

No 81.

In the *next* place; As to the plea of the heir of line, that nothing is conquest but *terra*, &c. it was *answered*; That our old laws, in explaining the succession in the conquest, indeed mention only *terra*, *tenementa*; because these are more generally the subject of succession; yet they no where say, that nothing is conquest but these; and all our lawyers agree, that an *annuus redditus* is a *feudum* which either ascends or descends, according as it was conquest or heritage. With respect to the quotation from the *Quon. Attach.* it proves nothing; for *sasitus* is only mentioned there as the common case; but it does not say, *sasitus* or not *sasitus* makes any difference. Besides, that word cannot signify *sasine*, as it was not in use for some hundreds of years after the book was wrote; and it would be absurd, if one who had purchased lands happened to die not infeft, that that should make any difference as to the rule of succession. Craig says, simply, *Si feudum adquisierit*; which holds whether the purchaser die before or after he is infeft. Stair, lib. 3. tit. 5. § 10.; July 7. 1675, Robertson, *vocæ* HERITAGE & CONQUEST. As to the observation from Craig, that *nihil feudi nomine dignamur*, &c. it is only intended as a description of a complete feu; but he no where says, if one possessed of lands which he had acquired dies uninfeft, that the same would go to his heir of line, and not to his heir of conquest. Nor is it to the purpose, that bonds excluding executors go to the heir of line; as it is admitted, that nothing is conquest but such heritable rights as whereon infeftment may follow.

THE LORDS found, that the bond is heritable, and that the same does belong to the heir of conquest. See HERITAGE AND CONQUEST.

C. Home, No 106. p. 169.

S E C T. XIV.

Bonds secluding Executors.

1681. February 22.

Lady MARGARET CUNNINGHAM *against* The Lady CARDROSS.

No 82.
An heritable bond, by secluding the creditor's executors, was found also heritable *quoad debitorem*.

THE auditor betwixt Lady Margaret Cunningham and the Lady Cardross, as heirs-portioners to Sir James and Sir William Stewarts, the Lady Cardross being only executrix, did propose this query, whether a bond granted by Sir William Stewart to his creditor and his heirs, secluding his executors, would burden my

Lady Cardross as executrix, as being a moveable bond, or if it would affect both parties as heirs, as being an heritable bond. It was *alleged* for the executrix, That this bond was heritable by the act 1661, cap. 32. bearing expressly, where executors are excluded, such bonds are heritable. It was *answered*, That albeit it was heritable *quoad creditorem*, yet it is moveable *quoad debitorem*; for, though the creditor hath excluded his executors, yet the debtor hath obliged his heirs and executors, and the LORDS, in the case of Nasmith *contra* Jaffray, No 53. p. 5483., decided the 25th day of July 1662, found, 'that an obligation by a husband to employ a sum upon land and annualrent to himself, his wife, and bairns of the marriage, was heritable as to the creditor, but moveable as to the debtor.' It was *replied*, That the act of Parliament is a rule distinguishing debts, heritable and moveable, both as to creditor and debtor, otherways bonds bearing clauses of infestment would be all moveable *quoad creditorem*, which was never pretended; but this statute is the rule both for debtor and creditor; and it would be very unreasonable that the heir should have all sums which are ordinarily heritable *quoad creditorem*, and yet should be free of the like sums which would burden the executor as being moveable *quoad debitorem*; and as to Jaffray's case, it was an obligation to employ a sum to himself and his wife, and their heirs, which was not in favours of a creditor, but in favours of himself, his wife, and their heirs; so that he could not oblige his heirs to employ in favour of his heirs, and therefore his executors behaved to be debtors, and consequently the obligation was found moveable *quoad debitorem*, viz. the wife and the heir.

THE LORDS found, that the bond in question was heritable, both as to debtor and creditor, but thereafter this was stopt till a farther hearing.

Fol. Dic. v. 1. p. 370. Stair, v. 2. p. 864.

* * * Fountainhall reports the same case :

SIR JOHN MAITLAND and his Lady against Cardross. 'THE LORDS found a bond heritably conceived, payable to the creditor, his heirs and assignees, secluding executors, that this bond was likewise heritable *quoad* the debtor, so that, the debtor dying, his heir was obliged to relieve the executors thereof;' This decision Sir G. Lockhart, and several other lawyers, judged to be an absolute mistake, and that which would turn the most part of all the debt upon the heirs, the usual conception now being to seclude executors; and therefore the Lords ordained it to be further heard in their own presence. See APPENDIX.

Fountainhall, v. 1. p. 131.