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

'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.

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A BOND containing a clause of infeftment, on which no infeftment 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 infeft 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 infeftment; 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 bythe 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

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interest; and, therefore, if he should happen to decease in the interim, the nature of the bond behoved to be determined according to the state it was in at the time of his death, which was moveable; and the stipulation of annualrent, upon the failure of payment, could make no variation, as depending upon the condition of an uncertain event. Nor has this rule been confined to the case where the provision of annualrent depended upon a personal obligation only, but also where there was an heritable security upon lands stipulated for it; as particularly June 15. 1627, Nicolson against Lyle, *voce* HUSBAND AND WIFE, where it is observable the stile is precisely the same with that of the deed in question, *mutatis mutandis*. And indeed, as our law then stood, there could be no reason for making a difference betwixt bonds which had, or had not, an obligement to infeft; for, if they bore annualrent, they were as much heritable without such a clause as with it; the provision of annualrent had in all respects the same effects; and, if this was the case before the act 1661, it does not appear how that statute can make any difference. Besides, this very point was determined in Fisher against Pringle, No 80. p. 5516., where the Lords found a bond moveable before the term of payment, though containing a clause of infeftment. Now, to apply this to the tenor of the deed under consideration, the obligation for payment of the principal sum at Sir William's decease is merely personal, to pay the sum to his son, his heirs, executors, &c. at the first term after his death. Next follows a provision, that, in case of failure, he shall be bound to pay L. 100 of liquidate expenses; thereafter, in the same event, he binds himself to pay the legal annualrent; and, for security thereof, there follows an obligement to infeft, to take effect only after his decease; whereby it would seem that the obligation for payment of annualrent, to which the infeftment is accessory, is plainly conditional, and to take place allenarly in case of failure in paying the principal sum.

Pleaded for John Menzies, the immediate younger brother; That, seeing William was not infeft, it was not conquest, but heritage, as is plain from our ancient and only laws about conquest, *Quon. Attach. chap.* 88. where nothing is accounted such but *terræ, tenementa, feuda*; and the chap. 97. speaking of the difference betwixt heritage and conquest, says, 'Statutum est, quod conquestus 'cujuslibet liberi hominis legittimi, qui moritur de ipso sasitus sine hærede de 'corpore suo, gradatim usque ad primogenitum ascendit, hæreditas vero descen-'dit gradatim.' Here the defunct is supposed to be *sasitus* to make the subject ascend; so that even *terræ* would not ascend, if the defunct was not seised therein; but to make an heritable bond, upon which no infeftment followed, conquest, would be an extension of these statutes, out of sight of their words and meaning, yea, contrary to reason; as the heir of line has the *onus tutelæ*, and the burden of all debts, on which account he should have the *commodum* also; consequently, where the law has not expressly provided a subject to the heir of conquest, it should go to the heir of line; but no law has provided any bonds, and far less heritable ones, upon which no infeftment has followed, to

the heir of conquest; and for this reason it was the LORDS found, that a bond secluding executors was not conquest in the sense of law, and so fell to the heir of line, not the heir of conquest, Jan. 23. 1706, Begbie, *voce* HERITAGE AND CONQUEST; whereby the Court showed they would deem nothing conquest but *terræ* or *feuda*, according to the express statute, at least that conquest required an infeftment. It may be true, that an *annuus reditus* has been reckoned a *feudum*, as Craig observes; but then, that same author, lib. 1. dieg. 10. § 16. and 37. says, Nihil enim feudi nomine dignamur, nisi id, de quo dici potest, quod N. obiit ultimo vestitus et sasitus, de tali prædio et tenemento; tit. DE FEUDO; plainly declaring, that no subject was deemed a *feudum* or *tenementum*, where the feuer was not *sasitus*. Neither is it surprising, that the being infeft or not infeft should alter the succession, there being several instances of this in law. See Hope's Minor Pract. tit. HEIRS.

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For the Trustees of Thomas Menzies, the elder brother and heir of conquest, it was *answered* to both these claims; *1st*, With regard to the plea for the executors, that the whole of the argument anent bonds being moveable or heritable before or after the term of payment, held solely in the case of those that were *quasi* heritable, in consequence barely of their bearing annualrent after the term of payment; but it never was applied to such as were properly, and *ex sua natura* heritable, by bearing an express clause for infeftment in lands, or containing a clause expressly excluding executors; these were always considered as heritable from their date, without regard to the term of payment, or the term of commencement of annualrents, as appears from all our law-books; Stair, lib. 2. tit. 1. § 4. and Sir George Mackenzie, lib. 2. tit. 2. § 5. and 6.; the last of whom observes, 'That all bonds for sums of money should be moveable, and so 'belong to the executors, except either the executors were secluded, or the 'debtor were expressly obliged to infeft the creditor.' See likewise Hope's Minor Pract. § 104. and Gordon against Ker, reported by P. Falconer, No 79. p. 5515; from whence it is evident, that a bond which is heritable, as bearing a clause for infeftment, is absolutely so *ab initio*; and that the creditor's dying before the term of payment, or annualrents becoming due, does not alter its nature. And as to the decision June 15. 1627, Nicolson, the obligement there to infeft was only conditional, in case of not payment of the principal sum at the term of payment, which is very different from this case; for Sir William here obliges himself presently to infeft his son for his security in an annuity of ———, &c.; grants procuratory and precept for that purpose; and, by the procuratory, he, *de presenti*, resigns the said annualrent; so that the infeftment in security might have been taken the next day, even though the term of payment was not come; which is very different from the case where the obligement to infeft is conditional, in the event of not payment at the term, as there no infeftment could be taken till that was past. And, as to the other decision No 80. p. 5516., the dispute there was, whether the bond was heritable or moveable *quoad debitorem?* but here the question is *quoad creditorem;* and these two do not always reciprocate.

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In the *next* place, As to the plea of the heir of line, that nothing is conquest but *terræ*, &c. it was *answered*; That our old laws, in explaining the succession in the conquest, indeed mention only *terræ*, *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 reditus* 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 acquisierit*; which holds whether the purchaser die before or after he is infeft. Stair, lib. 3. tit. 5. § 10.; July 7. 1675, Robertson, *voce* 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.

SECT. XIV.

Bonds secluding Executors.

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

1681. *February* 22.
Lady MARGARET CUNNINGHAM *against* The Lady CARDROSS.

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