharge can be produced, because Marion herself being a young woman, and the only party contractor, and the said James a most intelligent man, and accepting of an obligement for her tocher, either to pay that sum, or to assign the bond for the like sum, they having lived together by the space of 22 years, it is not imaginable but that he hath uplifted as much of her means as would amount to that sum; neither could it be expected, that he being her husband,

she could be so exact and knowing as to crave a discharge of her tocher; 2*do*, To evince that he was truly satisfied, they did produce the said James's testament, bearing his acknowledgment, that he was satisfied of all he could seek of his wife, which they alleged was equivalent to a discharge. It was *replied* for pursuer, That presumptions by the law do not take away that obligement for the tocher, which being founded upon writ, behoved to be taken away *scripto*; and as to the testament, that acknowledgment of satisfaction being made on death-bed, and importing no more but a legacy, it could not prejudge the heir, by diminishing of the moveables, whereby he would be relieved of moveable debts. THE LORDS did assoilzie from the reason of reduction, and found, that the husband and wife having lived so many years, and he having right *jure mariti* to all that was her's, albeit she had gotten no formal discharge of a tocher, it could not prejudge her of the provisions of her contract of marriage, specially he having declared upon death-bed, that he was truly satisfied; and therefore, found the letters orderly proceeded upon the decreet. No 475.

Gosford, MS. No 336. *p.* 157.

1673. *June* 17. THALLANE *against* ARCHIBALD ORROCK.

No 476.
A man having, in a testament executed on death-bed, acknowledged a debt, the testament, supported by witnesses, relative to correspondent facts, was found probative against the heir.

IN a pursuit at Thallane's instance, as assignee by John Orrock to the sum of 100 merks, against the heir of Archibald Orrock, which debt was instructed by an article of Archibald Orrock's testament testamentary, wherein he acknowledged himself debtor in so much to the pursuer's cedent; it was *alleged* for the defender, That the said testament could not constitute any debt against him, who was heir, the same being made *in lecto*, at which time he could not burden the heir. It was *replied*, That the defunct having given up the debt as due to him before his sickness, in fortification thereof it was offered to be proved, that he had intromitted with as much money which belonged to John Orrock, his brother's son, who was the pursuer's cedent, and had paid a year's annual-rent thereof, which was probable by witnesses, the principal sum being within L. 100. THE LORDS did sustain the summons, and repelled the defence, in respect of the reply; so that the debt being so constituted and proved as said is, the heir was liable as well as the executor, reserving him his action of relief; and so found, that a declaration on death-bed for a small sum, which might be proved by witnesses if the defunct had been living, being so fortified, might burden an heir, albeit only proved by witnesses.

Fol. Dic. v. 2. *p.* 255. *Gosford, MS. No* 592. *p.* 338.