

No 67.

*Pleaded* for Sir Thomas; That, before the statute 1661, bonds bearing interest were heritable: That an alteration was made by that statute, with an exception of bonds secluding executors, which remained as before heritable, and consequently descendible from heir to heir, although assigned; unless perhaps when executors were mentioned in the assignation, that might be construed an alteration in the destination: That there was no difference betwixt the bond, where the expression was, 'The executors of the said Sir John,' for by this the executors of his heir were sufficiently excluded, and the other bonds; but whatever was the case in general, here were heritable bonds assigned by a father to his eldest son and his heirs, which was only *præceptio hæreditatis*; and it was no absurdity, that the moveable bond in the same deed should be subject to a different destination; for, in a nicer case, between the Duke of Hamilton and the Earl of Selkirk, *voce* HERITAGE and CONQUEST, where bonds secured by infestment were found to go to the heir of conquest, yet a bond of corroboration being taken, accumulating the annualrents, secluding executors, it was found the accumulated annualrents went to the heirs of line; and thus the bond of corroboration was split.

THE LORDS, 18th November, 'preferred Sir Thomas Kennedy.'

They refused a petition, and adhered.

For Mrs Blair, *A. Macdougall & Lockhart.*

Alt. *Ferguson.* Clerk, *Forbes.*

*D. Falconer, v. I. No 215. p. 296.*

## S E C T. XII.

Effect of the death of Debtor or Creditor, before the term of payment, in cases of Bonds heritable by a clause of annualrent.

1624. *January 8.* BAIRNS OF COLONEL HENDERSON *against* MURRAY.

No 68.

The creditor in a bond dying before the term of payment, the annualrent was found to belong to the heir.

IN an action betwixt the bairns of umquhile Colonel Henderson and James Murray, a bond being made for payment of a sum of money, with yearly annualrent therefor, after an heritable manner, to the Colonel, and he dying before the first term appointed for payment of the annualrent; for the bond was made, and the money lent out at Whitsunday 1622, and the first term's payment of the annualrent was by the bond appointed to be at Martinmas thereafter, the same year 1622, for the profit of the money of the term and space decurring betwixt Whitsunday, at which time the money was lent, and the said term of Martinmas subsequent, before the which term of Martinmas the Colonel died, to wit, in the month of August preceding: it being questioned

betwixt the parties, to whom the said term's annualrent pertained, whether to the Colonel's heir or his executor; the LORDS found, that the same pertained to the heir, and was not due to the executor, seeing the Colonel died before he could crave the annual, it could not at the time of his decease be reputed *in bonis ejus*, and consequently could not pertain to his executor. See TERM LEGAL and CONVENTIONAL.

Act. *Hop & Baird.*Alt. *Morison.*Clerk, *Gibson.**Durie, p. 96.*

No 68.

1624. June 29. SMITH against ANDERSON'S Relict.

IN a registration pursued by Smith, as executor to his father, against the Relict of Peter Anderson; the bond desired to be registrate, bearing, to pay annual after the term of payment; and it being therefore *alleged*, that it was heritable, and so could not be registrate at the executor's instance;—THE LORDS repelled the allegiance, and found the bond pertained to the defunct's executors, notwithstanding of that clause of paying annualrent, because the defunct, to whom the bond was made, died before the term of payment contained in the bond, so that the clause adjected for payment of annual, in case of failzie of payment of the sum at the term, could not take effect in favours of the defunct, in his own time, to make it profitable to his heir, and therefore that it pertained to his executors.

Clerk, *Scot.**Fol. Dic. v. 1. p. 370. Durie, p. 132.*

No 69.

A bond payable at a certain term, with annualrent after the term of payment, found to be moveable before it fell due, and to go to the executors of the creditor, who died in the interim.

1626. December 21. EXECUTORS of BROWN against DRUMMOND.

IN a registration at the instance of the Executors of James Brown against Mr John Drummond, for registration of an obligation granted by him, whereby he was obliged to pay to the defunct 600 merks, and to his wife, and to the longest liver of them two, and to their heirs, at the term contained in the bond, and failing thereof, to pay ten merks for each hundred thereof to the longest liver of them, and their foresaids, as well not infest as infest, ay and while the repayment, the heir of the defunct compearing, *alleged*, that this sum being heritable, viz. bearing to pay annualrent, pertained to him, and so could not belong to the executor. This allegiance was repelled, and the sum found to pertain to the executor, notwithstanding of the heritable clause, because the husband died before the term of payment, at the which the heritable clause could only take beginning, and so the sum would fall under his testament, and

No 70.

A bond, payable at a certain term, to a husband and wife, and their heirs, with annualrent after that term, found to be moveable before it fell due, as in the case above.