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the right of succession to bonds secluding executors, and containing no obligation to infeft in lands, descended to the heir of line.

Found also, that a personal bond of corroboration taken by the defunct to heirs secluding executors, of the principal sum and annualrents contained in an heritable bond, and in which bond was also contained a further new sum borrowed of that date, did not alter the succession as to the principal sums contained in the original bond which devolved to the heir of conquest, but that all the further sums contained in the bond of corroboration descended to the heir of line. *See* HERITAGE and CONQUEST.

Kilkerran, (HERITAGE and CONQUEST.) *No* 2. *p.* 251.

1764. *August* 1. EARL of HOME *against* JANET STEEL.

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A bond of corroboration, which is intended for no other purpose but to secure the debt, cannot have the effect to alter the nature of the original bond.

A BOND bearing interest being heritable before the 1641, a creditor who took a bond in these terms, without engrossing any particular destination in his bond, intended undoubtedly that it should go to his heir. A bond dated in 1638, bearing interest, and consequently heritable, was corroborated in the year 1663, the bond of corroboration bearing in common form to heirs, executors, and assignees. The heir of the creditor, who was also his executor, having confirmed the debt as moveable, and upon that title having deduced an adjudication against the debtor's estate, it was *objected* by the heir of the debtor, That the adjudication was void, as proceeding upon the title of a confirmation of an heritable bond, which is altogether inept. It was the opinion of the Court, that a bond of corroboration, which is intended for no other purpose but to secure the debt, cannot have the effect to alter the nature of the original bond, *quia actus agentium non operantur ultra eorum intentionem*; and therefore the adjudication founded upon the heritable bond, to which the executor could have no title, was found null and void.

Sel. Dec. No 223. *p.* 288.

*** This case is reported in the Faculty Collection:

IN 1638, James Earl of Home as principal, and George Home, younger of Wedderburn, William Home of Ayton, Sir Archibald Douglas of Spot, Sir Robert Douglas of Blackerston, and Alexander Home of Haliburton, as cautioners, granted bond to Laurence Henderson, whom failing, to his two daughters, Janet and Barbara, for 3000 merks, with annualrent and penalty.

In 1659, Laurence Henderson, with consent of his two daughters, conveyed the bond to his other two daughters, Isabel and Margaret.

In 1663, the Earl, as principal, with Alexander Home of Ayton, and Sir Robert Douglas of Blackerston as cautioners, granted bond of corroboration to

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Isabel and Margaret, accumulating the principal and annualrents into a capital of 3620 merks.

In the same year 1638, the Earl as principal, with Sir David Home of Wedderburn, Sir Archibald Douglas of Spot, and Alexander Home of Haliburton, granted another bond to Laurence Henderson and his two daughters for 4000 merks.

In 1660, this bond was in like manner assigned to Isabel and Margaret.

And in 1663, a like bond of corroboration was granted for the accumulated sum of 4840 merks.

Inhibition followed upon these several bonds in 1664.

A process for payment appears to have been also brought, and an extracted act was produced, bearing date 31st January 1682.

Several markings appeared on the margin of the act, one of them of 25th July 1688, in these words, 'Avisandum *ut supra*, and grants certification against the 'defender for not production of his other titles, (signed) John Lockhart.'

Margaret Henderson, one of the creditors in the bond, married Henry Aldcorn.

Upon her death in 1723, Richard Aldcorn her son, confirmed her share of the bond for 3000 merks. And, upon the 22d of June 1728, executed a summons against the then Earl of Home for payment of both bonds; and having taken decree *cognitionis causa*, obtained decree of adjudication in 1730.

James Aldcorn the son of Richard, having served heir in general to his father, disponed his right to Anna Yule his mother, who insisted in an action of mails and duties.

Anna Yule having died during the dependence, all the above-mentioned rights and titles were adjudged by Janet Steel from James Aldcorn, as charged to enter heir to his father Richard, his grandfather Henry, and his mother Anna Yule.

In 1759, Janet Steel wakened the process of mails and duties, in which various defences were pleaded.

I. *Heritable and Moveable.*—The first defence was, that the adjudication, at the instance of Richard Aldcorn, was null and void, as led upon an insufficient title; so that the after adjudication of his interest by Janet Steel, must be ineffectual.

The two bonds were both granted before the 1641. They were therefore heritable, as bearing interest; and could not be carried by Richard Aldcorn's confirmation as executor to his mother.

The act 1661, c. 32. has no retrospect farther than to the 16th of November 1641, the date of the rescinded statute; and it does not vary the case, that those bonds were assigned in 1659 and 1660, or that bonds of corroboration were granted in 1663.

The sole purpose of the assignations was to transmit the right to Isabel and Margaret, *tantum et tale*, as it stood in their father; or, rather, as it would have

stood in Janet and Barbara, the original substitutes, had no assignation been granted. An assignation has no other effect than to carry the right as it was in the cedent. So says Lord Stair, in treating of the assignation of heritable bonds, III. 3. 15. And so it was found, December 12. 1627, Falconer *contra* Heirs of Beatie, No 34. p. 5465., in the case of a bond heritable as bearing annualrent; and 28th January 1708, Lockhart *contra* Muirhead, No 65. p. 5498.; and 17th November 1747, Kennedy *contra* Kennedy, No 67. p. 5499., in the case of bonds heritable by a clause secluding executors.

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As to the bonds of corroboration, they gave no additional security, the only new obligants being the heirs of the original debtors; they had no other effect than to accumulate the interest, and were granted *accumulando jura juribus*. A moveable bond of corroboration does not impair the original security, as appears from Dirleton, *voce* HEIR and EXECUTOR, and Bankton, II. 1. 39. as well as from the decisions marked in the Dictionary, HERITABLE and MOVEABLE, Sec. 18. This doctrine was held in the decision, 8th January 1740, Duke of Hamilton *contra* Earl of Selkirk, No 112. p. 5554.; where it was found, that a moveable bond, taken for the principal and annualrents, due upon an heritable bond, did not innovate the security as to the principal sum, which descended to the heir of conquest, while the accumulations descended to the heir of line.

Answered; When Laurence Henderson assigned the two bonds to his younger daughters, long after the 1641, he could have no view of making them descendible to heirs. Had they purchased such bonds, they would have become moveable in their person; and it rather strengthens the argument, that, in place of being purchased, they were assigned by their father as a portion to his daughters.

But the matter is still clearer upon the footing of the bonds of corroboration. These were certainly 'contracts and obligations for sums of money, with clause 'of annualrent, made and dated after the 16th of November 1641;' and, therefore, in terms of the statute 1661, must be 'holden and interpreted to be moveable bonds.'

It is a mistake to say that these bonds were merely corroborative of the original bonds. They are granted to the daughters in place of the father, for different sums, with different penalties, payable at different times. If the creditors had taken up the money in 1663, and lent it to another debtor, upon a bond in the same terms with the original bond, the debt would have been moveable; if so, it is difficult to see why the same consequence should not follow, when a new security is taken from the same debtors.

THE LORDS found that the principal sums contained in the original bonds of 3000 and 4000 merks, being heritable, as the law stood at the time when they were granted, were not rendered moveable, either by the assignations, or by the bonds of corroboration granted in the 1663; and consequently, that Richard Aldcorn's confirmation, as executor to Margaret Henderson his mother, did not carry or vest in him any right to her share of the principal sums contained in

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the original bonds; and, therefore, that the decrees of constitution and adjudication, at Richard's Aldcorn's instance, are in so far void and null: But found, that the confirmation of Richard Aldcorn, as executor to his mother, did carry her share of the principal sums contained in the bond of corroboration 1663, in so far as the same were made up of bygone annualrents, which had fallen due upon the bonds of corroboration, from the death of Henry Aldcorn his father; and, therefore, in so far sustain the decree of constitution and adjudication at Richard Aldcorn's instance.

II. *Prescription*.—The *second* defence was the negative prescription.

To this it was *answered*, That the prescription had been interrupted by process.

Replied for the Earl of Home; 1*mo*, The summons executed upon the 22d of June 1728 was inept: That summons was raised by Richard Aldcorn, as executor confirmed to Margaret Henderson his mother; but the bonds being granted before 1641, were heritable, and could not be carried by confirmation.

As, therefore, Richard Aldcorn had made up no proper title to the bonds, so an action, at his instance, can no more be considered as an interruption, than an action at the instance of a person who had no connection with the creditors. The mere *jus sanguinis* is no title, active or passive.

But, 2*do*, allowing that summons to have been an interruption, the prescription had run before it was raised.

For, computing backward from the execution of the summons, 22d June 1728, the 40 years will run to the 22d of June 1688, and, if no judicial proceedings appear, during that interval, the bonds must have been prescribed before the commencement of the action.

For instructing such proceedings, the pursuer produces no more than an act, said to have been granted in 1682; but he has not produced the summons in that pretended action, nor any other step of process. The markings upon the act deserve no credit. Three of them are dated in 1682, but these are neither signed nor authenticated in any respect. The fourth, bearing date 25th July 1688, does indeed bear a signature: But, 1*st*, *quomodo constat*, that it is the subscription of a judge? 2*dly*, The process must have been by that time asleep, as no step appears to have intervened between the 1682 and the 1688.

At any rate, 3*tio*, The act is no interruption, with regard to the bond for 3000 merks, in respect it appears from the act itself, that the pursuer restricted his demand to the bond for 4000 merks.

Duplied for the pursuer, to the *first*; Though the objection to the title of Richard Aldcorn were admitted, it would not follow that the summons at his instance was not a sufficient interruption.

A title to take, and a title to interrupt prescription are different: To constitute the first, it is necessary, that legal titles be made up; the other, being no more than an intimation to the debtor that the creditor has not relinquished his right, may proceed in the name of a person who has the radical right in him,

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though he may not have followed out the forms necessary to give him the *jus exigendi*. This doctrine seems to be supported by the opinion of Lord Stair, II. 12. 26.; and, in the case 26th July 1637, Ld Lawers *contra* Dunbars, *voce* PRESCRIPTION, an interruption was sustained upon diligence at the instance of a son, who had confirmed executor to his mother, in a subject which he ought to have taken up as executor to his father.

To the 2*d*, As soon as an act is extracted, the warrants of it are sent to the record, so they could not be produced; but, at any rate, there is no necessity to produce warrants *post tantum temporis*.

The appearance of the signatures upon the act is explained from the statute 1686, c. 3. That statute requires, that, from and after the 1st of November 1686, all interlocutors be signed by the judge, which shows that a contrary practice had formerly prevailed. Accordingly, the markings, prior to the statute, are unsigned; but that of 25th July 1688, is signed by Lord Castlehill, by whom it was pronounced. And there is no ground to presume that the process was asleep. *Omnia præsumuntur solenniter acta;* besides, in those days, it was thought sufficient to keep a process from sleeping, that it was called within the year, though there was no marking upon it; as appears from the decision. Home, November 1682, Home *contra* Earl of Home, *voce* PROCESS.

To the 3*d*, The act appears to have been designed for proving the passive title against one of the cautioners, as representing his grandfather, who was bound only in a bond for 4000 merks; and, therefore, does not imply a passing from the other.

'THE LORDS repelled the defence of prescription, so far as concerns the bond for 4000 merks; but found the bond for 3000 merks prescribed.'

The point of prescription was afterwards taken up on a different footing, in consequence of certain alleged acts of interruption, which were not before the Court, when this interlocutor was pronounced. *See* PRESCRIPTION.

Reporter, *Auchinleck*. Act. *Miller* Advocatus, *John Dalrymple*. Alt. *Lockhart*, *Rae*.
G. F. *Fac. Col. No* 4. *p.* 199.

*** This case was appealed:

THE HOUSE of LORDS, April 9. 1772, 'ORDERED and ADJUDGED, that the original and cross appeals be dismissed, and that the several interlocutors complained of be affirmed.'