1682. *December* 20. RAMSAY *against* RAMSAY.

No 75.

THE term of payment of annualrent, and not of the principal sum, regulates a bond as to the quality of heritable or moveable, when the creditor dies *ante terminum*.

Fol. Dic. v. 1. *p.* 370. *Harcarse. Fountainhall.*

*** See this case No 28. p. 4234.

1748. *November* 22. ANNE MEUSE *against* The EXECUTORS of CRAIG.

No 76.
Where the creditor in a personal bond, which bears annualrent from the date, dies before the term of payment, the bond is moveable.

IT being controverted between Anne Meuse, relict of Captain William Craig and his executors, Whether or not a personal bond granted to the defunct, and bearing annualrent from its date, but whereof the first term's payment of the annualrent was not come at his death, was moveable, and fell under the *jus relictæ*, or if it was heritable *quoad fiscum et relictam*; the ORDINARY found, "That neither the principal sum, nor the first term's annualrent contained in the bond, having become payable at the Captain's death, the bond fell under the *jus relictæ*;" and the LORDS "adhered."

Some of the Lords were indeed moved by an observation made for the executors, that most of the decisions in this case referred to for the relict were in the case where the bond did not bear annualrent from its date, but from and after the term of payment of the principal upon failure of payment at the term, and from the words of the act 1661; but the COURT was, by a great plurality, clear in the judgment given.

For as to decisions, though when upon the reformation, and the Canon Law losing its authority with us, personal bonds with clauses of annualrent, came first in use, the Lords were uncertain in their decisions, as Hope observes in his Minor Practiques, § 103, sometimes judging no bonds to be heritable, but what bore a clause to infeft, at other times finding a bond to be heritable, though without a clause of infeftment, if it bore a clause to pay annualrent to the creditor, as well infeft as not infeft; yet at last, says he, they came to find bonds heritable, although wanting both clauses, if they bore an obligation to pay annualrent. Nevertheless, where the creditor died before the first term's payment of the annualrent, they were still held moveable, and that not only in the case where the bond bore annualrent only after the term of payment, which it is true is the case of many of the decisions, but also where the bond bore annualrent from its date, Douglas *contra* M'Mitchel and Others, No 72. p. 5504. For they seem to have presumed where one lent money payable at a certain term, the intention of the lender to be, to have his money repaid at that term; and as for that end the debtor was supposed to have the money

ready, it was therefore considered as money lying by the creditor, and that not the less that it bore annualrent from the date of the bond; but when the term was past, and the money allowed to remain with the debtor, then and no sooner it came to be considered as a *feodum pecuniæ* and to become heritable; and so Stair and Sir George M'Kenzie have declared the law to have been: And if so, the act 1661 was thought to have nothing to do in the question; for although thereby obligations for money were made moveable to certain effects, which before were to all effects heritable, it left every thing moveable which before was so, Dick *contra* Ker, June 26. 1668, No 18. p. 3629. No 75.

Fol. Dic. v. 3. *p.* 265. *Kilkerran,* (HERITABLE AND MOVEABLE.) *No* 5. *p.* 247.

*** Lord Kames reports the same case:

CAPTAIN WILLIAM CRAIG, 23d of May 1744, took a bond from John Davidson of Whitehouse, for the sum of L. 200 Sterling, bearing a receipt of the money at Whitsunday preceding; and the obligation to pay is in the following terms, 'Which sum of L. 200 Sterling I bind and oblige me, my heirs, 'executors, and successors, to content and pay to the said Captain William 'Craig, his heirs, executors, or assignees, at the term of Martinmas next to 'come, with annualrent of the said principal sum, from the said term of Whit-'sunday last past to the said term of payment, and yearly and termly there-'after, during the not payment.' The Captain died in October 1744, before the term of payment, and the question occurred betwixt his relict and executors, Whether the bond was moveable *quoad fiscum et relictam.* The LORD ORDINARY, 'in respect that neither the principal sum nor the first term's annualrent became payable at the time of Captain Craig's death, found that the bond fell under the *jus relictæ.*' The executors reclaimed, and endeavoured to make good this proposition, That a bond bearing interest at the time of the creditor's death is heritable *quoad fiscum et relictam,* equally, whether he died before or after the term of payment.

As the taking interest for money is forbid by the Canon law, subterfuges became necessary in order to evade the force of the law. In England mortgages and double bonds were invented; we had in Scotland mortgages or proper wadsets, and annualrent-rights, which entitled the creditor not to take his interest from the debtor, but out of the rents of the land; and which in effect were a species of wadset, looseable in the same manner by premonition and requisition. After the Reformation, which set us free from the yoke of the Canon law, people began to lend their money upon personal bonds bearing a clause for payment of interest; and these new-invented securities, coming in place of annualrent-rights, were understood to be heritable like them, being in one sense *feoda pecuniæ.*

But at first when these securities crept in, people under impression of the former practice were generally anxious to put the stipulation for interest upon

No 75. such a footing as to evade this objection. One common clause was, to oblige the debtor to pay at the term, and, in case of failure, to pay interest in name of damages; which was thought less liable to objection than to stipulate interest directly. In such a case, if the creditor died before the term of payment, the bond was simply moveable, not bearing interest at that period, and consequently not being a *feodum pecuniæ*.

Sir Thomas Hope in his Minor Practiques, § 103. observes, that the great variety there was in the clauses stipulating interest made the Court very uncertain in their decisions; 'sometimes they judged no bonds to be heritable, 'except they bore a clause to infeft; other times, they found a bond heritable 'without a clause of infeftment, if it bore an obligement to pay annualrent 'to the creditor, as well infeft as not infeft.' But then he concludes with this observation, 'that at last they found it heritable, albeit it want both clauses, if 'it bear obligement to pay annualrent.' And to shew that this is to be understood in general, whether the creditor die before or after the term, he puts a case in the paragraph immediately following as the only exception, the same that is above mentioned, viz. where the bond bears annualrent after the term of payment in case of failzie, that, in that case, if the creditor die before the term, the bond is considered as simply moveable. And with him agrees Sir George M'Kenzie, Book 2. tit. 2. § 5. pronouncing, in general, bonds bearing annualrent before the 1641, to be heritable to all effects.

But we have a greater authority for this doctrine than any of our authors, viz. the statute law. The act 32 Parl. 1661, enacts 'All contracts and obli-'gations for sums of money, containing clauses for payment of annualrent and 'profit, to appertain to the nearest of kin, and to the defunct's executors and 'legatars; but that such bonds shall not fall under single escheat, nor shall 'any part thereof pertain to the relict *jure relictæ*, nor to the husband *jure* '*mariti*.' And it also declares this to have been the law of Scotland before the 1641, as is above made out.

The doctrine laid down for the relict is, that bonds bearing interest, where the term of payment of interest is not come at the creditor's death, are deemed simply moveable, so as to fall under the *jus mariti et relictæ*, and to be carried by single escheat. But this seems to be a whimsical doctrine, without any rational foundation. The parties are agreed, that personal bonds bearing interest are heritable, as having come in place of annualrent-rights. All our authors say so, and the point cannot be controverted. But an infeftment of annualrent has ever been held an heritable subject *a principio*, descendible to the heir at whatever time the creditor dies; even supposing him to die before the first term's payment of the annualrent; and therefore the same must hold as to personal bonds bearing interest or annualrent. If interest be stipulated from the date of the bond, it is a *feodum pecuniæ*; and therefore heritable as well before the term of payment of interest as after.

" THE LORDS adhered; and what principally seemed to move them was, the authority of the Lord Stair, l. 2. tit. 1. § 4.; and of M'Kenzie, Book 2. tit. 2. § 9." No 75.

Rem. Dec. No 96. p. 170.

*** This case is also reported by D. Falconer:

MRS CRAIG pursued her husband's executors for her *jus relictæ*, in a bond granted to him at Whitsunday 1744, payable with interest the Martinmas thereafter, he having died before the term.

Defence, The sum bearing interest from the date, was from the beginning heritable, as to the interest of the fisk and relict.

THE LORD ORDINARY, 8th January 1747, " in respect that neither the principal sum nor the first term's annualrent contained in the bond in question, became payable at Captain Craig's death, therefore found that the said bond fell under the *jus relictæ*."

Pleaded in a reclaiming bill; By the Canon law annualrent was forbidden to be taken for money; and hence the custom was introduced of buying annualrents out of lands, that thereby people might profitably employ their money; which rights were always looked upon as heritable. As the authority of that law wore out, and bonds were taken for money bearing interest, these, after the example of annualrent-rights, were reckoned to be *feoda pecuniæ*, and also heritable; but at first there was some doubt as to the validity of such obligations, and therefore the principal sum was taken payable at a term; and in case of failzie, an obligation for interest as penalty; and such bonds were reasonably constructed moveable before the term of payment. Hope in his Minor Practiques, § 103. observes the great variety of stile in clauses for annualrent, and thence the difficulties the Lords were in of finding the bonds heritable or moveable; and concludes, that they found bonds heritable containing clauses of annualrent. And that he means this of the case of the creditor's death happening before the term of payment, appears from the exception he makes of bonds bearing annualrent in case of failzie, which nevertheless are heritable after that term: And the statute 1661 enacts, that all bonds bearing annualrent, shall belong to executors, but shall not fall under single escheat, nor any part thereof belong to the relict.

As it is fixed, that bonds bearing annualrent are heritable with regard to the relict, no reason can be given why they should be moveable before the term of payment: And indeed the pursuer, in her pleading before the Lord Ordinary, has been obliged to recur to the brocard, *Non omnium quæ a majoribus constituuntur ratio reddi potest;* and rest entirely on the authority of decisions. But this point is not yet fixed, and the decisions do not come up to the question, several of them being in the case of interest stipulated after the term of payment *nomine damni;* in that ult. July 1666, Gordon against Keith, No 74. p. 5505., it was only found, that after the term of payment the sum was heritable

No 75. as to the fisk; in that, 26th June 1608, Dick against Ker, No 18. p. 3629., a bond was found moveable *quoad fiscum*, which was undoubtedly so, being granted after the creditor's rebellion.

Answered; When upon the decline of the authority of the Canon law, bonds were taken for interest, these were said to be *feoda pecuniæ*, as come in place of annualrent-rights, which were proper feus, and hence were reckoned heritable; but without just ground, as having no relation to land or any tenure. However, it being settled that they were heritable, before the weakness of the foundation on which the practice rested was adverted to, the general maxim could not be changed; but the Judges receded from it as far as they could, by making them moveable before the term of payment. And it would not now import, though the reason of this distinction could not be perceived; which yet might have been, that they supposed the creditor stipulating his payment at a day, intended to have it; and so the money might be looked upon as lying by him; but after the term, if he did not call for it, it was plain he considered it as a fund profitably employed.

The case has been always so decided, Douglas against Macmichael, No 72. p. 5504.; in that, Gordon against Keith, it was found the coming of the term of payment made the sum heritable; and in that, Dick against Ker, the point litigated and decided was, that the bond was moveable before the term of payment of the annualrent. The act of Parliament made no rights heritable which were not so before; and Stair's opinion is express, Book 3. tit. 4. § 24. and tit. 8. § 47.

THE LORDS adhered. *See* HUSBAND AND WIFE.

Act. *Lockhart* & *J. Erskine*. Alt. *H. Home*. Clerk, *Gibson*.

D. Falconer, v. 2. No 14. p. 16.

1765. *July* 9. KATHARINE STEWART *against* CHARLES M'FARLANE, &c.

No 76.
A husband took a bond payable to himself, his heirs, executors, and assignees at a certain term, with interest from its date. The narrative declared the sum to be solely for the use of a third person. The husband having died before the term

JOHN M'FARLANE, husband of Katharine Stewart, Feb. 11. 1763, lent the sum of L. 100 Sterling to Hugh M'Farlane of Callichraw, for which he took a bond, in the following terms: 'I Hugh M'Farlane of Callichraw, grant me to have 'borrowed, and actually received, from John M'Farlane tacksman of the 'bridge of Mitchaell, the sum of L. 100 Sterling, money foresaid, is allenarly 'lent out for the use and behoof of Charles M'Farlane, son of Duncan M'Far-'lane in bridge of Mitchaell; and the interest of the said sum, at five *per cent.* 'is to be uplifted by the said John M'Farlane, during his own lifetime; the 'foresaid John M'Farlane still reserving the management of the foresaid sum of 'L. 100, during his own lifetime or pleasure, and to renew this bond as oft as 'needful, renouncing all exceptions and objections to the contrary. Which 'sum of L. 100 Sterling, with the due and ordinary annualrent from the term