

No 79.

Where the obligation in a bond to infest is pure, and to have present effect, and not adjected as a failzie in case of not payment, the bond is heritable *a principio*, as to all effects.

1683. *November.*GORDON *against* KER.

ANDREW KER having granted bond to Robert Balfour for the sum of L. 1000 bearing an obligation to infest the said Robert Balfour, in an yearly annual-rent out of certain lands for security of the sum, and a personal obligation to pay the same without requisition, and Robert Balfour, the said Andrew's heir, having assigned the bond to Mr William Gordon advocate, and he having pursued Andrew for payment; *alleged* for the defender, That Robert Balfour the pursuer's cedent, having assigned the same to James Melvil for a debt due to him, the same became extinct by compensation. *Answered*, That the bond bearing an obligation to infest, was heritable, and the assignation being granted to Melvil upon death-bed, was null and could not be sustained in prejudice of the pursuer's cedent, who was heir. *Replied*, That albeit the bond was heritable by destination, yet the creditor having died before the term of payment, the sum was moveable, and so might have been assigned on death-bed, or disposed upon by testament, as in the case of bonds bearing annualrent, granted before the act of Parliament 1661; which albeit they were heritable in their own nature, yet if the creditor died before the term of payment they became moveable, as is clear by several decisions, and particularly Anderson against Anderson, No 78. p. 5513, and the 29th of June 1624. Smith against Anderson's Relict, No 69. p. 5503; and the 13th June 1627, Nicolson against Lyell,* where a bond, bearing an obligation to infest, was found to belong to a husband *jure mariti*, and did fall to his executors, he having deceased before the term of payment. *Duplied*, That there is a great difference betwixt bonds bearing obligation to infest, which are heritable *ab initio*, and of their own nature, and bonds bearing annualrent, which are only heritable after the term of payment of the annualrent, in which case the bonds being moveable before the term of payment, the sum belongs to the creditor's executors; whereas in the other case, the bond being heritable by destination *ab initio*, albeit the creditors die before the term of payment, yet the same belongs to his heir in respect of the obligation in the bond to infest. And Smith against Anderson's Relict, doth not meet this case; because in that case, the bond did bear an obligation to make payment of the sum at a certain term, and failing thereof to infest; in which case the sum was found moveable before the term of payment, which vastly differs from the case of a bond bearing an obligation to infest *ab initio* before the term of payment, which makes the sum heritable. THE LORDS found the sum heritable *ab initio*, in respect of the obligation to infest, and that the creditor dying before the term of payment, could not assign the same upon death-bed in prejudice of his heir; and therefore preferred Mr William Gordon the pursuer to the sum.

Fol. Dic. v. I. p. 370. Sir P. Home, MS. v. I. No 474.

* *Vocce* HUSBAND AND WIFE.

* * * P. Falconer reports the same case :

MR WILLIAM GORDON, as assignee constituted by Andrew Balfour, heir to Robert Balfour, in and to a bond granted by Andrew Ker to Robert Balfour, (for security of which sum, Andrew was obliged to infest his creditor in an annualrent forth of his tenement in Edinburgh,) did intent action against the heir of the said Andrew Ker for payment. It was *alleged*, That this sum was moveable, the creditor having died before the first term's payment of the annualrent, and that the defunct had assigned the same in favours of Andrew Melvil, to whom Ker was creditor, and so had ground of compensation. It was *answered* for Mr William Gordon, That this bond was heritable *ab initio*, seeing it bore an obligation to infest before the term of payment, and consequently he, as assignee from the heir, was preferable to any assignation made thereof on death-bed by the defunct; and that albeit bonds, which were only heritable by a destination for payment of annualrent, were moveable before the term of payment, yet bonds bearing an obligation to infest, were heritable *ab initio*, as was clear by the decision 15th July 1623, Anderson *contra* Anderson, No 78. p. 5513. ; and the decision, Smith against Auderson's Relict, No 69. p. 5503. is only where the bond bore an obligation to make payment at a certain term, and failing thereof, to infest; in which case, the sum was found moveable before the term of payment only. THE LORDS preferred Mr William Gordon, and found the bond heritable *ab initio*, although before the term of payment the creditor was deceased.

No 79.

P. Falconer, No 73. p. 48.

* * * Fountainhall also reports this case :

A CAUSE pursued by Mr William Gordon advocate *contra* Ker and Balfour, was reported by Forret: The debate was upon an heritable bond bearing obligation to infest; the creditor dies before the term of payment of the annualrent, no infestment having been taken on it; it was *contended*, That this sum was moveable before the term of payment, (as in other bonds only heritable by a clause of annualrent,) and so fell to his executors, seeing it did not begin to be heritable till the elapsing of the term, and that the obligation to infest preceded the personal clause for paying the annualrent; and cited a decision in Durie, 15th June 1627, Nicolson *contra* Lyle, *voce* HUSBAND AND WIFE, where an heritable sum before the term of payment was found moveable; and such a sum as this by the 51st act of Parliament 1661, is arrestable before infestment. But this is by virtue of that statute only. Yet the LORDS found no difficulty in this case, but unanimously determined it to be heritable, *a primo momento* it was subscribed; like a bond payable to one's heirs and assignees, secluding his executors; as being the party's express meaning and design to have such sums

No 79.

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.

No 80.

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,