1725. *January.* JAMES LESLY *against* SIR JAMES NICHOLSON.

No 4.
A bill of exchange is moveable *quoad* husband and wife, and falls *sub communione*, and therefore the husband is liable to pay such debts.

JAMES LESLY having right to a bill accepted by Sir James Nicholson's lady before the marriage, Sir James obtained suspension thereof, upon the following ground, That bills due to a wife, and whereof the term of payment was come and bygone before the marriage, did not belong to the husband *jure mariti*, and for that reason, bills due by her ought not to affect him; and in order to prove that such bills did not fall under the *jus mariti* or *relictæ*, he insisted upon the act 1681, cap. 20. by which bills bear annualrent, and thereby become heritable *quoad fiscum et relictam*, in consequence of the 32d act 1661. To this it was *answered* for the charger, That the act 1661 did statute only, 'that all contracts and 'obligations for sums of money, containing clauses for payment of annualrent 'and profit, should be heritable as to the *jus mariti* and *relictæ*;' wherefore, where sums bear annualrent not *ex pacto*, by a clause contained in the obligation, but *ex lege*, and in consequence of a statute, they were not declared heritable, and therefore belonged to the husband; and in the present case, the bill containing no clause for payment of annualrent or profit, no argument can be drawn from the said act 1661. In fortification of which distinction it was *contended*, That even before the act 1661, sums bearing annualrent *ex lege*, went to the fisk and relict, and consequently no less since, that act leaving the respective interests of the fisk and relict in the precise circumstances they were before; and that for the following considerations, *First*, The reason why bonds bearing clauses of annualrent, were reckoned heritable, and not moveable, was, because before the Reformation, annualrents were constituted by infeftment only, to prevent the objection of usury, arising from the canon law; and in regard the provision of annualrent, though the obligation was personal, to pay it yearly and termly, without mention of infeftment, resembled those annualrent-rights, which formerly belonged to the heir, therefore the succession to them was regulated in the same manner, as they had been so constituted: So that indeed the reason of their descending to the heir, was not that profit arose upon the sum, which would have been as forcible as to money employed in trade or exchange; but because of the express stipulation of yearly annualrents, which made it a *fœdum pecuniæ*, and precisely the same thing with annualrents constituted by infeftment, differing only in the security, the one being real, the other personal. 2*do*, This distinction is made out from examples, as follows: Sums in a decreet did, before the act, and do still fall to the executor, without exclusion of the *jus relictæ*; and that albeit the creditor had charged the debtor, denounced and registered, whereby the sum in the decreet did *ex lege* bear annualrent. A second example may be given in annualrents, which, after the denunciation and registration, become a principal, and bear annualrent; and yet from these it never was contended, that the relict is excluded. A third instance is this, money in a tutor's hands does, by law, bear annualrent after a

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certain time; and yet the succeeding heir could not plead a right exclusive of the executor, with respect to intromissions in a tutor's hands, not accounted for, or stocked out upon bond. From all which instances it plainly appears, that even before the 1661, there was a difference betwixt sums bearing annualrent *ex lege*, and where it was due *ex pacto*; and therefore that relicts and husbands had an interest in such sums as bore annualrent only by statute, though they, as well as the executors, were excluded from sums due by contracts and obligations, containing clauses for payment of annualrent and profit.

Replied for the suspender, It is not the clause in a bond or contract for payment of annualrent or profit, that makes a sum heritable, as to the wife and husband, else the clause would be good to make it so, even before the term of payment; which is quite otherwise in law and practice. The true reason why any sum is heritable, is because it is laid out and employed upon annualrent, whereby there is a *tractus futuri temporis*, and a *fœdum pecuniæ* constituted; and it can make no imaginable difference, the money being once lent out intentionally to bear interest, that the law has already provided annualrent to run conform to their intentions, or if a special clause is necessary for that effect. To apply this to the case in hand; no mortal can doubt, that a creditor's intention by lending money upon bill, is to have annualrent paid for it: Is not the intention of the creditor the same in this case, as in that of a bond stipulating annualrent? Does not every creditor by bill know, that the exchange-contract makes a sum bear interest, though no provision be made? How then can the not expressing of what is in law implied, the expressing of which adds nothing to the force and effect of the right, make any alteration in the nature thereof? It is allowed, that a clause of annualrent expressed in the bill, would exclude the *jus mariti* and *relictæ*; but what additional effect can the expressing of a clause have, which is virtually in the writing already? Taking up the matter in this view, it will be evident that the examples produced by the charger are not in the case; for in none of them is there any thing like a *fœdum pecuniæ*, a laying out of money to continue for a tract of time upon interest. On the contrary, the debtors in all of them are understood to be *in mora*; and upon account of that *mora* alone it is, that the sums bear annualrent *loco interesse*, and not in consequence of any stipulation expressed or implied.

Duplied for the charger, Adhering to what is above said; the reason why a sum is reckoned moveable, the creditor dying before the term of payment, is, because by adjecting a term to the payment, the creditor had declared an *animus* of levying the money; which *animus* has always a strong influence in determining what is heritable, and what is moveable. But when he survives the term, and calls not for the sum, then it lies indefinitely in the debtor's hand, affording by express paction a revenue; then it became a *fœdum pecuniæ*, and by the old law transmitted to the heir by a service, as being a sort of fee. In the *next* place, the suspender seems to mistake the nature and design of bills, which are never considered as *fœdum pecuniæ*, nor intended to have a *tractus fu-*

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turi temporis, being designed solely as an expedite method of conveying money from hand to hand; and the bearing of annualrent is not *principally* intended in the contract, but follows by not at all a necessary consequence *ex mora loco interesse*.

'The Lords found, That the sum pursued for was moveable, and therefore found the suspender liable.'

'The Lords afterwards found in this cause, 16th February 1725, That this bill being only payable three years after date, does not enjoy the extraordinary privileges of a bill of exchange, but is only to be considered as an ordinary debt.'

Fol. Dic. v. 1. p. 385. Rem. Dec. v. 1. No 55. p. 105.

*** Edgar reports the same case:

1724. *December.*—The said James Leslie having right to a bill accepted by Sir James's Lady, the term of payment of which was passed before their marriage, charged Sir James for payment, who suspended upon this ground, That inland bills, since the act of Parliament 1681, bear annualrent after the term of payment, and therefore fall not under the *jus mariti* or *relictæ*, in consequence of the act of Parliament 1661, which declares all sums bearing annualrent to be heritable *quoad fiscum et relictam;* and therefore such bills due by a wife ought not to affect the husband.

It was *answered* for the charger, That since the act 1661 did only statute, 'That all contracts and obligations for sums containing clauses for payment of 'annualrent and profit, should be moveable in certain cases, declaring that they 'should remain heritable as to the *jus mariti et relictæ*,' it does not naturally follow, that sums which bear no annualrent *ex pacto*, but *ex lege*, as bills do, are not heritable *quoad relictam*. And so my Lord Stair gives his opinion, b. 3. t. 4. § 24. of his Institutions, in which place, when he states the relict's share, he mentions always bonds bearing clauses of annualrent; from which it would appear, that he made the distinction between what was due *ex lege* and *ex pacto*. Thus a charge upon a decreet, with denunciation and registration, makes the sum in the decreet bear annualrent by statute, yet the sum does not thereby become heritable *quoad relictam;* nor would it before the acts 1641 and 1661 have thereby fallen to the heir, these acts not having restricted the *jus relictæ* any further than it stood at the time, though they brought subjects altogether heritable to be in certain respects moveable as to the executor. Money in a tutor's hand bears annualrent by law after a certain time, yet the heir could never pretend, before the act 1641, to exclude the executor therefrom. A relict was preferred to her part of a decreet obtained at her husband's instance, for repayment of an heritable debt which he had paid as cautioner, bearing annualrent ay and while the total sum was paid, 10th July 1628, Cant *contra* Edgar, No 116. p. 5564. A charge or pursuit upon a bond does not stop the currency of the annualrent for

the time, yet such a charge or pursuit would make the sum moveable, *quoad jus mariti*, as was decided 19th July 1664, Scrimzeor *contra* Murrays, No 4. p. 463. The reason why bonds and contracts containing clauses for annualrent did belong to the heir before the acts 1641 and 1661, was, That the creditor having thereby pactioned for an annual profit for a tract of time, it was considered in law as a *feudum pecuniæ* or fee, and the money was presumed to have been laid out for the behoof of his heirs. And until it appeared from his not calling for the money at the term of payment, that he designed to let it lie for a tract of time, the bond would have belonged to his executors; which is plain evidence that the intention of the creditor, and not the simple bearing of annualrent, made it heritable and go to the heir; and since bills are considered as bags of money, no such intention can appear from them. No 4.

Replied for the suspender, That nothing was further intended by the above two acts, than settling the succession of younger children to sums of money bearing interest, which formerly went to the heir, but the rights of the husband, the wife, and the fisk, continued to stand upon the footing of the former law, by which all these were excluded from any right to the property of sums bearing annualrent, without any distinction whether it was by an express clause, or from the nature of the transaction.

The suspender likewise endeavoured to show the weakness of the distinction between annualrent due *ex pacto* and *ex lege*, from the following cases; 1*mo*, A bond for the price of lands will not, as to any part of it, belong to the relict, though it has not a clause for payment of annualrent; and this merely on account that it bears annualrent *ex tacito pacto*, or what the charger calls *ex lege*: 2*do*, In the case of an English or double bond, the debtor has a power to relieve himself from payment of the double sum, by paying the interest of the sum truly advanced to him; and though no annualrent is therein stipulated, yet the relict will have no share of such a bond.

Duplied for the charger, That neither of these instances were sufficient to overturn so just a distinction supported by so good authority; for the *first* was no more than begging the question, since the suspender could assign no other reason, why a bond for the price of lands should not fall under the *jus relictæ*, than that it would seem absurd that the wanting or adding a clause of annualrent should enlarge or lessen the relict's interest; and as to the *second* instance, a double bond has been always found to resolve into a stipulation of annualrent to the extent of the principal sum at the current interest.

THE LORDS found, That the sum contained in the bill was moveable, and that therefore the suspender was liable.

Reporter, *Lord Grange*. For the Charger, *Ch. Areskine*.
Alt. *Jo. Spottiswood et H. Dalrymple, sen.* Clerk, *Justice*.

No 4. 1725. *February* 16.—Mr Leslie, as indorsee to a bill drawn by one Fachney upon and accepted by Sir James's Lady, before their marriage, payable three years after date, charged for payment, which was suspended upon one ground, finally determined 18th of December 1724; and now it was *insisted*, 1*mo*, That the writ was not probative, as not having writer's name nor witnesses, and could not be considered as a bill, being so far remote from the nature and design of bills, that the term of payment was not till three years after its date. 2*do*, Even suppose it were probative, yet it should have none of the extraordinary privileges of bills; and therefore compensation upon a debt due by Leslie's author, who was the original creditor in the bill, should be sustained.

It was *answered* for the Charger, That the writ charged on was in the exact form of a bill; and it could be no objection to it, that the term of payment was at a distant day, for that was regulated by agreement of parties, and not limited by any law to a particular time.

THE LORDS found, That the bill, being only payable three years after date, did not enjoy the extraordinary privileges of a bill of exchange, but was only to be considered as an ordinary debt. See BILL of EXCHANGE, Div. 1. Sect. 2.

Reporter, *Lord Grange.* For Sir James, *Pat. Leith.* Alt. *Ch.* & *Jo. Erskine.*
Clerk, *Justice.*

Edgar, p. 132. & 170.

1736. *January* 10. WILKISON *against* BALFOUR.

No 5.

A RELICT having paid some of her husband's debts bearing annualrent, taking a discharge and not an assignation, her claim of relief was found to be simply moveable, and to fall under her second husband's *jus mariti.* See APPENDIX.

Fol. Dic. v. 1. *p.* 385.

No 6. 1738. *December* 13. GILHAGIE *against* ORR.

A BILL which bore annualrent from its date, was found moveable *quoad* husband and wife. See No 23. p. 1421.

Fol. Dic. v. 1. *p.* 385.

1739. *February* 23. DUNLOP *against* GRAYS.

No 7.
If the bygones of an annuity bear-

THE LORDS found, That the bygones of an annuity, which fell due in the wife's viduity before her second marriage, fell under the *jus mariti* of the second husband, although by a clause in her first contract of marriage, in which the