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heritable *ab initio* ; whereas in the other cases, it is only the payment of the annualrent, and its term being come, that makes it to be reputed an heritable right ; because of old before the reformation, *annui redditus*, our annualrents by infestment, were (to elude and evacuate the canon law prohibiting usury,) only constituted by sasines out of lands.

*Fountainball, v. I. p. 251.*

\* \* \* This case is also reported by Harcase :

FOUND that bonds bearing an obligation to infest are heritable *ab initio*, even from the very date, though the creditor die before the term of payment ; and therefore that such could not be disposed *in lecto*.

*Harcarse, (BONDS.) No 190. p. 43.*

\* \* \* In conformity with the above was decided the case of Stewart of Pardovan against Stewart of Torrence, 26th June 1705, No 14. p. 140, No 41. p. 703. and, No 15. p. 2767.

1718. February. ROBERT FISHER *against* MARION PRINGLE.

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An heritable bond, in which the obligation to infest was not pure, but conditional, failing payment at the term, found moveable before the term of payment ; and therefore the debtor dying before the term, relief was found competent to his heir, (who paid the debt), against his executor.

THE question occurred betwixt these parties, about an heritable bond, having a clause of infestment, the debtor dying before the term of payment ; whether it was heritable or moveable ? And it was *contended* for Robert Fisher, who had paid the debt as heir of the defunct, It is a general rule, that all heritable sums are moveable before the term of payment ; and therefore he ought to be relieved of this debt by Marion Pringle, who had intromitted with the defunct's moveables.

The defender *noticed*, That this assertion proceeds from a mistaken notion of law, as if all bonds indistinctly, whether moveable or heritable, were understood to be moveable before the term of payment ; whereas indeed that rule only holds as to moveable bonds, which before 1641 were heritable after the term of payment, as to executors ; and to this hour exclude the relict and the fisk when that term is once past ; but he believes it was never once doubted, that an heritable bond was by the destination a debt due by the heir, without regard to the term of payment, or any other consideration. And for clearing this point, it was noticed, That our lawyers, until their doubts were settled by acts of Parliament, did always reason from the intention or destination of the parties to infer a sum heritable or moveable, so as to befall the heir or executor, where they could not clear the point from the nature of the thing ; and therefore, in determining the nature of sums secured by bonds bearing interest, where the sum looked like a stock or estate yielding termly or yearly profits,

they concluded that it was intended as a settlement for the heir, before the act 1641\*; but at the same time they held, that before it yielded interest, or became payable, it was to be understood moveable; whether because the creditor had not completed his intention of making it bear interest, by letting it lie after the term of payment, or because the Judges were willing by that benign interpretation to favour executors and younger children, who by the other rigorous construction were frequently brought to misery, is not defined by our writers; only it is certain that bonds of their own nature moveable, were always deemed, as to succession, heritable or moveable, according to that rule, until the act 1641, that all such bonds were adjudged moveable, except *quoad fiscum et relictam*; as to which, they remained still under the former regulations. And indeed there could have been no question or ambiguity concerning any other kind of right, except moveable bonds bearing interest; for as on the one hand, bills, tickets, notes, &c. behaved to be looked upon as moveable, being only securities for the naked delivery of moveable sums; so on the other hand, infestments, dispositions, and all bonds secured by infestment, must needs be looked upon as heritable, since here was a real security in land for the payment of the debt; and as an heritable bond is equally a charge upon the granter's lands, whether he die before or after the term of payment, since there is no doubt of the granter's intention to burden his heritage with the debt, it seems manifest, that as to bonds so secured, there can arise no difficulty upon the granter's dying before or after the term of payment; and therefore it must be understood, that the rule cited for the pursuer takes place only in moveable bonds bearing interest, agreeable to Lord Stair's sentiment, lib. 2. tit. 1. § 4. in these words, 'But sums only heritable by destination for annualrent, are moveable till the first term of payment of the annualrent be past.' But further, it will not be doubted that the creditor and granter's intentions respectively, when expressed, terminate the question, whether sums are heritable or moveable? as is plain in the instance of a bond secluding executors; which, though moveable of its own nature, goes to the heir, even where the creditor dies before the term of payment: And from the same reasoning, it is obvious, that an heritable bond, which of its own nature, and by the granter's explicit design, becomes a debt upon the heritage, must continue a debt upon it, and not upon the executry, without regard to the time of the debtor's death. And the argument is abundantly stronger and more manifest, when the question is considered in relation to the heir and executor of the granter of an heritable bond, than in the case of the creditor's successors; for as to the debtor's successors, it is clear as the sun, that the granter by the precept of sasine burdening expressly his heritage, intended that debt should affect his heir; and whatever influence the creditor's decease before the term of payment might have, in determining the right of succession to the sum, it is plain, the debtor's decease before the term of payment could never relieve the land, or consequently the heir from the burden of the

\* Revived by the act 1661, c. 32.

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debt. Again, if the question is put concerning the creditor's decease, before the term of payment of an heritable bond; it is pretty plain, his heir, and he only, could serve and obtain himself infeft in the lands for the security of the sum: Now, to imagine that the executor should have right to the debt, because the creditor died before the term of payment, and at the same time to suppose, that the heir had right to the lands pledged in security of the debt, is too ridiculous to require an argument to expose it; and it will shew *a fortiori*, that there is no doubt the heir of a granter of an heritable bond, and not the executor, is directly liable.

To which it was *replied*, If before the year 1641, bonds bearing annualrent were heritable, and yet remained moveable until the term of payment; why should not bonds, heritable by bearing a clause of infeftment, but no infeftment taken thereon, remain also moveable until the term of payment? The intention of the parties, as well as of the law, to make the sums heritable, seems equally evident in both cases; for as the taking or granting a bond in such a manner as the law now esteems heritable, viz. 'bearing a clause of infeftment,' indicates the party's intention to have the sum heritably secured; so the taking or granting a bond before the year 1641, in such a manner as the law did then esteem heritable, viz. 'bearing a clause of annualrent,' equally points out the party's intention to have the sum heritably secured; and as before the year 1641, the party's intention to have the sum heritable, did not render it so before the term of payment; so no more ought it now. As to the argument drawn from bonds, secluding executors; there is a great disparity betwixt bonds, 'secluding executors,' and other bonds to heirs and executors containing a clause of infeftment: The former are heritable *ab initio quoad creditorem*, not so much because provided to the heir, as because the executor is expressly excluded; whereas the bond in question is payable to heirs and executors; and the clause of infeftment being but conditional, *sciz.* 'failing payment at the term,' is not purified till the term is elapsed, and no payment made; and then, and not till then, is the sum heritable *quoad creditorem*. But in the *next* place, bonds secluding executors, albeit heritable as to the creditor, in respect of the express exclusion of executors, remain moveable *quoad debitorem*; so that no argument can be drawn from bonds secluding executors, to favour the defender's distinction. As to the *last* argument, drawn from the creditor's decease before the term of payment of an heritable bond; the whole of this is a mistake, for the heir has nothing ado in the case proposed; as the executor has the only right to the sum, (his predecessor dying before the term of payment;) so he alone has right to the accessory security of infeftment: Nor is there any absurdity in this, more than in the case that daily occurs, viz. an infeftment of annualrent, where the executors have the benefit of the heritable right, and have a real action of pointing the ground for bygones upon the infeftment, and not the heir. And the reason of all this lies in the regard the law has to the creditor's destination, and manner how he would have his suc-

cession regulated ; and in that view considers infestment as accessory, not as a principal part of the contract.

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' It is informed, that the LORDS found the bond moveable ; and consequently sustained action against the executor.'

*Fol. Dic. v. 1. p. 370. Rem. Dec. v. 1. No 10. p. 19.*

1738. December 8.

The CREDITORS of MENZIES *against* The EXECUTORS of MENZIES.

No 81.

A BOND containing a clause of infestment, on which no infestment had followed, found to belong to the heir, though the creditor died before the term of payment.

*Kilkerran, (HERITABLE and MOVEABLE.) No 1. p. 243.*

\* \* \* C. Home reports the same case :

SIR WILLIAM MENZIES of Gladestains granted a bond of provision to his second son William, wherein he obliged himself to pay to him, his heirs, executors, or assignees, the sum of L. 500 Sterling at the first term of Whitsunday or Martinmas after his decease, with annualrents during the not payment thereof, after the said term of payment ; and, for his further security, he obliged himself to infest the said William in an annualrent of ———, &c. to take effect, and be payable to him, at the first term after the granter's decease. William lived some time after the date of this bond, but died before his father, without taking infestment ; and, upon the decease of both, a competition arose betwixt the executors, the heir of line, and the heir of conquest of William, each pretending a right to the bond.

For Mary Menzies, &c. executors to William, it was *contended*, That as, by the practice of the Court, bonds bearing annualrent having always been held heritable, except in so far as it has been varied by the statute 1661 cap. 32 ; so, by the same authority, it was established, that where a bond was conceived in such a manner, that annualrents were not to run upon it till after a certain term previous thereto, the bond was to be held a moveable subject as to all respects whatsoever ; and the reason of this was extremely analogous to the other ; for, as the constitution of annualrents was understood to constitute the *feudum pecuniæ*, by making it to bear fruits *ad instar feudi*, which made the law rank them in the same class with land-fees, as to succession ; so, when no annualrent was due, nor begun to run, the sum could not be considered in that view. It appeared to be intended by the creditor to be uplifted at the term of payment, and only in the event of failure of payment at that time, to be laid out upon